Neutral Citation Number: [2024] EWCA Crim 304

Case No: 202302230B5; 202303562B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
THE HONOURABLE MR JUSTICE COOKE
T20170213
HIS HONOUR JUDGE GLEDHILL QC
T20167025

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before :

LORD JUSTICE BEAN
LORD JUSTICE POPPLEWELL
and
MR JUSTICE BRYAN

- -

Between :

(1) TOM HAYES **Appellants**
(2) CARLO PALOMBO

- and –

REX **Respondent**

- -

Adrian Darbishire KC and Tom Doble
(instructed by **Karen Todner Solicitors**) for the **First Appellant**
James Hines KC, Gillian Jones KC and Max Baines
(instructed by **The Serious Fraud Office**) for the **Respondent in Hayes**
Tim Owen KC, Katherine Hardcastle and Tim James-Matthews
(instructed by **Hickman & Rose Solicitors** for the **Second Appellant**)
James Waddington KC and Max Baines
(instructed by **The Serious Fraud Office**) for the **Respondent in Palombo**

Hearing dates: 14, 15 and 18 March 2024

Approved Judgment

This judgment was handed down remotely at 11.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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

1. This is the judgment of the court to which we have all contributed.

Introduction

2. The Appellants, both traders for major banks at all material times, were convicted in 2015 and 2019 respectively of the common law offence of conspiracy to defraud pursuant to allegations that they had dishonestly conspired with others to manipulate LIBOR and EURIBOR rates respectively. Their convictions are said by the Appellants to have depended on the construction of LIBOR and EURIBOR adopted at their trials, a construction which has been consistently adopted and confirmed in five decisions of this court, including two which dismissed appeals against conviction by each of them.

3. In July 2023, the Criminal Cases Review Commission ("the CCRC") referred the Appellants' convictions to the Court of Appeal, Criminal Division ("CACD") following the decision of the United States Court of Appeals for the Second Circuit ("the Second Circuit") in *United States v Connolly and Black*, No. 19-3806 (2d Cir. 2022) ("*Connolly and Black"*) on the basis that the decision adopted a different construction of LIBOR from that adopted by this court in its previous decisions, which logically extended to EURIBOR.

LIBOR and EURIBOR

4. LIBOR (London Interbank Offered Rate) was, in essence, a benchmark representing the rate at which a bank could borrow money in London at 11am each business day. It was in operation from 1986, and at the relevant time (2006-2010) 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. LIBOR was published each day, in ten currencies, including Sterling, US Dollars and Japanese Yen. Rates would be published for various notional borrowing periods, from overnight to 12 months, known as "tenors". The rates were calculated from submissions made from a number of panel banks, appointed by agreement with the BBA, to Thomson Reuters, who conducted the LIBOR setting exercise on behalf of the BBA. In major currencies, such as Sterling, US Dollars and Japanese Yen, there were 16 contributor panel banks. On each business day, each panel bank would submit its estimate of the interest rate that it would be charged if it were to borrow funds from another bank at 11am on the day in question, for the relevant currency and tenors. For each currency/tenor, the submitted rates would be ranked in order, with the highest and lowest quartiles excluded and the mean taken from the middle quartiles (that is, the average of the middle 8 in a 16-bank panel). The "trimmed mean" average was then published as LIBOR.

5. At all relevant times, the LIBOR setting process was governed by a document published by the BBA entitled "The BBA Libor Fixing – Definition". It provided, amongst other matters, as follows:-

> "1. BBA LIBOR is the BBA fixing of the London Inter-bank Offered Rate. It is based on offered inter-bank deposit rates contributed in accordance with the *Instructions to BBA LIBOR Contributor Banks*.
>
> 2. The BBA will fix BBA LIBOR and its decision shall be final….
>
> 3. BBA LIBOR is fixed on behalf of the BBA by the Designated Distributor [Thomson Reuters] and the rates made available simultaneously via a number of different information providers.
>
> 4. Contributor Panels shall comprise at least 8 Contributor Banks. Contributor Panels will broadly reflect the balance of activity in the inter-bank deposit market. Individual Contributor Banks are selected … on the basis of reputation, scale of activity in the London market and perceived expertise in the currency concerned, and giving due consideration to credit standing.
>
> 5. The BBA, in consultation with the BBA LIBOR Steering Group, will review the composition of the Contributor Panels at least annually.
>
> 6. Contributed rates will be ranked in order and only the middle two quartiles averaged arithmetically. Such average rate will be the BBA LIBOR Fixing for that particular currency, maturity and fixing date. Individual Contributor Panel Bank rates will be released shortly after publication of the average rate.
>
> …
>
> 9. If an individual Contributor Bank ceases to comply with the spirit of this Definition or *Instructions to BBA Libor Contributor Banks*, the BBA, in consultation with the BBA LIBOR Steering Group, may issue a warning requiring the Contributor Bank to remedy the situation or, at its sole discretion, exclude the Bank from the Contributor Panel."

6. The "Instructions to BBA LIBOR Contributor Banks" provided:-

> "A. 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.
>
> B. Rates shall be contributed for currencies, maturities and fixing dates and according to the quotation conventions specified in Annexe One.

> C. Contributor Banks shall input their rate without reference to rates contributed by other Contributor Banks.
>
> D. Rates shall be for deposits:
>
> X made in the London market in reasonable market size;
>
> X that are simple and unsecured;
>
> X governed by the laws of England and Wales;
>
> X where the parties are subject to the jurisdiction of the courts of England and Wales.
>
> …
>
> F. Rates shall be contributed in decimal to at least two decimal places but no more than five.
>
> G. Contributors Banks will input their rates to the Designated Distributor between 1100hrs and 1110hrs, London time.
>
> The Designated Distributor will endeavour to identify and arrange for the correction of manifest errors in rates input by individual Contributor Banks prior to 1130.
>
> The Designated Distributor will publish the average rate and individual Contributor Banks= rates at or around 1130hrs London time.
>
> Remaining manifest errors may be corrected over the next 30 minutes. The Designated Distributor then will make any necessary adjustments to the average rate and publish as the BBA LIBOR Fixing at 1200hrs."

7. The key definition of the LIBOR rate which the panel banks were required to submit was therefore the rate at which that panel bank "could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time." We shall refer to this as 'the LIBOR definition'.

8. EURIBOR (EU Interbank Offered Rate) was devised at the time of the creation of the Euro currency in 1999. It was principally devised by the European Banking Federation ("EBF") representing national banks and the Financial Markets Association ("ACI") representing European Banks. Two entities (EURIBOR - ECF and EURIBOR - ACI) were established, under Belgian law, to supervise the operation of EURIBOR. The purpose of the rate was to provide participants in Euro denominated transactions with a benchmark comparable to those found in many money markets, including LIBOR.

9. Like LIBOR, there was a different EURIBOR rate for a range of tenors, from one week to one year. EURIBOR was commonly designated as a reference rate for interest rate swaps or other derivative transactions. For the purposes of setting the daily EURIBOR rate for

each "tenor", submissions were received prior to 11am Brussels time on each day from banks on a designated panel. The number of such panel banks fluctuated from time to time but was generally 48. The EURIBOR daily rate was fixed by averaging the submissions of each panel bank for the respective tenor, but with the highest and lowest 15% of the respective submissions being excluded. The remaining submissions would be averaged and the result rounded to three decimal places, producing the daily rate which was then published by Thomson Reuters. No panel bank was permitted to see any other panel bank's submission during the relevant window before 11am.

10. The process for setting EURIBOR was set out in the EURIBOR Code of Conduct 1999 ("the Code"). This was replaced in 2008, but in materially identical terms. The Code was then comprehensively revised in 2013, but that version is not directly relevant to Mr Palombo's appeal because it postdates the indictment period.

11. It is common ground that the Code was governed by Belgian law.

12. The Preface of the Code for the relevant period stated as follows:

> "The EURO Interbank Offered Rate – "EURIBOR" – is the new money market reference rate for the euro. This Code lays down the rules applicable to EURIBOR and the banks which will quote for the establishment of EURIBOR.
>
> EURIBOR is the rate at which euro interbank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 am. Brussels time ("the best price between the best banks"). It is quoted for spot value (two Target days) and on actual/360 day basis."

13. Article 1 of the Code set out the various criteria for qualifying as, and remaining, a panel bank. It was specifically stated, among other things, that panel banks "must be of first class credit standing, high ethical standards and enjoying an excellent reputation" (at [3]).

14. After provision for the number and spread of panel banks and for periodic review of the constitution of the panel, Article 6 dealt with the obligations of panel banks, providing as follows:-

> "ARTICLE 6: OBLIGATIONS OF PANEL BANKS
>
> 1. Panel banks must quote the required euro rates:
>
> - to the best of their knowledge, these rates being defined as the rates 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")
>
> - for the complete range of maturities as indicated by the Steering Committee
>
> - on time as indicated by the screen service provider

- daily except on Saturdays, Sundays and Target holidays
- accurately with two digits behind the comma

2. Panel banks must commit themselves to transmit to the European System of Central Banks all the necessary figures to establish an effective overnight euro rate, and in particular their aggregate loan volume and the weighted average interest rate applied.

3. Panel banks must make the necessary organisational arrangements to ensure that delivery of the rates is possible on a permanent basis without interruption due to human or technical failure.

4. Panel banks must take all other measures which may be reasonably required by the Steering Committee or the screen service provider in the future to establish EURIBOR.

5. Panel banks must subject themselves unconditionally to this Code and its Annexes, in their present or future form.

6. Panel banks must promote as much as possible EURIBOR (e.g. use EURIBOR as reference rate as much as possible) and refrain from any activity damageable to EURIBOR."

15. The key definition of the EURIBOR rate which the panel banks were required to submit was therefore "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")". We will refer to this as the 'EURIBOR definition'. 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.

Factual and Procedural background

16. Mr Hayes is a British citizen, born on 26 October 1978. Between 8 August 2006 and December 2009, he was employed in Tokyo as an interest rate derivatives trader by UBS Securities Japan Limited ("UBS"). From 3 December 2009 to December 2010, he was employed in the same capacity in Tokyo by Citigroup Global Markets Japan Inc. ("Citigroup").

17. In December 2012, Mr Hayes was indicted by authorities in the United States on charges of conspiracy to commit wire fraud, bank fraud and anti-trust violations in relation to his alleged manipulation of the Japanese Yen LIBOR during his employment at UBS and Citigroup.

18. On 11 December 2012, Mr Hayes was arrested by the Serious Fraud Office ("SFO") on suspicion of the common law offence of conspiracy to defraud related to the same alleged conduct. Following his arrest, Mr Hayes entered into a formal agreement with the SFO on 27 March 2013, pursuant to sections 73-74 of the Serious Organised Crime and Police Act

2005 (a "SOCPA agreement"), to plead guilty to any offences arising from the SFO's investigation. As a result, he was not extradited to the US.

19. Mr Hayes was interviewed at length between 31 January 2013 and 11 June 2013 as part of the SOCPA process. During the course of those "scoping interviews", he made admissions that he had acted dishonestly and that he had sought to influence the LIBOR submissions of his own bank, and other panel banks, in order to benefit his trading.

20. On 18 June 2013, Mr Hayes was charged by the SFO with eight counts of conspiracy to defraud. On 9 October 2013, he withdrew from the SOCPA agreement, maintaining that he had only co-operated with the SFO out of fear of extradition. He entered not guilty pleas to each count. He was tried alone; his alleged co-conspirators were tried, and acquitted, in separate trials.

21. On 5 December 2014, following a preparatory hearing for Mr Hayes' trial, Cooke J made a ruling to the effect that there was a legal duty on a bank to submit a rate in accordance with the definition of LIBOR, and that the definition implicitly excluded taking into account the bank's commercial interests. On 21 January 2015, the CACD (Davis LJ, Simon and Holgate JJ) dismissed Mr Hayes' interlocutory appeal against that ruling: *R v H* [2015] EWCA Crim 46.

22. On 3 August 2015 Mr Hayes was convicted (then aged 36 years) of all eight counts of conspiracy to defraud (Counts 1-8) before Cooke J and a jury, in the Crown Court at Southwark. He was sentenced to a total of 14 years' imprisonment. On 23 March 2016, he was made subject to a confiscation order for £878,806 under section 6 of the Proceeds of Crime Act 2002. This was revised on 29 June 2016 to £852,560.94 on the basis that there had been a mathematical error in the original order made.

23. On 21 December 2015, the CACD (Lord Thomas CJ, Sir Brian Leveson PQBD and Gloster LJ) dismissed Mr Hayes' appeal against his convictions and granted leave to appeal against sentence: *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr. App. R. 10. The court quashed the sentence imposed by Cooke J and substituted a sentence of 11 years' imprisonment. On 8 March 2016, the court refused to certify that a point of law of general public importance was involved in the decision. On 28 March 2018, the court (Davis LJ, Edis J, HHJ Field QC) dismissed Mr Hayes' appeal against the confiscation order.

24. On 29 June 2016, three former employees at Barclays Bank plc ("Barclays"), Jay Merchant, Jonathan Mathew and Alex Pabon were convicted following trial in the Crown Court at Southwark, before HHJ Leonard QC and a jury, of conspiracy to defraud in respect of fixing the US dollar LIBOR rate. Before the trial, Judge Leonard had given a ruling in which he followed the approach in relation to the legal directions taken by Cooke J in Mr Hayes' trial. Merchant and Mathew were sentenced to six-and-a-half years and four years' imprisonment respectively. On 22 February 2017, the CACD (Lord Thomas CJ, Dingemans and William Davis JJ) dismissed Merchant's and Mathew's appeals against their convictions and approved the court's construction of LIBOR in *R v H* and *R v Hayes*: *R v Merchant and Mathew* [2018] 1 Cr. App. R. 11.

25. Mr Hayes applied to the CCRC in February 2017 for a review of his case. The main points the CCRC explored in its review related to Mr Hayes' submissions that: his Asperger's Syndrome (diagnosed shortly before his trial) was inadequately dealt with during the SFO's investigation and at his trial; a prosecution expert witness (Mr Saul Haydon Rowe) had been discredited in separate appeal proceedings since the trial; there were new expert witnesses who could support his trial evidence about the range of legitimate answers to the LIBOR question; and there was evidence not disclosed at the trial which could show the extent that commercial influence on LIBOR was endemic within the industry. The CCRC reached the conclusion that those matters, whether viewed individually or cumulatively, did not give rise to a real possibility that Mr Hayes' conviction would be overturned, and therefore issued a decision on 7 December 2021, declining to make a reference.

26. Mr Palombo is a French citizen, born on 14 October 1979. At all material times he was employed by Barclays. He worked on the Euro Money Markets and Derivatives Desk in their London office, trading interest rate derivatives, colloquially referred to sometimes as "swaps". He was tried, in the Crown Court at Southwark, alongside five others (Christian Bittar and Achim Kraemer, both former employees of Deutsche Bank, and Philippe Moryoussef, Colin Bermingham and Sisse Bohart, all former employees of Barclays) on a single count of conspiracy to defraud in relation to the manipulation of EURIBOR.

27. On 27 February 2017, in preparation for the EURIBOR trial, HHJ Gledhill QC made a ruling concerning the legal duty on a panel bank in relation to the submission of EURIBOR, which treated the "LIBOR cases" (*R v H, R v Hayes* and *R v Merchant*) as providing guiding principles. On 31 January 2018, the CACD (Davis LJ, Teare and Bryan JJ) dismissed an interlocutory appeal from that ruling on behalf of Christian Bittar and determined that it had been legitimate for the judge to have regard to the underpinning reasoning of the courts in the "LIBOR cases": *R v B* [2018] EWCA Crim 73.

28. On 26 March 2019, Mr Palombo was convicted (by a majority of 10 to 2) following a retrial before Judge Gledhill and a jury in the Crown Court at Southwark. On 1 April 2019, he was sentenced to 4 years' imprisonment. On 9 December 2020, the CACD (Fulford LJ, VPCACD, Cutts J and Sir Nicholas Blake) dismissed Mr Palombo's appeal against conviction: *R v Bermingham and Palombo* [2021] 4 WLR 113.

29. On 27 January 2022 the United States Court of Appeals for the Second Circuit (Circuit Judges Kearse, Cabranes and Pooler), 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 basis for that decision is at the heart of the present appeals and we discuss it below. In short it was treated by the CCRC on the current references ("the CCRC references") 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: "*Connolly and Black*". On 27 October 2022, Mr Hayes' indictment in the US was dismissed, following this decision.

30. On 6 July 2023 the CCRC referred Mr Hayes' case to CACD under sections 9 and 14 of the Criminal Appeals Act 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."

31. 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 alleged analogy between EURIBOR and LIBOR.

The Crown Court proceedings in the case of Mr Hayes

32. As we have noted, Mr Hayes' trial took place before Cooke J and a jury, sitting in the Crown Court at Southwark, in 2015. The trial lasted 47 days. The prosecution (SFO) case was that between 8 August 2006 and 7 September 2010, Mr Hayes conspired with others to dishonestly manipulate the LIBOR setting process, to enhance profits for his employing banks and thereby to increase bonus payments for himself. Counts 1-4 related to his employment at UBS and Counts 5-8 to Citigroup. Both his employing banks were Yen LIBOR panel banks.

33. The particulars of each of the eight counts of the indictment were framed as follows:-

> "Tom Hayes… conspired together with [others]… to defraud in that:
>
> (1) knowing or believing that [UBS/Citibank], through the trading activity of Tom Hayes and others, was a party to trading referenced to the London Interbank Offered Rates for Japanese Yen ("Yen LIBOR");
>
> (2) they dishonestly agreed to procure or make submissions of rates by [UBS/Citibank]… into the Yen LIBOR setting process which were false or misleading in that they:
>
> (a) were intended to create an advantage to the trading of Tom Hayes and others; and
>
> (b) deliberately disregarded the proper basis for the submission of those rates,
>
> thereby intending to prejudice the economic interests of others."

34. Particulars were given of what was meant by the expression "deliberately disregarded the proper basis" in the indictment as follows:

(a) "proper basis"

> The proper basis for the submission of rates was in accordance with the definition of LlBOR published by the British Bankers' Association, namely: "The rate at which an individual Contributor Panel Bank could borrow funds were it to do so by asking for and then accepting inter bank offers in reasonable market size just prior to 11.00 London Time" ("the Definition").

(b) "deliberately disregarded"

> The submissions deliberately disregarded the proper basis by purporting to comply with the Definition when they did not, in that they were intended to create an advantage to the trading position of Hayes and others.

35. To prove the existence of the conspiracies and to show that Mr Hayes and co-conspirators appreciated they were acting dishonestly, the prosecution relied on uncontested documents including electronic communications, messages, Bloomberg chats as well as recorded telephone conversations; and Mr Hayes' extensive admissions in the SOCPA process during his interviews from 31 January 2013 to 11 June 2013.

36. The defence case was that Mr Hayes had not conspired to manipulate the LIBOR rate and that there was an absence of any agreement, either with known or unknown persons, to establish a wide or specific conspiracy. Mr Hayes gave evidence in his own defence that he had not acted dishonestly, and he relied on his previous good character. He had never agreed with any individual to procure the making of a submission by a bank of a rate that was not the bank's genuine perception of its borrowing rate in accordance with the LIBOR definition. Mr Hayes' case was that he had not acted dishonestly in that (as summarised by the CACD in *R v Hayes* at [8]):

> "i) he had not agreed with any individual as named in the indictment to procure the making of the submission by a bank of a rate that was not the bank's genuine perception of its borrowing rate in accordance with the LIBOR definition;
>
> ii) he was never trained in the LIBOR process and, in particular, as to what was or was not a legitimate consideration for a submitter to take into account in making a LIBOR submission;
>
> iii) he had no regulatory or compliance obligations imposed on him by either UBS or Citigroup when he was employed by them;
>
> iv) he saw that other banks answered the question as to what was the appropriate LIBOR submission in a manner favourable to their own commercial trading interests;
>
> v) he perceived that the activity at panel banks in making the LIBOR submissions gave rise to an inherent conflict of interest as the banks would always have a commercial incentive to make submissions which inured to their commercial advantage;

> vi) he considered that what he was doing was common practice in the banking industry at the time and was regarded as legitimate by a significant number of submitters, traders and brokers. He understood that the banks, as a matter of practice, based submissions on their own commercial interests;
>
> vii) was aware that banks were involved in the practice of low-balling (i.e. the submission by a particular bank that the LIBOR should be lower than that particular bank's actual cost of borrowing in order to enhance that bank's reputation, i.e. that it was able to borrow at a lower rate than in fact was the case);
>
> viii) actions were not only condoned, but also encouraged by his employers and he was instructed to act in the way which he did;
>
> ix) there was a range of potential answers to the LIBOR question which could be justified as a subjective judgment of the panel bank's borrowing rate. The defendant did not personally realise that the selection of a figure within that range by reference to a trader's or bank's trading advantage was dishonest by the standards of ordinary, reasonable and honest people."

37. At preparatory hearings leading up to the trial, on 27 November and 5 December 2014, Cooke J made a number of rulings concerning the nature of the alleged economic prejudice caused to the counterparties to the relevant trading, and the definition of LIBOR. His rulings on 5 December 2014 concerning the legal duty on a panel bank in relation to LIBOR submissions were as follows:-

> "3. I am asked to make specific rulings in relation to three further matters… The defence require, it is said, the following rulings:
>
> > "1. That there is no legal duty to submit in accordance with the definition of LIBOR and that as a result there is no unlawful act in relation to the submission process.
> >
> > "2. If a range of figures is available to a submitter then any submission within that range accords with the definition, even if prompted by a request from another party and cannot therefore be false.
> >
> > 3. If the definition is a black letter definition, then the prosecution cannot import a rule of "no commerciality" into the submission."
>
> 4. The prosecution's case is that there is a legal duty when making a submission not to put forward a rate which is not a genuine assessment of the rate at which an individual contributor panel bank could borrow funds in accordance with

the definition. It is said that there is a duty not to make dishonest fraudulent misrepresentations in putting forward a rate which is known not to be a genuine assessment of borrowing rate but is in fact a rate designed to advantage the bank's trading.

5. In my judgment the prosecution is right in that submission. In putting forward a rate which is not believed to be the single figure which represents a genuine assessment of borrowing rate, the submitter or those responsible for the submission would be attempting to defraud.

6. As far as the second proposition is concerned, which deals with the question of a range of figures potentially being available to a submitter, much the same point in truth applies. What a submitter is obliged to do when putting forward a figure is to answer the question at what rate the bank in question could borrow funds in accordance with the definition. That would give rise to a single figure. It is no doubt true that in many cases that single figure could be a number of different figures within a range, because an assessment of the borrowing rate is not always a straightforward matter, particularly in an illiquid market.

7. But as I said before in my ruling on 3 July, whether or not a panel bank could legitimately take the view that a number of figures in a range could properly be submitted as the rate at which it could borrow in an appropriately sized market on the day in question, the issue is not whether the rate put forward could be justified by one method or another, but whether Mr Hayes, in seeking with others to influence the rate, was seeking to defraud by procuring the submission of rates which did not reflect any genuine view on the rate, but instead represented a rate which would advantage him and his employers in the trades that he had concluded.

As to the third rule sought, the prosecution submits that it is not seeking to import anything into the rule at all. The definition to which I have already referred requires a genuine assessment of borrowing rate and nothing else. The fact that the rule does not specifically state that a party is not to put forward a rate which is intended to benefit its trading position as opposed to its genuine assessment of borrowing rates is neither here nor there. The guidance makes it plain that that is what the rule means.

It is what the rule means. If it be a matter of law – and I am inclined to think that it is – the meaning of the definition is perfectly straightforward; it is an assessment of borrowing rate which is required and nothing else.

> Of course – as has been said on numerous occasions by many different people and by myself, I think, on a number of occasions at previous hearings – in an illiquid market a bank may draw on its experience of commercial trading in order to make a genuine assessment of its borrowing rate, but the question is still: what is the borrowing rate? That is the question which falls to be answered and it is improper to answer it by reference to a rate which will advantage the bank's trading position as opposed to representing its borrowing rate.
>
> I make none of the rulings that are sought by the defence in this case…"

38. Mr Hayes made an interlocutory application for leave to appeal these rulings as determinations of questions of law under section 9(11) of the Criminal Justice Act 1987. Cooke J refused Mr Hayes leave to appeal. The application was referred to this court by the Registrar. In dismissing the appeal (*R v H*), the court (Davis LJ, Simon and Holgate JJ), held amongst other matters, as follows:-

> "24. … We have carefully considered those rulings and the respective arguments advanced before us which, to a considerable extent, track the arguments advanced to the judge below. We have come to the conclusion – and we have to say the clear conclusion – that *the judge was right and that he was right for essentially the right reasons.* That being so, there is relatively little purpose in setting out at enormous length on this interlocutory application in our own words our reasoning, when really it would be a duplication of the judge's concise reasoning. Accordingly, we propose to deal with the arguments advanced before us relatively briefly…
>
> …
>
> 41. It is submitted that the definition contained in the BBA description of LIBOR, as we have read out above, connoted no legal duty on the submitting panel bank. Consequently, it is said, there was no unlawful act involved in the submission made in this case as allegedly induced by the conspirators.
>
> *42. In our view, and in entire agreement with the judge, it is inherent in the whole LIBOR scheme that the submitting panel bank is putting forward its genuine assessment of the proper rate. Indeed, it might be asked: how otherwise could the scheme ever work? The definition provided by the BBA does, it is true, call for a statement of opinion which involves subjective considerations; but otherwise it is by reference to what is an objective matter: the rate at which an individual contributor panel bank could borrow funds, et cetera.*
>
> *43. As it seems to us, if a panel bank makes a submission then it is under an obligation to do so genuinely and honestly as*

representing its own assessment. Not to do so is potentially dishonest. The judge regarded that as self-evident. So do we. It serves no purpose at all to play around with the word "duty". The point is that there was an obligation ("duty", if you like) to give a genuine, to give an honest, opinion as to what the rate was. Indeed, if it were otherwise, then one can conceive that the individual submitter could simply, and perhaps even be said to be obliged to under his duties as an employee, make a submission that would further the interests of his own employing bank notwithstanding that the submission itself did not reflect his own opinion: an almost unthinkable proposition.

44. As to the third ground, that too is not sustainable. *It is of course the case that various submissions by panel banks can legitimately differ. They can legitimately differ because views as to the appropriate rate can legitimately differ. But that does not displace the requirement that the submission actually made must represent the genuine opinion of the submitter. Accordingly, that the figure could be within a range provides no answer if the figure actually submitted does not represent the genuine opinion of the person submitting that figure. In truth, this point is really just a variation of the first ground and has no greater validity.*

45. What the judge said was this in his further ruling:

"... whether or not a panel bank could legitimately take the view that a number of figures in a range could properly be submitted as the rate at which it could borrow in an appropriately sized market on the day in question, the issue is not whether the rate put forward could be justified by one method or another, *but whether [the applicant], in seeking with others to influence the rate, was seeking to defraud by procuring the submission of rates which did not reflect any genuine view on the rate, but instead represented a rate which would advantage him and his employers in the trades that he had concluded."*

46. *We agree with that*. We also record that in argument, Mr Hawes had great difficulty in dealing with certain examples taken from other contexts (such as valuations by estate agents) which were put to him. He was in a position to say that some of the examples put to him were perhaps somewhat extreme; but nevertheless the logic of his argument really showed that an unacceptable result would be reached if it were right.

47. The final ground is to the effect that on the BBA definition itself, the prosecution was unable, so it is said, to import a requirement to the effect that a panel bank cannot rely on its own commercial interest into its submissions. *It is said in this regard that the BBA definition is not prescriptive or black*

> *letter. If that were right, then again for the reasons we have summarised above one would query how the LIBOR scheme could ever work. Indeed, we agree with Mr Hawes QC, who appeared for the Crown, that this submission in fact turns on its head the BBA definition. The definition requires the submitter to state what is there provided. There is no other indication that the submitter is free to take the bank's own commercial interest into consideration. Mr Hawes submitted that it was not specifically excluded as a matter and therefore it could be taken as included. That is an untenable argument. In effect, that comes close to saying likewise that because bad faith has not been explicitly excluded, then bad faith may be allowed: which of course is quite ridiculous.*
>
> 48. Mr Hawes sought to rely on certain points illustrated in, for example, a document dated 30 July 2009, which says that a document giving guidance for submitting rates could not be prescriptive, as the fundamental basis of LIBOR is that it is a bank's own view of the markets in general and its own cost of funds in particular. As we see it, that extract is in fact against his argument. Of course submitters may have regard to considerations such as "market colour" and their knowledge of what is going on; further, the considerations of panel members thereby may differ as between each other. That reflects the subjective exercise involved: and to that extent the valuation exercise cannot be prescriptive. *But as this document itself makes clear, and is obviously the case, the fundamental basis of LIBOR nevertheless is that it is the bank's own view of the markets in general and its own cost of funds in particular that counts. That accordingly emphasises that what must be submitted is the bank's own view (that is to say, its own genuine view) as to what the rate should be.*
>
> 49. It seems to us that all the elaborate arguments advanced under this head come to nothing. *It is self-evident, as the judge found, that a bank, in making its submission to Thomson Reuters, is not free to let its submission be coloured by considerations of how the bank may be advantaged in its own trading exposure. That simply is contrary to the definition set by the BBA and to the whole object of the exercise.* Again, we note that various examples were put to Mr Hawes in argument which illustrated the potentially remarkable results that could arise if his argument were correct."
>
> (our emphasis added)

39. In a Ruling on 6 July 2015 during the course of the trial, Cooke J summarised his understanding of what had been decided in *R v H* as follows:

> "1. The Court of Appeal has decided that to take into account a trader's or bank's trading advantage when making a LIBOR submission is not permissible at all. Whilst there may be a range of figures, all of which could be objectively justifiable, a submitter has to submit the one figure which represents his honest opinion as to the rate at which his bank could borrow. If instead of submitting that figure the submitter puts in a different figure influenced by the perception of trading advantage, the submission is not a genuine answer to the LIBOR question and does not accord with the LIBOR definition.
>
> 2. If therefore Mr Hayes agrees with another to procure the making of a submission which is perceived to be to his trading advantage when, uninfluenced by any such consideration, the submission would have given rise to a different figure, or regardless of whether the rate would actually have been different, then Mr Hayes has agreed to procure a submission which does not accord with the LIBOR definition.
>
> 3. On this basis if the evidence shows that this is what Mr Hayes did, which in my judgment it does, though of course this a matter for the jury, the sole remaining question is whether Mr Hayes was dishonest in making such agreements."

40. After the judgment in *R v H*, Cooke J gave the following jury directions in Mr Hayes' trial concerning "the definition of LIBOR":-

> "You know the definition well by now, I think, but it appears in the reference bundle at C/1. The rate at which an individual contributor panel bank could borrow funds, were it to do so, by asking for and then accepting interbank offers in reasonable market size just prior to 11.00 am London time. A LIBOR question to be answered was: at what rate could you borrow funds, were you to do so, by asking for and then accepting interbank offers in reasonable market size just prior to 11.00 am?
>
> It's clear, and the courts have so decided as a matter of law, that this means that the panel bank, when making a submission to Reuters, must make a genuine, honest assessment of the rate at which it could borrow funds on the day in question without reference to its own perceived commercial advantage. In making a LIBOR submission, a panel bank is not free to let its submission be influenced at all by considerations of how the bank may be advantaged in its own trading.
>
> Obviously if the bank is not actually borrowing funds at about that time in the tenor in question, whether for one, three or six

months or whatever it may be, it will have to use information available to it to make an honest assessment of the rate at which it could borrow such funds. It's undisputed that such information may include the rates at which the bank borrowed for other lengths of time or in other currencies from banks in the London market or elsewhere, similar rates at which it borrowed from its customers which were not banks, rates at which it borrowed the day before or when it last borrowed, its own credit rating, the rate at which it lends to other banks, currency exchange, currency swaps, the rates at which derivatives trade and the like.

It must, however, be an honest assessment of its borrowing rate and not one which takes into account its trading advantage or is simply a figure designed to look as though it is such an honest estimate when it is in fact a figure designed to secure a trading advantage for a derivative trader.

So as a matter of law the courts have decided, and I direct you in the following way: first, a bank when submitting a LIBOR rate must put forward its own genuine, honest assessment of the rate at which it could borrow in the currency and tenor in question. The submission must be the bank's genuine opinion as to that rate, whether the conclusion is reached by the submitter after discussion and collective assessment or not.

Second, the fact that making such an assessment is not always easy and that the figure could be within a range of possible figures depending on the subjective judgment of the submitter, after taking account of a number of factors, is neither here nor there if the figure submitted is not genuine, honest opinion of the submitter as to the correct rate in accordance with the LIBOR definition. The submitter must arrive at one figure which represents the honest assessment of the bank as to its borrowing rate.

Third, the bank is not entitled to take into account that which would or might advance its own commercial interest at all in putting forward its LIBOR submission. It's the borrowing rate which is to be the subject of the submission and not any perceived trading advantage of the submitting bank or any other bank or person. To take such commercial matters into account would be to act in a way that was contrary to the LIBOR definition.

To answer the LIBOR question by taking into account such commercial interests of a bank would be to bring in factors which should play no part when assessing the rate at which it could borrow.

Fourth, if a submitter considered that there was a range of possible figures which could be submitted, each one of which could be justified as a subjective judgment on the information he had, and then submitted a figure within that range which was different from the figure he would have submitted, if he had not taken into account such commercial interests of the bank or of any other bank or person, that submission would not accord with the LIBOR definition, nor be a genuine, nor proper answer to the LIBOR question.

Fifth, if a submitter considered that there was a range of possible figures which could be submitted, each one of which could be justified as a subjective judgment on the information he had, and then submitted a figure within that range which took account of such commercial interests of the bank or any other bank or person, even if the submitted figure did not differ from the figure which would have been submitted without taking such commercial interests into account, the submitter would not have made a genuine assessment of the bank's borrowing rate in accordance with the LIBOR definition.

Sixth, there's no need for anyone, whether Thomson Reuters or the BBA or elsewhere, to be deceived into thinking that the rate put forward by any bank is a genuine assessment of the borrowing rate. Even if Thomson Reuters or the BBA or other banks as counterparties suspected or even knew that other banks' submissions into the LIBOR setting process were skewed or that low-balling occurred, it would make no difference to the question whether the counterparty's rights were at risk.

As I already said, it's possible that a genuine, honest assessment unaffected by consideration of its derivative trading advantage might coincide with a bank's assessment after taking its trading advantage into account, but consideration of that trading advantage is an illegitimate factor which should not be taken into account in answering the LIBOR question at all. If consideration of that advantage resulted in a different figure from that which would have been submitted without regard to it, then the figure submitted would not accord with the LIBOR definition, but even if the figure was the same it would not be an assessment of the bank's borrowing rate in accordance with the LIBOR definition because trading advantage had been taken into account.

So an agreement between individuals to seek to move a bank's submission to such a different figure for that reason would be an agreement to make or procure a submission contrary to the LIBOR definition. Also an agreement between individuals to put in a submission or procure a submission which took into account a perceived trading advantage, even if the figure did

> not differ from the figure which would otherwise have been submitted, would also be an agreement to make or procure a submission contrary to the LIBOR definition because that factor shouldn't be taken into account at all.

41. Having directed the jury on the proper basis for the submission of LIBOR ("as a matter of law"), Cooke J continued:-

> "The question for you, therefore, is whether Mr Hayes dishonestly agreed with others to seek to procure that UBS, Citi or other banks should make submissions which were not, in accordance with the LIBOR definition, their honest, true assessment of their borrowing rate or rates but the rate or rates designed to secure a trading advantage for himself or his bank.
>
> There are two elements to consider. First, there must be an agreement or, as the prosecution allege here, several such agreements and, secondly, there must be dishonesty in making such an agreement or agreements.
>
> … It's clear, and undisputed, that Mr Hayes asked submitters at UBS and the trader submitter at Deutsche to put forward rates intended to advantage his or the bank's trading and that he asked traders at other banks, such as JP Morgan Chase, RBS, HSBC, as well as at UBS and Citi, to ask their submitters to do the same, whilst asking brokers to make some latter requests of other bank representatives, traders, submitters or trader submitters, or to influence their opinion in other ways, whether with broker run-throughs, recommendations, suggestions or spoof offers or bids.
>
> He asked them to take account of his and his employer's commercial interests by putting in rates which would advantage his or his bank's trading."

42. Cooke J directed the jury to approach its finding on "dishonesty" in accordance with the two-limb test derived from *R v Ghosh* (1982) 75 Cr. App. R. 154; [1982] QB 1053:-

> "In order for you to be sure of Mr Hayes's guilt, you need to be sure that he was acting dishonestly. That means that you have two questions to resolve. First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? I will say that again.
>
> Was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated, if different. Not by the standards of his employers or colleagues, if different. Not by the standards of bankers or brokers in that market, if

> different, even if many or even all regarded it as acceptable, nor by the standards of the BBA or the FXMMC, but by the standards of reasonable, honest members of society.
>
> There are no different standards which apply to any particular group of society, whether as a result of market ethos or practice. You must form your judgment as to what those standards are in the light of the arguments that have been put before you.
>
> If what Mr Hayes agreed to do was not dishonest by those standards, the prosecution fails.
>
> Second, must Mr Hayes have realised that what he agreed to do would be regarded as dishonest by those standards? It is dishonest for a person to act in a way which he knows ordinary, reasonable and honest people consider to be dishonest, even if he thinks he is justified an acting in the way he does, whether because he thinks that others in the market do it or thinks that everyone tries to do it or because his employers or others encourage him to do it or appear not to object to him doing it.
>
> In deciding this second question, you must consider Mr Hayes's state of mind at the time of the events in question. If, after taking into account all the evidence, you're sure that the answer to both of these questions is "yes", then the element of dishonesty is proved. If you're not sure of that, the element of dishonesty is not proved and Mr Hayes is not guilty of the offences charged."

43. Cooke J then identified that Mr Hayes' case was that what he did was not dishonest under the objective limb, which was a matter for the jury to decide; and that he was not dishonest under the subjective limb, which was also for the jury to decide. In the latter context Cooke J set out the eight factors summarised at [8] (ii) to (ix) in the judgment in *R v Hayes* which we have quoted above.

44. Cooke J gave the following direction concerning Mr Hayes' participation in the SOCPA interviews:-

> "The prosecution say that Mr Hayes confessed each and every ingredient of the offences of which he's now charged in the SOCPA interviews which he voluntarily attended. You have agreed summaries of those interviews which took place over a period of some 82 hours, in which Mr Hayes explained to investigators what he had done and named those persons with whom he had reached agreement to seek to manipulate the LIBOR rate to his trading advantage. The prosecution points out that he admitted that he was dishonest within a dishonest system, which is, you may think, the main point on which you have to reach a decision in this trial, since the documents show

what Mr Hayes was requesting and what the response was of those to whom those requests were directed.

There's no dispute about the records of the interviews and what it was that Mr Hayes said at the time to the investigators. Mr Hayes's case is that everything he said in those interviews was said out of fear and a desire to avoid extradition to the United States and prosecution there where he would be separated from his family and there was the possibility of a 60-year sentence. He said that for that purpose he needed to be charged and had to admit wrongdoing.

…

So a word about those interviews. Before each of his interviews Mr Hayes was cautioned. He was first told that he didn't need to say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court and that anything he did say might be given in evidence. Mr Hayes told the Serious Fraud Office a great deal, as can be seen from the agreed summaries you have in the interview bundle. As part of his defence before you Mr Hayes has said that he was not dishonest, that he did not appreciate that what he was doing was dishonest. The prosecution not only say that this is something that he never said to the Serious Fraud Office in his interviews, however much he sought to qualify the extent of his dishonesty as compared with other people, but that he said the very opposite and they rely on his confessions of dishonesty in those interviews. You can see what he said for yourselves.

The prosecution say that if there was any truth in this defence at all, he would have said throughout these long interviews that this was the position in the light of the factors he now relies on. He would then have said that what he did was not dishonest and that he did not appreciate at the time that what he was doing was dishonest. The fact that he did not, says the prosecution, shows that this is a fabricated defence put forward at a later date, once the risk of extradition had diminished as a result of being charged.

Mr Hayes says that he told the Serious Fraud Office what he thought he had to in order to avoid or minimise the risk of extradition, but never in fact thought that he had been dishonest in what he did.

This question of his dishonesty is a central issue in the trial and he's given you reasons why he says he confessed to being dishonest in the interviews, whether with or without qualification at different times. You will need to come to a

> view about this and about what he told you in evidence. Which is correct? You have to decide whether you're sure what he did was dishonest by the ordinary standards of reasonable and honest people and whether he knew that what he was doing was dishonest by those standards, whatever the standards in UBS, Citi or other banks or brokers at the time."

45. Cooke J took the jury through the ingredients of the indicted offences by reference to Count 1, saying in respect of the "deliberately disregarding the proper basis" element:

> "That requires a little more explanation. What it says is this: the persons concerned agreed that UBS, in this example, or the other panel banks in question in the other counts, should make submissions of rates to Thomson Reuters, that is into the LIBOR setting possess, which were intended and designed to benefit Mr Hayes' trading or his bank's trading and did not represent a genuine assessment of the true rate at which UBS could borrow funds at 11.00 am on the day in question, contrary to the LIBOR definition requirements that I explained to you yesterday."

46. Cooke J provided a route to verdict, in writing, and read it to the jury, directing them to ask and answer the following questions:-

> "1. Did Mr Hayes agree with any individual as named in the counts, to procure the making of a submission by a bank of a rate which was not that bank's genuine perception of its borrowing rate for the tenor in question in accordance with the LIBOR definition but was a rate which was intended to advantage Mr Hayes's trading?
>
> If the answer is No, Mr Hayes is not guilty on that Count. If the answer is Yes, proceed to Question 2
>
> 2. Was what Mr Hayes did dishonest by the ordinary standards of reasonable and honest people?
>
> If the answer is No, Mr Hayes is not guilty on that Count. If the answer is Yes, proceed to Question 3
>
> 3. Did Mr Hayes appreciate that what he was doing was dishonest by those standards?
>
> If the answer is No, Mr Hayes is not guilty on that Count. If the answer is Yes, the Mr Hayes is guilty on that Count."

47. On 3 August 2015, Mr Hayes was convicted of all eight counts and sentenced by Cooke J to 14 years' imprisonment.

Mr Hayes' 2015 appeal: *R v Hayes*

48. Mr Hayes advanced six grounds of appeal to the CACD:

    i. The trial judge had wrongly applied the objective limb of the *Ghosh* test of dishonesty.

    ii. The trial judge had misdirected the jury regarding the definition of dishonesty.

    iii. The trial judge had been wrong to refuse to allow a defence submission that the results of an internal inquiry conducted by Tullett Prebon into the activities of their employee, Noel Cryan, should not be allowed into evidence.

    iv. The trial judge had been wrong to refuse to allow into evidence the interview transcript of Andrew Walsh dated 9 July 2014.

    v. The trial judge had been wrong to refuse to admit medical evidence regarding Mr Hayes's mental health at the time he had entered the SOCPA agreement.

    vi. The trial judge had been wrong to refuse to allow disclosure of documentation Mr Hayes had requested and referred to in evidence; namely his "daily profit and loss accounts", his "daily risk" and his "trade blotter".

49. The CACD (Lord Thomas CJ, Sir Brian Leveson PQBD, Gloster LJ) granted leave in relation to the first ground only and also granted leave to appeal against sentence. In its judgment, dated 21 December 2015, the court, having considered all six grounds put forward in some detail, dismissed Mr Hayes' appeal against conviction : *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr App R 10.

50. The court summarised the decision in *R v H* concerning the definition and true effect of LIBOR in the following terms at [9]:

> "i) *it was inherent in the LIBOR scheme that the submitting panel bank was putting forward its genuine assessment of the proper rate*. Although it had the subjective element inherent in an opinion, it was otherwise to be made by reference to an objective matter—the rate at which the panel bank could borrow funds etc;
>
> ii) *any submission made had to be made under an obligation that the submitter genuinely and honestly represented its assessment;*
>
> iii) assessments by different panel banks could legitimately differ, but that did not displace the obligation that the submission made must represent the genuine opinion of the submitter;

> iv) *where there was a range of figures, the submission made had to represent a genuine view and not a rate which would advantage the submitter*; and
>
> v) *the submitting bank could not rely on or take into consideration its own commercial interests in making its assessment. The bank was not free to let its submission be coloured by considerations of how the bank might advantage its own trading exposure; that would be contrary to the definition and the whole object of the exercise*."
>
> (emphasis added)

51. The judgment addressed Cooke J's directions to the jury on the definition of LIBOR from [34] in a section addressing the second ground of appeal, namely that evidence relevant to dishonesty had been wrongly excluded:

> "34. As this court, in January 2015, had determined the definition of LIBOR as a matter of law (as we have set out at [9]), it was accepted that the judge was correct in referring the jury to that. However, it was submitted that the judge had gone further than the decision of this court and wrongly included what were matters of fact in the third to sixth propositions he had set out in his directions.
>
> 35. It was submitted that save for the matters that this court had dealt with, the interpretation and the application of the LIBOR definition were matters for the jury to determine. Particular criticism was directed by way of illustration at the fifth proposition:
>
> > "Fifth, if a submitter considered that there was a range of possible figures which could be submitted, each one of which could be justified as a subjective judgment on the information he had, and then submitted a figure within that range which took account of such commercial interests of the bank or any other bank or person, if the submitted figure did not differ from the figure which would have been submitted without taking such commercial interests into account, the submitter would not have made a genuine assessment of the bank's borrowing rate in accordance with the LIBOR definition."
>
> 36. In our judgment, however, taking this as an example, the judge was doing no more than spelling out helpfully for the jury *the decision of this court that it was impermissible as matter of the legal definition of LIBOR for the submitting bank's assessment to be coloured by taking into its consideration its commercial interests. As a matter of law, the submitter was not entitled to take those interests in any way into consideration.*

> 37. On examination, it is clear that the other criticised propositions are all explanations to the jury in line with decision of this court on the legal definition of LIBOR and the obligations to which it gave rise. In the circumstances, there is no arguable merit in this ground of appeal; leave to appeal is refused."
>
> (emphasis added)

52. Expressing its conclusions on Mr Hayes's appeal against conviction, the court stated at [86]-[87]:

> "86. It is important to underline that the critical issue for the jury's consideration in this case was whether they believed that the appellant may have been telling the truth when he said that his admissions of dishonesty and LIBOR manipulation in his SOCPA interviews had not been genuine admissions of guilt (and, in particular, dishonesty), but had merely been an opportunistic means of avoiding extradition to the USA. That was the critical issue on which all turned and in respect of which there was not merely the interviews but the contemporaneous recordings which substantiated those interviews. Standing back from the detail, once the objective standard of dishonesty was established as the correct test for the first limb of the *Ghosh* direction, it is difficult to see how the application of the subjective standard to what the appellant was saying while undertaking these trades could have led to any different conclusion.
>
> 87. In the circumstances, in deference to counsel and the detailed arguments presented to us, we have dealt with each of the grounds in some detail. In the event, none have any merit and although we grant leave to appeal in relation to the first ground, the appeal is dismissed."

53. However, the Court of Appeal allowed Mr Hayes' appeal against sentence, quashing the total sentence of 14 years and substituting in its place a total sentence of 11 years.

R v Merchant

54. Following the conviction and appeal of Mr Hayes, five former Barclays traders stood trial in proceedings brought by the SFO on charges of conspiracy to defraud in relation to US dollar LIBOR manipulation. The indictment particulars were materially identical to those in Mr Hayes' case. Judge Leonard followed the approach of Cooke J in Mr Hayes' trial, directing the jury that the case turned on the question of dishonesty. On 29 June 2016, three of the five traders, Jay Merchant, Jonathan Mathew and Alex Pabon, were convicted. Mr Merchant and Mr Mathew appealed to the CACD on grounds including that those directions of law were wrong.

55. The CACD (Lord Thomas CJ, Dingemans and William Davis JJ) dismissed the appeal against conviction in its judgment of 22 February 2017: *R v Merchant*. In reciting the history of the LIBOR cases, the court said of Hayes' case at [15] that:

> "The approach by Cooke J was upheld on a pre-trial appeal against the ruling by Cooke J by Davis LJ in *R v H*... The approach by Cooke J was part implicitly and part expressly approved in the judgment of this court in *R v Hayes*…The approach adopted by Cooke J was itself followed by Hamblen J in another LIBOR rate fixing trial [This was a reference to Hamblen J's directions in *R v Read & others* in which the defendants were acquitted]"

56. As recorded at [22] of the judgment, there were two aspects to the appeal in *R v Merchant*. The first was that that the judge's directions on the elements of the offence conflated issues of falsity in fact with the intention of the defendant when giving directions on the LIBOR question. This involved a submission that *R v H* was wrongly decided such that "the appeal against conviction involved, as a principal though not exclusive ground, a comprehensive attack on the approach taken in other LIBOR trials, an approach which has been approved by this Court in *R v Hayes*." That contention was rejected in the following terms at [32], [36]-[38] and [41]-[42] under a heading "H and Hayes rightly decided":

> "32. At the heart of the submissions made on behalf of Mr Merchant by Mr Jonathan Crow QC in seeking to persuade us that the approach in H was wrong, was the proposition that whether a statement is true or false is a question of fact which does not depend on the belief in which or the intention with which the statement is made. It was said that so long as the answer to the LIBOR question was within a range of permissible interest rates, the answer was not false just because the submitter had adjusted the rate to take account of requests made by traders, who were hoping for an advantage to their trading position.
>
> …
>
> 36. We consider, in agreement with Cooke J's initial ruling and his second ruling on 5 December 2014, and the judgment of this court in *H*, that *the person making the LIBOR submission was under an obligation to give their honest and genuine assessment. That the submitters will give their honest and genuine assessment is implied into the LIBOR submission*; long established authority (some of which was referred to in [377]-[379] of Asplin J's judgment) shows that, *when an answer is given in such circumstances, it must be an honest or genuine assessment by the person making the answer.*

37. It is clear from the transcript of the argument in *H* that the court fully considered both the meaning of the LIBOR question and the issue as to legal duty. *The court clearly concluded that the operation of the LIBOR market and the answer to the LIBOR question entailed a legal duty to provide, when answering the question, an honest or genuine assessment. Indeed it is difficult to understand how the market which depended on the setting of a benchmark could have operated in any other way. As Davis LJ observed, unless when answering the question there was a legal duty to give an honest and genuine assessment the market could not operate. It followed that in making a LIBOR submission there was a legal duty to provide an honest and genuine assessment.* That was the proposition which Cooke J accepted, and which was accepted without hesitation in both *H* and *Hayes*. It is hardly surprising in the circumstances that the matter was dealt with shortly by such an experienced commercial judge as Cooke J, and by the Court of Appeal in *H*.

38. *We ourselves cannot see how a benchmark could have been set in any way other than through discharge of such an obligation when answering the question*. Quite apart from the decisions in this court, it is important also to note that Hamblen J, another very experienced commercial judge, followed the same approach as Cooke J.

…

41. We therefore reject the submission made on behalf of Mr Merchant to the effect that the LIBOR question requires only an answer of one of the rates at which the bank could borrow and no legal duty to the effect suggested was owed. In our judgment, the judges who considered this question in the earlier cases were correct and the bank was required to give a genuine assessment. They were right in concluding that this is so obvious that it was to be implied in the return. An answer which was not a genuine assessment was a false answer**.** For these reasons *H* was rightly decided, founded as it was on well-established legal principles.

42. In these circumstances it was not necessary for the prosecution to prove that the actual submissions made by Barclays in answer to the LIBOR question were outside the permissible or acceptable range; *what needed to be proved by the prosecution was that they were not genuine submissions. This is because a submission would be false, even if within the range, if it was either higher or lower than the bank believed a genuine answer would have yielded*. As the evidence demonstrated, very small movements, within the permissible range, were capable of increasing profitability for the bank and reducing profits or increasing losses to the counter-parties."

(emphasis added)

57. The second aspect to the appeal in *R v Merchant* did not depend upon the correctness of *R v H* and *R v Hayes*. It was that the judge had not given proper directions in a number of respects. In one respect this submission was accepted, namely that the judge had not given a direction that the ingredient of the offence at paragraph 2(b) of the indictment (which was in materially identical terms to the indictment in Mr Hayes' case) had to be made out; this was the allegation that the defendant had agreed that the proper basis for a LIBOR submission should be disregarded, which required his knowledge /intention that the LIBOR submission would be a false one. This is in substance the point Mr Hayes seeks to raise as Ground 2 of his present appeal. At [48]-[49] the court nevertheless dismissed Mr Merchant's appeal against conviction on the basis that on the specific facts of his case the jury must have been satisfied of that question because they could not otherwise have found Mr Merchant to have been dishonest.

58. Although the case did not involve an appeal by Mr Hayes, the court specifically addressed whether the same point would have affected the conviction of Mr Hayes, in whose trial the directions had been framed in materially identical form. At [24] the court drew attention to the factual circumstances in *R v Hayes* being specific to that case, including that at the time of the rulings by Cooke J Mr Hayes had made extensive admissions and that the defence had itself said (prior to the 6 July 2014 ruling) that the question for the jury was one of dishonesty. At [25] the court emphasised that directions must always be tailored to assist the jury in relation to the particular facts and issues in each case in the following terms:

> "25. ……It is always necessary to remember that the evidence in each trial may be different, and directions appropriate for one trial might not be appropriate for another trial. It is the principled aim of every summing-up to provide succinct, focussed directions on the issues raised in the specific trial. Directions which have been appropriate in one of a series of trials being heard separately for proper reasons of case management, even if those directions have been approved on appeal, might not be appropriate in a subsequent trial in the series in which there are different issues and evidence. As has been said on numerous occasions, crafting the directions for each case is essential."

59. At [46] The court said:

> "Cooke J dealt with the issue of deliberately disregarding the proper basis as a general issue for the jury under the issue of dishonesty. This may have been because, as noted above, the central issue before Cooke J had been identified as one of dishonesty. *We accept that the issue can be addressed under dishonesty and because of the focus of the issues in that case, it was right to do so*. However in the present case, properly analysed, deliberately disregarding the proper basis was, as drafted in the particulars of the offence of this indictment, part of the element of the particulars of this offence of defrauding."

(emphasis added)

The Crown Court proceedings in the case against Mr Palombo and others

60. Mr Palombo's trial (and subsequent re-trial) took place before Judge Gledhill and a jury, in the Crown Court at Southwark in 2018-2019. Mr Palombo was tried alongside five others: Christian Bittar and Achim Kraemer, both former employees of Deutsche Bank, and Philippe Moryoussef, Colin Bermingham and Sisse Bohart all former employees of Barclays. The prosecution (SFO) case was that between 1 January 2005 and 31 December 2009, Mr Palombo conspired with the co-defendants and others to make false submissions of EURIBOR to the EBF, in order to gain commercial advantage in respect of swaps contracts made between Barclays and its contractual counterparties. The indictment was in materially identical terms to that in Mr Hayes' case save for the differences in the individuals and dates, and the involvement of EURIBOR rather than LIBOR submissions, alleging that the submissions would be false in that they would deliberately disregard the proper basis for EURIBOR submissions.

61. The prosecution case was that the conspiracy had three essential aspects:

    i. "Interbank" – The first central allegation was that traders in different banks liaised with each other to arrange for their cash desks to make submissions on a concerted basis with a view to achieving a rate which benefited the various banks' economic positions. This aspect was advanced against Mr Palombo but not Mr Bermingham or Ms Bohart; and only on two occasions.

    ii. "Intrabank" – The second critical assertion was that traders at Barclays including Mr Palombo made requests of their cash desk for a higher or lower submission to benefit the bank's economic position. This criminality was said also to have involved Mr Bermingham and Ms Bohart.

    iii. "Cash-pushing" – The third limb was the prosecution's allegation that Mr Bermingham and Ms Bohart (but not Mr Palombo) agreed to make bids and/or transactions in the market in order to manipulate the actual market price.

62. The prosecution case against Mr Palombo, therefore, was mainly of involvement in the "intrabank" aspect of the conspiracy, making requests of the Barclays cash desk for a higher or lower submission to benefit the bank's economic position.

63. At the retrial, the prosecution relied upon the following, amongst other matters, to prove its case:

    i. The fact that Christian Bittar had pleaded guilty to the indictment, and that Philippe Moryoussef had been convicted at the first trial (in his absence), proved the existence of the conspiracy.

    ii. Archived communications recovered from Barclays and other panel banks relating to EURIBOR submissions during the indictment period (all audio and written electronic communications which had been recorded for compliance purposes, including emails, Bloomberg electronic messages, transcripts of telephone and intercom calls, the submissions, and published EURIBOR rates).

64. Mr Palombo's defence case was that:

i. Whilst accepting a degree of involvement in seeking to influence Barclays EURIBOR submissions on certain dates, he denied he was part of any conspiracy, that he was attempting to procure submissions that were false or misleading, or that there was any element of dishonesty in his actions.

ii. Where the EURIBOR submission was within a range of possible submissions which were legitimate (i.e were not inaccurate answers to the EURIBOR question), that it was legitimate for the submitter to have regard to the bank's commercial position in selecting a submission within that range.

iii. He had not worked in banking prior to joining Barclays as a graduate trainee. He received no specific training on applying the EURIBOR Code. He was told to learn on the job, and when he was assigned to work with Moryoussef, specifically told to learn from him. He learned that the cash desk might arrive at more than one figure which could be the "proper basis" for a submission. If there was a range of figures, it was honest for the cash desk to submit any of the figures that fell within the definition.

iv. The whole Euro swaps desk believed the same and if a member of the desk wanted a higher or lower submission, a request would be made of the cash desk on the basis that the figure was within in legitimate range. The practice was discussed and conducted in an entirely open basis.

v. Whilst he accepted his role in requests made to the cash desk, he was not aware of the interbank nature of Moryoussef's dealings, and if the appellant was said to be involved to any extent, it was as a proxy for Moryoussef. He accepted that on two occasions he had asked traders at other banks to request a particular rate. This was done at the specific direction of Moryoussef on days when Moryoussef was not present, and on such days he bore a heavy overall responsibility which caused him significant anxiety and consequently he gave not thought to the directions but simply to carry them out as instructed along with many other tasks.

65. On 22 September 2017, Judge Gledhill made a ruling concerning the proper construction of the EURIBOR Code and the definition of EURIBOR in preparation for the trial. As already noted, the EURIBOR Code was governed by Belgian law and the judge heard expert evidence as to the Belgian law principles of contractual construction. The judge held that applying Belgian law principles (as he had established them to be), the proper interpretation of the Code was a matter of law for him. He then expressed his decision on the ultimate issue before him at paragraph 46 of his ruling in the following terms:-

> "46. RULING ON THE ISSUE
>
> I. The common intention of the parties to the Code is clear from the EURIBOR definition, as stated in Article 6.1 of the Code. The panel banks were not permitted to take into account their own trading advantage when submitting the daily rate. The common intention was that each panel bank

would submit a rate which to the best of their knowledge was the rate at which euro interbank term deposits were being offered within the EMU zone by one prime bank to another at the given time. The common intention was that each bank was to make an independent and genuine assessment of the rate submitted. When putting forward its assessment of the rate there is a subjective element to the assessment, as any assessment is to an extent a matter of opinion. But otherwise the rate was to be assessed objectively as to the rate at which deposits were to be offered by one prime bank to another at the given time.

II. The common intention is also clear from the other intrinsic elements of the Code. In particular, the Preface states that EURIBOR is the new market reference rate for the Euro. The rate was to be used on the financial markets and would be relied on by third parties.

III. In these circumstances, having determined the common intention, Belgian law does not require the court to consider the extrinsic elements and there is no other reason to do so in this case.

IV. Pursuant to the principle of good faith, the Code is to be supplemented by the requirement that panel banks should not take into account trading advantage when submitting the rate.

V. I reject the defence submission that the fact that the taking into account of the bank's own trading position is not expressly prohibited means that the Code must be construed as if it were therefore permitted. There was no common intention of the parties that the panel banks were permitted to manipulate the rate for their own advantage or the advantage of others – and conversely, to the disadvantage of others.

VI. I also reject the defence submission that the bank was permitted to take into account trading advantage when selecting the rate to be submitted as long as the rate was within the range of justifiable rates. If the banks were permitted to take their own interest/s into account, the rate submitted would not be objective and would not be submitted to the best of their knowledge. On the contrary, it would be subjective and would distort the EURIBOR rate.

VII. There is no need in the circumstances to apply Article 1162 of the Civil Code.

> VIII. As I have ruled at paragraph III above, I am not required to hear evidence of the extrinsic elements. However, I am conscious that such evidence will be relevant, or at least some of it will be, at the trial. It is admissible if it goes to the issue of the defendant's state of mind, and in particular, to whether he or she was acting honestly. Indeed, it may very well be that the real issue in this case is whether the prosecution can prove that the defendant was dishonest, within the meaning as set out by the Court of Appeal (Criminal Division) in the case of *R v Ghosh* 75 Cr. App. R. 154."

66. Having so held, the judge went on briefly to say that he also accepted that the various decisions of the CACD in the LIBOR cases (cited above) were "highly relevant" to the case before him, and that "the principles set out in these cases should guide this court as to the correct approach in law". He held that "the correct approach is as set out in the LIBOR cases" (at [47]-[48]).

67. Judge Gledhill's ruling at the preparatory hearing was the subject of an appeal to the CACD by Mr Palombo's co-defendant, Christian Bittar: *R v B*. The court (Davis LJ, Teare and Bryan JJ) upheld the judge's ruling. Having set out the appellant's indictment, the court referred to the "LIBOR cases", noting (at [13]-[16]):

> "13. It is now established that conduct of such a kind (if proved), undertaken with the requisite dishonest intent (if proved), can constitute a criminal conspiracy, under English law, where carried out with regard to the fixing of the Libor rate.
>
> 14. This is established at this level by a series of three cases in the Court of Appeal (Criminal Division): *H* [2015] EWCA Crim 46; *Hayes* [2015] EWCA Crim 1944; and *Merchant & Mathew* [2017] EWCA Crim 60. With regard to alleged Libor fixing the following five principles have in particular been identified (see paragraph 9 of the judgment in *Hayes*):
>
> i) It was inherent in the Libor scheme that the submitting panel bank was putting forward its genuine assessment of the proper rate. Although it had the subjective element inherent in an opinion, it was otherwise to be made by reference to an objective matter – the rate at which the panel bank could borrow funds etc.
>
> ii) Any submission made had to be made under an obligation that the submitter genuinely and honestly represented its assessment.
>
> iii) Assessments by different panel banks could legitimately differ, but that did not displace the obligation that the

> submission made must represent the genuine opinion of the submitter.
>
> iv) Where there was a range of figures, the submission made had to represent a genuine view and not a rate which would advantage the submitter.
>
> v) The submitting bank could not rely on or take into consideration its own commercial interests in making its assessment. The bank was not free to let its submission be coloured by considerations of how the bank might advantage its own trading exposure; that would be contrary to the definition and the whole object of the exercise.
>
> 15. It may be noted that in *Merchant & Mathew* it was sought to be said that *H* and *Hayes* were wrongly decided. In particular, it was sought to be said that so long as the relevant submission for a particular tenor was within a range of permissible rates then submitted rate within that range at the behest of traders hoping for an advantage in their trading position. This challenge failed: see paragraphs 41 and 42 of the judgment of the court delivered by the Lord Chief Justice.
>
> 16. However, that is the position under English law with regard to Libor. In the present case, the judge was concerned with Euribor: which, as we have said, was, unlike Libor, governed by the Code (in the version extant at the time) and which was itself subject to Belgian law."

In upholding Judge Gledhill's ruling and dismissing the appeal, the court said at [51]-[56] and at [63]-[64]:

> "51. Mr Hunter launched a strong attack on the judge's conclusion that, approaching the matter intrinsically, the meaning of Article 6.1 was clear. In our view, however, the judge's conclusion to that effect was entirely justified.
>
> 52. On any view of Belgian law, the judge was at least entitled to look at all the provisions of the Code to assist in the determination of the meaning of Article 6.1. And it is noteworthy that the Code, among other things, stipulates:
>
> (1) The rate is to be "the best price between banks": it is clear from the words of the Preface that hypothetical prime banks are contemplated, not any particular individual panel bank.
>
> (2) Panel banks are required to have high ethical standards and enjoy an excellent reputation.
>
> (3) The submission is required to quote the rate "accurately with two digits behind the comma"; and

(4) Panel banks are to refrain from any activity damaging to Euribor.

53. These points, taken both individually and cumulatively, tell strongly against the appellant's argument that an individual panel bank can have regard to its own trading advantage in making its submission.

54. The point, however, is then put beyond any real doubt by the opening words of Article 6.1 itself. The submitted rates are required to be by reference to the rates at which euro interbank term deposits are being offered "by one prime bank to another" – that is, viewed objectively, again by reference to a hypothetical prime bank (not the individual panel bank). And that is then all qualified by the requirement that the quoted rate is "to the best of their knowledge". This language is specific. It is not, pace Mr Hunter, vague. And it is wholly inconsistent with the panel bank being entitled in effect to skew the submitted rate to its own trading advantage: for that would not then be putting forward its "to the best of their knowledge" assessment of what is, objectively, the best price between the best banks.

55. We think it legitimate to have regard also, if necessary, to the underpinning reasoning of the courts in the Libor cases. This is not to use those cases as extrinsic materials but simply to point out that aspects of the underpinning reasoning in those cases in principle would apply equally to Euribor. This is, essentially, because both rates (Libor and Euribor) are designed to be a comparable benchmark for the relevant markets for the day in question (as the summary of the background facts before the judge itself indicated). It is hard to conceive how such a benchmark, if to work, ever could have been intended to be permitted to be influenced by the trading advantage of individual submitting panel banks. (Indeed, as was put to Mr Hunter in argument, that prospectively would confer on panel banks a potentially great commercial advantage denied to other, non-panel, banks.) So to permit would be contrary to the whole object of the exercise. As stated by the court in H and in Hayes (see in particular at paragraph 47) unless the requirement was to give a genuine assessment of the rate the market could not operate. Those sorts of considerations surely must apply as much to Euribor as to Libor: and are also wholly consistent with the language of Article 6 of the Code, read as a whole, and with the words "to the best of their knowledge" in particular.

56. This reading thus also disposes of the appellant's central argument that to submit a rate designed to advantage the submitting bank is permissible if that submitted rate is within the (or perhaps a) justifiable range. In our judgment, one cannot

> get that out of the language of Article 6. Article 6.1, after all, is directed at a single rate, to be submitted (to two decimal points) to the best of the submitting bank's knowledge. The Article simply is not directed at a range of rates from which a submitting bank then may choose to suit its own advantage. In any event, what is the "justifiable range"? Is that range to be determined with or without reference to a panel bank's own trading advantage? And might not such a range itself thereafter become capable of being skewed if all panel banks are entitled on preceding occasions to submit rates to their own advantage? Again, the underpinning reasoning in Merchant & Mathew – where the like point as to "range" had been specifically pursued – surely has equal purchase in the Euribor context.
>
> …
>
> 63. By this ground the appellant complains, as we have said, that the judge wrongly and unfairly had regard to the decisions of the English courts on the Libor cases (cited above). Not only were those cases governed by English law and did not involve the Code but in any event it was unfair and inconsistent for the judge to, in effect, take those cases into account as extraneous materials.
>
> 64. There is nothing in this point. The fact is that, in broad terms, Euribor was intended to be a benchmark, comparable to Libor, for euro denominated transactions. Mr Cameron rightly conceded that the judge was entitled to have regard to the underpinning reasoning in the Libor cases to the extent that such reasoning bore on the intrinsic meaning and intended effect of the Code (as indeed we have ourselves done in earlier parts of this judgment). Although the judge's remarks in paragraph 48 of his ruling are perhaps not ideally worded, it is plain enough that that had been his approach and that was what he was intending to indicate. That was a justified approach."
>
> (emphasis added)

68. Judge Gledhill's directions to the jury at Mr Palombo's trial reflected the terms of the preliminary ruling and the decision of the CACD in *R v B* [2018] EWCA Crim 73. The jury were provided with a written document headed "Legal Directions – 2". So far as is relevant, those directions provided as follows:-

> "CONSPIRACY TO DEFRAUD
>
> To defraud or to act fraudulently is dishonestly to prejudice another's right, knowing that you have no right to do so. Prejudicing another's right includes causing economic loss or exposing another to the risk of economic loss.

…

Before you can convict any defendant of conspiracy to defraud, you must be sure:

…

3. that the defendant you are considering was a knowing party to the Conspiracy, in that he/she agreed with one or more employees of a Euribor panel bank to make or procure submissions of Euribor rates which were false or misleading in that they:

a. were intended to create an advantage to the trading positions of employees of one or more of the panel banks, and

b. deliberately disregarded the proper basis for the submission of those rates, thereby, intending that the economic interests of others may be prejudiced.

…

PROPER BASIS FOR THE SUMBISSION OF EURIBOR RATES

The proper basis for the submission of Euribor rates includes:

i. A submitter at a Panel Bank, when submitting a Euribor rate, must put forward his/her assessment, to the best of his/her knowledge, of the rate at which Euro interbank term deposits in the relevant tenor are being offered within the EMU zone by one prime bank to another at 11 am Brussels time.

ii. Assessments by different Panel Banks could legitimately differ, but that did not displace the obligation that the submission must represent the assessment of the submitter, to the best of his/her knowledge.

iii. Where there was a range of figures, the submission made still had to represent an assessment to the best of his/her knowledge and not a rate intended to advantage the submitter or trader or the bank at which he/she worked. The fact that the figure could be within a range provides no answer if the figure submitted does not represent the assessment to the best of the knowledge of the person submitting the figure.

iv. A submitter is not entitled to take into account that which would or might advance his/her own or another Bank's commercial interests or those of a trader in putting forward

his/her Euribor submission. To take such commercial matters into account would be to act in a way that was contrary to the Euribor Code of Conduct, as it plays no part in an assessment to the best of his/her knowledge of the borrowing rate.

v. You must bear in mind that although this was the law of England and Wales during the period covered by the Indictment, and indeed has always been so, it was set out by the Court of Appeal for the first time in January 2018. This was therefore not available to the Defendants beforehand. (Please see the written Answer to Jury Note 2 – JB 3 Tab A).

Deliberate Disregard

The prosecution must prove so that you are sure in the case of each defendant that he/she agreed to procure or make submissions that deliberately disregarded the proper basis for the submission of those rates.

For a defendant to "deliberately disregard" the proper basis, he/she must know what the proper basis for submissions is at that time. He/she must know that the submissions deliberately disregarded that proper basis for the submissions.

…

DISHONESTY

…

Dishonesty is a central issue in the case.

When considering the question of dishonesty, you must:

1. Ascertain the defendant's actual knowledge or belief as to the facts - that is, ascertain what the defendant genuinely knew or believed the facts to be. When considering the defendant's belief as to the facts, the reasonableness or unreasonableness of his/her belief is a factor that is relevant to the issue of whether the defendant genuinely held the belief. However, it is not an additional requirement that the belief must be reasonable. The question is whether the belief was genuinely held.

2. Having determined the defendant's state of knowledge or belief, go on to determine whether the defendant's conduct (as you have found it to be) was honest or dishonest by the standards of ordinary decent people. There are no different standards of honesty which apply to any particular profession or group in society, whether as a result of market ethos or practice. If you are sure that the defendant's conduct was

> dishonest, by the standards of ordinary decent people, the prosecution does not have to prove that the defendant recognised that the conduct was dishonest by those standards."

69. It may be noted that there are two relevant differences between these directions and those of Cooke J in Mr Hayes' case. First, in accordance with the decision in *R v Merchant*, the jury were expressly directed that for a defendant to "deliberately disregard" the proper basis, he/she must know what the proper basis for submissions is at that time. He/she must know that the submissions deliberately disregarded that proper basis for the submissions." Secondly the dishonesty direction was no longer in the terms required by *R v Ghosh* but in accordance with the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 .

70. On 26 March 2019, Mr Palombo was convicted by a 10 to 2 majority. On 1 April 2019 he was sentenced to four years' imprisonment.

Mr Palombo's 2020 appeal: *R v Bermingham and Palombo*

71. On 9 December 2020, the Court of Appeal (Fulford LJ, VPCACD, Cutts J, Sir Nicholas Blake) dismissed Mr Palombo's and Mr Bermingham's appeals against conviction. One of the grounds of appeal was that the judge had misdirected the jury on the "proper basis" for the EURIBOR submissions. Giving the judgment of the court, Fulford LJ rejected this ground as "unarguable", for the reasons set out at [78]-[82]:

> "78. In the present case, this issue was resolved after full argument. The Court of Appeal should only revisit an earlier decision if satisfied that it was reached per incuriam in accordance with the exceptions to stare decisis identified in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, or because this step is necessary in the interests of justice vis-à-vis an appellant because the law had been misapplied or misunderstood, and the accused had been improperly convicted (*R v Taylor* [1950] 2 KB 368; *R v Spencer* [1985] QB 771).
>
> 79. The evidence now relied on was irrelevant to the issue of the correct approach to be taken to the interpretation of the common intention of the parties to the Code. *The judge had concluded, wholly sustainably, that the intention of the parties was clearly established by the Euribor definition, as set out in article 6(1).* It has not been challenged on this appeal that Belgian law provides that if the common intention is clear from the contract, there is no need to rely on extraneous evidence. Accordingly, there is no suggestion that the judge or the Court of Appeal misapplied Belgian law in this regard.
>
> 80. *We consider, furthermore, that the decision of this court is unassailable in upholding the judge's decision that the meaning of article 6(1) was clear (see Bittar at para 52). As Davis LJ observed, the Code required that the rate is to be*

> *"the best price between banks", and this is by reference to hypothetical prime banks and not particular individual banks. Panel banks are required to have high ethical standards and enjoy an excellent reputation. The submission by the bank has to quote the rate "accurately with two digits behind the comma". The Panel banks were expected to refrain from any activity damaging to Euribor. We agree that these points strongly indicate that individual panel banks could not have regard to the institution's own advantage in making its submission. Furthermore, this was an objective test to the best of the individual's knowledge, which further tends to exclude considerations of trading advantage* (see *Bittar* at para 54).
>
> 81. It follows that the aspects of the evidence of Guido Ravoet and Helmut Konrad that are submitted to be determinative of this ground of appeal, to the contrary, were irrelevant on this issue. Testimony of this kind, as foreshadowed by the judge in his ruling (see para 70 above), was germane, inter alia, to the defendants' state of mind and, in particular, as to whether they acted honestly: this material potentially assisted on how the applicants interpreted the Code by throwing light, for instance, on the discussions concerning the banks' commercial interests at the design stage and during the Steering Committee meetings. Any evidence of an interpretation of the Code that tended to contradict the judge's direction in law did not create a "legal no man's land" for the jury. It was clear that the jury were obliged to follow the judge's directions, and the jury would have focussed on the evidence of Helmut Konrad (and to a markedly lesser extent to Guido Ravoet) when considering the applicants' contention that they had not knowingly and dishonestly participated in a conspiracy to disregard the proper basis for making Euribor submissions.
>
> 82. It follows that it is unarguable that the decision in *Bittar* was wrong in law or was decided per incuriam, or that the jury were provided with inadequate guidance by being left in a "legal no man's land". We decline to grant leave to appeal on this ground."
>
> (emphasis added)

72. On Mr Palombo's behalf Mr Owen KC advanced a further ground, namely that the conspiracy charge lacked the certainty required at common law, reinforced by article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as enacted in domestic law by the Human Rights Act 1998. This submission was comprehensively addressed and rejected at [83]-[104]. Although Mr Owen sought to advance the same argument as Mr Palombo's third ground of appeal before us, we do not need to set out the entirety of the judgment rejecting it. The following suffices:

"94. It is regrettable that there was no authoritative guidance as to whether taking account of a submitting bank's commercial interests was unlawful before the trial judge's ruling in this case was confirmed by way of the interlocutory appeal in *Bittar*. It is also regrettable that the test of what constituted dishonesty changed during the proceedings. However, despite Mr Owen's eloquent and erudite submissions to the contrary, we are satisfied that the requirements of legal certainty were fully met in this case by both the indictment and the agreed legal directions on the elements of the offence given by the trial judge.

…

96. There was, accordingly, a close connection between the two issues relating to intention on which the prosecution needed to satisfy the jury to the criminal standard of being "sure". First, that each defendant deliberately disregarded the proper basis for the Euribor submissions when they either made or procured them. Second, that they did so dishonestly according to the reformulated *Ivey* test. Under the first requirement, a defendant could only deliberately disregard the proper basis if he or she knew what the proper basis was and despite this made or acted on false representations not permitted by the Code. Under the second, a jury could only be sure that the defendant had acted dishonestly if they had established (subjectively) the state of the individual's knowledge or belief as to the facts and, in the light of that, that the conduct was dishonest by the (objective) standards of ordinary decent people. Applying the first element of the *Ivey* test meant that the jury must have rejected the defendants' account of what they said they knew and believed as to the proper basis of making submissions to Euribor.

97. Together this set a demanding test for the prosecution to meet. In these circumstances, we are to an extent unsurprised that in the absence of authoritative guidance on the requirements of the Code a number of traders in the Euribor and Libor prosecutions have been acquitted. In this case, however, the jury must have concluded that the defendants' evidence as to their states of mind was false, and their deliberate disregard of what they knew was the proper basis for setting the rate was dishonest, applying the objective test of the standards of ordinary decent people to the defendant's state of mind. It is apparent from a number of questions the jurors asked during the trial that they were acutely aware of the difference between the state of knowledge of the defendants at the time they did the acts alleged and what is now known about the proper meaning of the Euribor Code of Conduct.

…

> 100. In the present case, both unlawfulness and dishonesty needed to be established; these ingredients were the subject of clear and comprehensive directions; and they were established to the jury's satisfaction, as reflected in their verdicts. We are satisfied that the principle of legal certainty was not impugned in this regard.
>
> …
>
> 102. We do not accept that these defendants were disadvantaged by the change in the standard dishonesty directions from *Ghosh* to *Ivey*. The first limb of the *Ivey* test gives a substantial measure of protection from the application of an objective test unrelated to the state of mind of the defendant under consideration…
>
> …
>
> 104. In these circumstances there is simply no basis for a submission that the applicants were unfairly convicted because they did not realise at the relevant time that what they were doing was wrong and the conduct made them criminally liable."

Connolly and *Black* (US Court of Appeals for the Second Circuit)

73. On 27 January 2022, the Second Circuit gave judgment quashing the convictions of Matthew Connolly and Gavin Black. Both were employed by Deutsche Bank ("DB") which was one of the 16 US dollar LIBOR panel banks. They were traders, based in New York and London respectively. They were charged with, and convicted of, offences of conspiring to commit wire fraud and bank fraud contrary to 18 USC para 1349 in connection with US dollar LIBOR submissions; and of the substantive offences of committing bank fraud and wire fraud contrary to para 1343. The substantive counts alleged wire fraud "by inducing co-workers to submit to the [BBA] false statements that could influence LIBOR rates, in order to increase their employer's profits – or decrease its losses – on existing derivatives contracts".

74. The trials took place over 4 ½ weeks in the Federal Court before Chief Judge McMahon and a jury. Connolly and Black brought motions, initially at the close of the US Government's case and again following conviction pursuant to Federal Rule of Criminal Procedure Rule 29, arguing (so far as relevant to this appeal) that the Government had failed to introduce sufficient evidence to establish the elements of the counts of which they were convicted. This is recorded in the judgment of McMahon CJ dismissing the motions at p. 2 (*USA v Connelly and Black* 16 CR. 370 (CM)) where the principles of the sufficiency of evidence are set out. The principal evidence adduced by the prosecution was expert testimony from Dr Youle, an economist, and factual evidence from alleged co-conspirators Messrs King, Curtler and Parietti, who had entered into cooperation agreements with the Government. Mr King and Mr Curtler were responsible within DB for making the LIBOR submissions, and had each used a "pricer" to assist in reaching a

conclusion as to the rate to submit. Also relied on was documentary evidence in the form of emails, Bloomberg chats and records of telephone conversations.

75. In allowing the appeals, the Second Circuit expressed its conclusion as being that "Finding that the evidence was insufficient as a matter of law to permit a finding of falsity, we reverse the judgments of conviction and remand to the district court for entry of judgments of acquittal" (p.2, lines 15-18; see also p.28, lines 15-18). The Government accepted that the conspiracy charges must stand or fall with the substantive wire fraud charges (p.28). The court said at p. 28: "Because we conclude, for the reasons which follow, that the evidence was insufficient to prove that the defendants caused DB to make LIBOR submissions which were false or deceptive i.e. to prove that they engaged in conduct that was within the scope of para 1343, we reverse defendants' convictions." There were other grounds of appeal which the court did not consider it necessary to address. The court set out at p.37 and 39 the Government's case which it had set out to prove as its "theory of falsity" as being that there was (a) one true interest rate (b) automatically generated by Mr King's pricer (c) which generated DB's LIBOR submission except when there was a request from a trader. It held that the Government had failed to adduce sufficient evidence on each of the three elements. There was not "one true interest rate". The submissions had been made taking into account market matters other than Mr King's pricer. DB's LIBOR submission had differed from the pricer even where there was no request from a trader.

76. We will examine the decision in more detail below when considering Mr Palombo's first ground of appeal.

The CCRC References

77. On 6 July 2023, the CCRC referred Mr Hayes' case to the CACD following 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). It did so accepting submissions on behalf of Mr Hayes that the Second Circuit had ruled upon the definition and operation of LIBOR as a matter of law, and as such its decision conflicted with the decisions of the English courts. We will address whether that is the correct characterisation of the decision, which Mr Darbishire KC and Mr Owen KC no longer maintained in oral argument before us. The grounds for the reference identified for the purposes of section 14(4A) of the Criminal Appeal Act 1995 are set out at [87i]):

> "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."

78. 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" (at [17]). Its reasoning for making the reference was the same as that in the Hayes reference given the close analogy between EURIBOR and LIBOR. The grounds identified for the purposes of section 14(4A) of the Criminal Appeal Act 1995 are set out at [50]:

> "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 – and by close analogy, the definition and operation of EURIBOR - to the reasoning which was used in Mr Palombo's case, and conclude that this renders his conviction unsafe."

The Grounds of Appeal

79. Mr Hayes seeks to advance two grounds of appeal:

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.

80. Mr Palombo seeks to advance three grounds of appeal:

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.

81. There are two potential hurdles to each of these grounds being entertained by this court. The first arises from the fact that the current appeals arise out of the CCRC References. The second arises from the doctrine of precedent ('*stare decisis*') under which this court is bound by its previous decisions save in limited circumstances. We address each in turn.

The scope of grounds which may be argued on a CCRC reference

82. As identified above, the CCRC were careful to define the ground on which the reference was made in each case. The significance of the formal definition of the ground referred is that it limits the scope of the grounds which may be argued on this appeal. Section 9(1) of the Criminal Appeal Act 1995 is the statutory basis on which the CCRC may refer a conviction to the CACD following a trial on indictment in England and Wales. Section 9(2) provides that such reference shall be treated for all purposes as an appeal against the conviction under section 1 of the Criminal Appeals Act 1968. Appeals under s. 1 of the 1968 Act are not as of right: there is a filter of obtaining leave to appeal. Moreover, once there has been an appeal against conviction which is dismissed, there is no right to pursue a second appeal to the CACD in the absence of a CCRC reference. For this reason the 1995 Act seeks to restrict the grounds which can be argued on a reference to those which relate to the ground which is referred. A CCRC reference is not to be treated as if it were an ordinary appeal. It is not an opportunity to argue any grounds which the appellant wishes to. Section 14(4A) and (4B) of the 1995 Act (as amended by s. 315 of the Criminal Justice Act 2003) provide as follows:

> "(4A) Subject to subsection (4B), where a reference under section 9, 10 or 12A is treated as an appeal against any conviction, verdict, finding or sentence, the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference.
>
> (4B) The Court of Appeal … may give leave for an appeal mentioned in subsection (4A) 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."

83. A question therefore arises in relation to each of the grounds of appeal which Mr Hayes and Mr Palombo seek to advance whether the ground relates to any reason given by the Commission for making the reference; and if not whether leave should be granted pursuant to s. 14(4B) to permit the unrelated ground to be advanced. If the answer to those questions is in the negative, the ground cannot be considered.

The doctrine of precedent

84. The main authorities are *R v Taylor* [1950] KB 368; *R v Gould* [1968]; 2 QB 65; *R v Spencer* [1984] 1 QB 771; *R v Simpson* [2004] QB 118; *R v Magro* [2011] QB 398*; R v Barton* [2021] QB 685; *R v Bermingham and Palombo* [2021] 4 WLR 113; and *R v Layden* [2023] EWCA Crim 1207, from which we derive the following principles:

    i. There is a rule of *stare decisis* which applies in CACD, just as in the Civil Division, which binds the court to follow a previous decision on a point of law by

the CACD, or its predecessor the Court of Criminal Appeal, subject to certain exceptions: *Spencer* at p. 779D-F; *Simpson* at [26]-[27].

ii. Those exceptions include the exceptions which apply to civil appeals as identified in *Young v Bristol Aeroplane Ltd* [1944] KB 718, namely where (i) the previous decision conflicts with another previous decision of the CACD; or (ii) the previous decision cannot stand with a decision of the House of Lords or Supreme Court although not expressly overruled; or (iii) the previous decision was reached *per incuriam*: *Spencer* at p. 778E-F.

iii. The second of these applies where there is in effect an instruction by the Supreme Court not to follow the previous decision, albeit strictly *obiter*: *Barton* at [96], [102], [104].

iv. There is an additional flexibility in criminal cases where the liberty of the subject is in issue: in such a case the court can depart from a previous decision, where this step is necessary in the interests of justice *vis a vis* an appellant because the law had been misapplied or misunderstood: *Taylor* at 371, *Gould* at 68-69, *Spencer* at p779D-F, *Bermingham and Palombo* at [78]. This was described in *Simpson* at [38] as a residual discretion. Although initially identified as applicable only to prevent a wrongful conviction, the discretion is not so limited: *Simpson* at [34], *Barton* at [96].

v. Such residual discretion must be exercised circumspectly: *Magro* at [30]. It must take into account the principle that the rules as to precedent are of considerable importance because of their role in in achieving the appropriate degree of certainty as to the law, which is a foundation stone of the administration of justice and the rule of law: *Simpson* at [27]; *Barton* at [103]. In deciding whether to depart from a previous decision, the constitution of the court making that decision is a relevant factor: *Simpson* at [38]. Even where the court considers the previous decision wrong, it should not depart from it if it is carefully reasoned and has not overlooked any relevant argument or information: *Magro* at [30]-[31].

vi. One factor in favour of exercising the residual discretion is development of the law to meet contemporary needs: *Simpson* at [27].

85. These cases all concern the impact of a previous decision of this court in a different case to that with which it is dealing on the subsequent occasion. In the present appeal, however, we have previous decisions, at both an interlocutory stage and on full appeals against convictions, in the very cases of Mr Hayes and Mr Palombo which we are being asked to consider. We are unaware of any case considering the doctrine of precedent involving this particular circumstance, and were told that the combined researches of counsel had not found any. It must, we think, impose a heavy burden on an appellant to show that substantial injustice would be caused if they were not permitted to reopen the previous decisions of this court which decided the very points which are sought to be advanced. In this connection we observe that where there has been a change in the law since the date of conviction, but without a previous appeal, this court will not ordinarily grant an extension of time to appeal unless satisfied that there has been substantial injustice; and a change in the law will not of itself justify an extension of time if the conviction was in accordance with the law at the time and followed a fair trial: *R v Cotterell* [2008] 1 Cr App R 7 at [42]-[46]. Those principles, which are applicable to

extensions of time for out of time appeals, may be applied to dismiss an appeal even where there has been a CCRC reference, by reason of s. 16C of the Criminal Appeal Act 1968.

Palombo ground 1

86. We find it convenient to address this ground first because it is the only ground, in our view, which relates to reasons for the CCRC making the references.

87. We have highlighted by way of emphasis above the passages in *R v H*, *R v Hayes*, *R v Merchant*, *R v B* and *R v Bermingham and Palombo* which explain the reasoning for the conclusion, consistently reached in each of those cases, that a submission which is influenced by trading advantage is not a genuine or honest answer to the question posed by the LIBOR and EURIBOR question. We agree with that conclusion and those reasons, and do not propose to repeat or paraphrase them. Mr Darbishire submitted that *R v Merchant* decided no more than that the duty on a LIBOR submitter was to make a genuine and honest assessment, but that is not a tenable view of the decision; it clearly endorsed *R v H* and *R v Hayes* as rightly decided in holding that trading advantage could never be taken into account.

88. At the heart of the challenge on this ground was the argument advanced by both Mr Darbishire and Mr Owen that there was a range of rates which could represent the submitter's honest and genuine assessment; and the submitter was free to take into account trading advantage in deciding where within the range of honest and genuine assessments to make the submission. There is, it is said, a false dichotomy between a genuine and honest assessment and one which takes into account trading advantage because if the submission is within the range of genuine and honest assessments available it can be placed anywhere within the range based on trading advantage and remain a genuine and honest assessment.

89. We reject this argument. It begs the question "genuine assessment of what?" That is a matter of construction of the LIBOR Definition or the EURIBOR Definition which defines the question which the submitter has to answer. That was the question of law addressed in the LIBOR cases, and as we explain when dealing with Mr Hayes' first ground and Mr Palombo's second ground, that was correctly treated as a question of law for the court. In the LIBOR Definition what is required is an assessment of the rate at which the panel bank "could borrow". That must mean the cheapest rate at which it could borrow. A borrower "can" always borrow at a higher rate than the lowest on offer. But the higher rate would not reflect what the LIBOR benchmark is seeking to achieve, namely identification of the bank's cost of borrowing in the wholesale cash market at the relevant moment of time. If in a stable and liquid market a submitting bank seeks and receives offers for a reasonable market size at the very time it is to make its submission, and receives offers ranging from 2.50% to 2.53%, it would accept the offer at 2.50%. It would be absurd to suggest that the LIBOR question could then properly be answered by a submission of 2.53%. The bank "could" borrow at that rate in the sense that it was a rate which was available, but that is obviously not what "could" means. When pressed in argument as to what "could" meant if it did not mean the lowest at which the bank could borrow, Mr Darbishire suggested that it meant the rate "at which it would have to borrow". This is a reformulation without a difference. The rate at which a bank would "have to" borrow is the lowest rate at which it could borrow. This remains the criteria

which has to be applied in the more common scenario when there are a number of factors other than contemporaneous offers which have to be taken into account in answering the question. In an illiquid market, it may be very difficult to reach an answer to the question, and views between different banks might legitimately differ. But that does not change the nature of the question which the LIBOR Definition requires to be answered, which is the selection of the single figure which in the genuine estimation of the submitter represents the lowest cost at which the panel bank could borrow. There is no range of genuine and honest assessments in the sense that the submitter can treat each of them as a genuine assessment of the answer to the question, because the question demands a single rate by reference to an objective criterion which defines a single rate.

90. This is not undermined by the fact that a rate might differ by reference to the size of the borrowing. In *Connolly and Black* the evidence was that the rate for larger borrowings would be higher because of their size (see below). However if the rate at which the bank could borrow an amount properly within the description "reasonable market size" is at 2.50%, but twice that amount at only 2.51%, the LIBOR Definition question would have to be answered as 2.50%. That is obviously so as a matter of language in what is meant by "could". It also meets the purpose of the LIBOR Definition as a benchmark.

91. The same is true of EURIBOR, which expressly requires "the best price". Mr Owen submitted that this still imported a range because it did not specify whether the bank being spoken of was a borrowing bank or a lending bank and, because there would or might be a bid/offer spread, the rate might be different depending on the answer. We are unable to accept this submission because the EURIBOR Definition requires identification of the "rate at which euro interbank deposits are being offered". That is the offer price and it is the same for the lending and borrowing bank. It is the "best" rate for the borrowing bank because it is the lowest at which it can borrow; and it is the "best" rate for the lending bank as it is the highest offer price which will be accepted by the borrowing bank.

92. This is why it was regarded as significant in the LIBOR and EURIBOR decisions in this court that the definitions required a single rate to be submitted to at least the nearest basis point. The submission had to be of a single figure, not a range, because the question being asked only admitted of an assessment of a single figure. Indeed any other construction would be unworkable. If the assessment could be of a range, the Definition does not define the criteria by which the range is to be confined: it is easy enough to identify the bottom of the range as the lowest at which the bank (in the case of LIBOR) or a prime bank (in the case of EURIBOR) could borrow; but there is nothing to identify where the top of the range is at which the bank could borrow more expensively, when a bank can always pay more than the lowest rate it could achieve. Moreover, if there were a range, the Definitions provide no criteria as to how a submitter is to go about choosing where in the range to make the submission. To draw on an answer Mr Hayes gave in one of his interviews, would it be permissible to roll a dice? Obviously not; that would be the very antithesis of an independent benchmark seeking to represent accurately the cost of borrowing between banks in the wholesale cash market. Mr Hayes' answer to the question was, in effect, that because that was absurd, the absurdity was avoided by being able to take account of trading advantage. But that is not only contrary to the language of the LIBOR and EURIBOR Definitions, which require an assessment of a single rate, but also contrary to its purpose as an independent benchmark: it 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.

93. The fallacy in the range submission, therefore, is to treat the LIBOR and EURIBOR questions as being capable of being answered by a genuine assessment of a range. They cannot. 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. Of course the exercise required subjective judgment. Different submitters might reach different figures, not only because in the case of LIBOR it was a rate for that particular bank, but more fundamentally for both LIBOR and EURIBOR because it was not a mechanistic exercise, and required a judgment based on multiple factors such as those enumerated in Cooke J's summing up which we have quoted. In that sense there was a range in which the answers might lie, none of which could be said objectively to be incorrect, because they were opinions reached as a matter of subjective judgment. In that sense there was no "one true rate" or "one correct rate". But from the point of view of an individual panel bank there could only be one genuinely assessed rate, because the assessment required was of a single rate.

94. It was suggested that this was a new point which this constitution of the court had identified for the first time. We disagree. It is a fundamental part of the reasoning in each of the LIBOR and EURIBOR decisions. In particular, it is contained either expressly, or as the underlying premise for, the following passages in the cases:

i. *R v H* identifying the range argument at [21] and rejecting it by endorsing the judge's reasons at [24]; and at [42], [43] and [44] referring to "*the* proper rate"; and at [46] approving the dichotomy drawn by Cooke J between a rate which reflected a genuine view and a rate taking account of trading advantage.

ii. *R v Hayes* at [9(i)]: "*the* proper rate…*by reference to an objective matter*"; and at [9(iii)-(v)] referring to the range as being by different panel banks. Cooke J had addressed and rejected the range argument in his summing up:

> "The word "range" was used by Mr Hayes to describe a number of potential individual figures that might represent a realistic possible answer to the LIBOR question in a thin or non-existent cash market from which he said any one figure could be submitted after taking account of trading advantage. Mr Hayes's case is that there was no one figure which did answer the LIBOR question and that any number of answers could be given as to the borrowing rate. I have already given you directions of law as to the inapplicability of that concept in relation to a proper submission in relation to the LIBOR definition. The submitter had to submit one figure only which was the best assessment of the bank's borrowing rate and had to come to that conclusion without reference to the bank's trading interest. There may have been a number of different figures that a bank could have put forward as realistic without criticism from others because

> they all appeared to be objectively reasonable, but the submitter had to put forward one which represented the honest best opinion of the borrowing rate."

iii. *R v Merchant* at [41]-[42]; the court at [42], when referring to "a permissible or acceptable range", must be referring to what is a range which subjective judgments might produce, not a range of genuine assessments by the submitter of the answer to the LIBOR question; otherwise it would not have been possible to say that "a submission would be false, even if within the range, if it was higher or lower than the bank believed a genuine answer would have yielded."

iv. *R v B* at [56] expressly rejecting any range; and at [54] "what is *objectively*…the best price"; and adopting the LIBOR reasoning at [55] and [64];

v. *R v Bermingham and Palombo* treating *R v B* as correct for the reasons identified at [80]-[82], especially the reference to an "*objective test*" in the last sentence of [80].

95. Mr Owen and Mr Darbishire relied on evidence that this was not the view which had been expressed by a number of those involved in the operation of LIBOR and EURIBOR at the relevant time, including by way of example only, Mr John Ewan, BBA LIBOR Manager, in a deposition taken for the *Connolly and Black* proceedings; Fred Sturm, Director of the Chicago Mercantile Exchange in a letter to Mr Ewan on 3 July 2008; and Ms Bohart's evidence at Mr Palombo's trial. These and other pieces of evidence undoubtedly show that some involved in the operation of LIBOR and EURIBOR at the time took a different view. Equally there are market participants who have espoused the view that "could" does mean the lowest price at which the panel bank could borrow (see, for example, the evidence of Dr Youle and Mr Curtler recorded in the judgment of McMahon CJ in *Connolly and Black*). That is neither here nor there in relation to the true construction of the question posed by the LIBOR and EURIBOR Definitions in the respective Codes, which in this country is a question of law for the judge. It was not suggested that there was a settled market practice as to the interpretation of those instruments; and in the absence of a settled market practice, what they mean, as a matter of English and Belgian law respectively, cannot be influenced by evidence of what practitioners think they mean or thought they meant. Such evidence is relevant to whether an alleged conspirator knew or intended that what he or she was agreeing should happen would be against the rules, that is to say contrary to what LIBOR and EURIBOR required, and to dishonesty. But it is not relevant to the question of construction which determines what LIBOR and EURIBOR did require.

96. Finally, so far as our own views on the issue are concerned, they are supported by, and consistent with, the publication by the BBA on its website in December 2008, during the Hayes indictment period, of the instruction amplifying the LIBOR definition that "The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivatives book." We were told that in *every* panel bank, *all* those involved in the treasury function of manging the panel banks' cash and making the submissions would also have trading positions, perhaps because of the need to hedge. However, the distinction must have been drawn here because it recognised the greater conflict of interest to which those conducting the

derivatives trading would be subject in making submissions than those exercising a treasury function; and to have been seeking to mitigate that conflict, precisely because taking into account trading advantage could form no legitimate part in the assessment which had to be made in the submission.

97. We turn to the decision of the Second Circuit in *Connolly and Black* to explain why there is nothing in it which affects our conclusion that the LIBOR and EURIBOR decisions of this court were rightly decided for the reasons which they gave.

Connolly and Black

98. As is apparent from the terms in which the conclusions were framed (as set out above) and the very test contained in Rule 29 of the Federal Rules of Criminal Procedure, the Second Circuit decision was one about the sufficiency of evidence, not one which rested upon any conclusion of law or construction of LIBOR as an issue of law.

99. The process of reasoning for the conclusions starts at p. 33 after setting out at p. 31 that for a conviction of wire fraud under New York law, the Government need not prove an actual false statement so long as it proves a "scheme to engage in some form of deception, such as a half-truth, *i.e.*, a "representation stating the truth so far as it goes" but is nonetheless misleading because of the "failure to state additional or qualifying matter"". Section B then addresses the Government's evidence as to fraud, falsity or deception. It starts by examining "the LIBOR instruction with which the LIBOR Submitters were to comply." As to that "We look principally to the language of the BBA LIBOR Instruction, to any accompanying elaboration or explanations of the BBA LIBOR Instruction and to the Government's evidence as to how DB's submitters arrived at their LIBOR". Pausing there, the court was not confining itself, even "principally", to the language of the BBA Definition but was taking into account the evidence from the DB submitters put forward by the Government, primarily Mr King and Mr Curtler, as to how those particular submitters arrived at their submissions in practice. This was because, as the court went on to say in the next sentence, the trial judge had correctly directed the jury that "the government has the burden to negate any reasonable interpretation of the instruction that would make Deutsche Bank's submission responsive". This means, as Mr Darbishire confirmed during the course of argument, that the question of how the LIBOR Definition was to be construed was being treated as an issue of fact for the jury, on which the prosecution bore the burden of disproving as a matter of evidence that it was to be construed in the way contended for by the defendants.

100. Having referred to the wording of the LIBOR Definition, and in particular that it required a rate at which the submitting bank "could borrow", the Second Circuit referred to McMahon CJ's conclusions that the Government had no obligation to present evidence that DB could not have borrowed at the submitted rate. It said at pp. 34-35:

> "The BBA LIBOR Instruction did not ask about an actual loan. Rather, it asked a question that was "hypothetical." … A panel bank was to "estimate" … the interest rate at which the bank "could" … borrow an amount of cash that it would typically borrow, "were it to do so by asking for and then accepting" inter-bank offers in London just before 11 a.m. … ("[b]ecause

> of that word 'could,' this instruction is asking for a hypothetical rate," "[i]t's asking for the panel banks to make an estimate").
>
> The district court, in denying defendants' Rule 29 motions for acquittal on the ground of lack of proof that any LIBOR submissions were false, stated that the government had no obligation to present evidence showing that DB "*could not* have borrowed funds at [the] rate[s it] submitted" after receiving a request for higher or lower rate submissions by derivatives traders. … (emphasis in original). And in the district court's view, evidence that DB Bank "*could* have borrowed funds at a submitted rate would not have rendered the Defendants' statements truthful." … (emphasis in original). We disagree. The precise hypothetical question to which the LIBOR submitters were responding was at what interest rate "could" DB borrow a typical amount of cash if it were to seek interbank offers and were to accept. If the rate submitted is one that the bank could request, be offered, and accept, the submission, irrespective of its motivation, would not be false."

101. The court went on to refer at p. 36 to the evidence of Messrs Curtler, King and Parietti and said:

> "Yet none of the witnesses testified that DB could not have borrowed a typical amount of cash at the rate stated in any of DB's 'LIBOR submissions. And contrary to the district 'court's Rule 29 Opinion, whether "B "could" do so was the precise question to which the LIBOR submissions were to respond, and was thus the key to whether a given submission was false."

102. This does not engage with the detailed reasoning of McMahon CJ on the question set out at pp. 6-10 of her judgment. She there expounded a number of reasons for her conclusion. The first was the evidence that if the bank could borrow at one rate, it could always borrow for more, but the latter was not what was meant by the rate at which the submitting bank "*could*" borrow. Dr Youle and Mr Curtler testified that that obviously meant the cheapest at which the panel bank could borrow. McMahon CJ's second reason for her conclusion was that statements of opinion are not scientifically right or wrong but are either honestly held or not. An opinion not honestly held is a factual misrepresentation, citing Federal case law. The same is true in English law and was spelled out in *R v Merchant* (at [33] and [36]). The Second Circuit did not address either aspect of this reasoning at this stage of its judgment, although, as will be seen, it does do so later.

103. At p.37 the court identified the Government's falsity theory of (a) one true number (b) generated by Mr King's pricer (c) departed from only when requested by a trader). The one true number theory was identified as being that "you borrow at the lowest rate. There's no range." At p. 39 the court said:

> "There are two principal respects in which the trial evidence, viewed as a whole, fails to support the foundations of the government's theory of falsity, *i.e.*, that there was (a) one true

> interest rate, (b) automatically generated by the pricer, (c) which was DB's LIBOR submission as generated except when there was a request from a trader. First, the testimony of the government's witnesses revealed that there were many factors other than the data automatically received by the pricer that informed DB's final LIBOR submission. Second, there were many loans available to DB, with varying interest rates; and as DB could agree to such rates, there was no one true rate that it was required to submit."

104. The first of these addressed paragraph (b) of the Government's falsity theory, and is of no relevance to the current appeal. The second rejected the one true rate theory on the basis that DB had loans available at various rates but again without at this stage addressing the point which McMahon CJ had made that the bank could borrow at the lowest of those rates and that's what "could" must mean in the definition.

105. The court came to its reasoning on this point by reference to the evidence at pp. 44–47:

> "Most importantly, the one-true-interest-rate theory was also belied by the evidence that loans may have different rates of interest simply because they involve different amounts of principal. King testified that the cash desk would "borrow money every single day" (Tr. 657), and that "[t]here were periods where I need to borrow some $20- to $25 billion a day" (id. at 269). He said that "[o]ften it costs you more to borrow more cash than less cash," and thus loans in various principal amounts could be at varying rates of interest. (Id. at 667-68.)
>
> Similarly, Curtler testified that "there were days where there would have been a wide range of offered rates." (Id. at 2135 (emphasis added).) He said that "[i]f two counterparties were willing to lend to you, I believe I would borrow the cheapest money first"; but "[y]ou wouldn't borrow one or the other. You would borrow both . . . ." (Tr. 2181 (emphasis added).) And the BBA LIBOR Instruction does not say which of those two prices should be submitted. Curtler testified that he would have told the FBI "that for LIBOR, there are a range of numbers which could be reasonably used as a correct LIBOR rate." (Id. at 1905.)
>
> King likewise testified that where there could be loans of the same tenor
>
> but of different sizes, carrying different rates of interest, the BBA LIBOR Instruction provided no guidance as to which interest rate should be submitted, hence giving him leeway as to what rate to submit:
>
> ….

> These varying rates are rates that DB would "ask[] for and then accept[]" (GX 1-803 (BBA LIBOR Instruction at 2, ¶ A)), as opposed to "inflated interest rate[s]"--hypothesized by the government--at which DB "could" borrow to its obvious detriment (see Government brief on appeal at 47).
>
> ….
>
> King, who believed that the "'reasonable market size'" term of the BBA LIBOR Instruction "gave [him] flexibility as to where [he] could actually submit [DB's] LIBOR……."

106. The court also said at p. 51:

> "Nor could a reasonable jury infer from Dr. Youle's testimony that the BBA LIBOR Instruction required DB to submit its "one best estimate" (id. at 226; see Government brief on appeal at 44-45). While Dr. Youle testified to "an understanding that [banks] would submit the one best estimate of the true borrowing costs they had" (Tr. 226), he did not link that understanding to the BBA LIBOR Instruction, which contains no similar qualification (see GX 1-803 (BBA LIBOR Instruction)). Nor did he link that understanding to language in the BBA LIBOR Instruction expressing the expectation that panel banks would "comply with the spirit of th[e] Definition or the Instructions to BBA LIBOR Contributor Banks"

107. We have already given our reasons for rejecting the argument that there cannot be one single rate which is the lowest at which the panel bank could borrow for funds "in reasonable market size" merely because the price of loans may vary according to size. The remainder of the reasoning is dependent on the evidence of the witnesses in that trial about how they understood the LIBOR Definition or operated it in practice themselves. Neither is of any relevance to the exercise which the English courts have undertaken, and which if we are to reconsider it, we must undertake, which is what the LIBOR Definition means as matter of English law.

108. The second strand of McMahon CJ's reasoning, that a statement of opinion carries with it an implied statement of fact that it is honestly given, was addressed at p.49-50:

> "The government's argument that we should uphold the convictions on the theory that trader-influenced submissions constituted statements of "opinion[s] not honestly held" (Government brief on appeal at 32) suffers the same deficiency. While the government's three cooperating witnesses all testified that it was "wrong" to allow DB's LIBOR submissions to be influenced by existing derivatives trading positions because it gave them an "unfair advantage" over their counterparties (see,e.g., Tr. 278 (King), 765 (King), 1167 (Parietti), 1609 (Curtler), 2152 (Curtler)), not one of the witnesses testified that the submissions that were actually made were not rates at

> which DB "could"— as defined by the BBA LIBOR Instruction--borrow."

109. Again, this addresses itself exclusively to the evidence in the trial about the rates at which DB could borrow, which does not touch on the question of construction with which we are potentially concerned.

110. At p. 50 the court said:

> "Although the government states that the BBA's "instructions did not allow a panel bank, when submitting its honest estimate of its borrowing costs, to consider the submission's effect on the profitability of interest rate swaps or other derivatives positions held by the bank's traders" … in fact the BBA LIBOR Instruction contained no such prohibition. … In contrast, the BBA did evince a concern about collusion between panel banks. The BBA LIBOR Instruction expressly stated that "Contributor Banks shall input their rate without reference to rates contributed by other Contributor Banks." … But there was no similar prohibition against banks' making their LIBOR submissions with consideration of the bank's own interest-rate-sensitive derivatives."

111. It is only in this passage, if viewed in isolation, that the judgment might be interpreted as expressing the court's own view of the LIBOR Definition as a matter of construction. This seems to have been the interpretation of the CCRC, but we doubt that the judgment is properly to be read in this way. This passage is immediately followed by reference to Dr Youle's evidence and the whole thrust of the judgment, consistently with the nature of a Rule 29 motion, is to address what was established by the Government's evidence, it already having been said that what LIBOR meant was a matter of fact for the jury on which the prosecution bore the evidential burden of proof.

112. In any event, we do not find what is said persuasive in the context of an issue of construction as a matter of English law. It is a "black letter" approach, rather than a purposive one which does not address the robust reasoning of Davis LJ in *R v H* at [47] for rejecting this point in particular, nor the more general reasoning adopted in the English cases, including the purposive construction factors, such as that an ability for a panel bank to use its LIBOR submission to gain an advantage over a non-panel bank in its trading contracts is anathema to the fundamental concept of an independent benchmark for market wide use.

113. The Second Circuit also observed that while the BBA introduced a Code of Conduct in 2013 which did prohibit any "attempt to influence, or inappropriately inform, the contributing bank's submissions for any reason, including for the benefit of any derivatives trading positions", during the relevant period (which also encompassed the Hayes indictment period) "there were no such guidelines or prohibitions, and the BBA LIBOR Instruction did not prohibit LIBOR submitters' consideration of the traders' positions". We do not consider that spelling this out in a much more detailed code after the period covered by the indictment casts any light one way or another on the position

prior to its introduction. In this respect it does no more than spell out what the LIBOR Definition always meant.

114. For these reasons, therefore, we find nothing in the Second Circuit decision in *Connolly and Black* which causes us any doubt about the correctness of the English decisions as to the construction of LIBOR as a matter of English law, or by extension, of EURIBOR. In summary that is because the US court was addressing a different question from that being addressed by the English court in its decisions. As we have emphasised, it is apparent from the terms in which the conclusions were framed, and the very test contained in Rule 29 of the Federal Rules of Criminal Procedure, that the US decision was one about the sufficiency of evidence, not one which rested upon any conclusion of law or construction of LIBOR as an issue of law. This indeed was Mr Owen's submission in a detailed speaking note served shortly before the hearing. The meaning of the LIBOR definition was treated as an issue of fact for the jury on which the prosecution had the burden of disproving that it bore the meaning contended for by the defendants. It was no doubt for this reason that the court never addressed what system of law applied, or any principles of English law. It was no doubt also for this reason that it did not consider any of the decisions of this court on LIBOR or EURIBOR: they would not have been relevant to the exercise which it was undertaking. Moreover, it was concerned only with the sufficiency of the particular evidence which the government adduced in that case, and therefore rested on the personal practices and views of three individuals, namely Dr Youle, Mr Curtler and Mr King. It was not a case which turned upon evidence of general market practice in London.

115. As already noted, the Second Circuit did not address what system of law was applicable to the interpretation of LIBOR, let alone purport to apply English law. That was not a relevant question on a Rule 29 motion when meaning was a question of fact for the jury. The decision therefore has nothing to say on the question of what the LIBOR Definition means for the purposes of criminal trials in England and Wales. That is a question of law, under the *lex fori*, and is governed by English law because that is the law with which the LIBOR setting system has its closest connection. It is a rate in respect of lending in London, based on the submissions of panel banks selected as those operating in that wholesale cash market, and devised and administered by a British trading association, based in London, and comprised of banks operating in that market.

116. Consequently 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.

Stare decisis

117. We have addressed Mr Palombo's first ground of appeal on its merits, because it was the ground for the reference. However, we would regard the doctrine of *stare decisis* as preventing us from allowing the appeal even if we had taken a different view. The point has been addressed in five cases in this court, and in each decision the court has reached the same consistent conclusion. To depart from those decisions on the basis of one

decision of the US court, which was not addressing the same issue, would not, in our view, engage the residual discretion for a court of the CACD to depart from one of its previous decisions, let alone five. That would be so even if the US decision contained reasoning which was relevant and persuasive, which it does not.

Hayes Ground 1 and Palombo Ground 2

Is this ground related to the reasons for the references?

118. The first question is whether this ground is related to the reasons for the references. We have no hesitation in concluding that it is not. The background to the references is that this court had consistently approached the question of the meaning of LIBOR and EURIBOR as a question of law for the court to determine, not a question of fact for the jury. That is clear from each of the decisions:

i. *R v H* was an appeal on rulings as a matter of law, as was recognised at [11] noting that it was an appeal from rulings on a point of law at a preparatory hearing [under s. 9(3)(c) of the Criminal Justice act 1987] so as to found an appeal with leave pursuant to s. 9(11). It was suggested by Mr Darbishire that all that was decided in *R v H* was that *the prosecution were entitled to advance a case, for consideration by the jury*, that taking into account trading advantage rendered a submission otherwise than genuine and honest, but that is quite inconsistent with the language used.

ii. In *R v Hayes*, the court summarised what had been decided in *R v H* at [9], and went on to describe those as determining "the definition of LIBOR as a matter of law" at [34]. It reiterated at [36] that "as a matter of law" the submitter was not entitled to take into account considerations of its commercial interest.

iii. In *R v Merchant* at [32]-[38] the court addressed the issue as a question which fell to be determined by the court, not a jury, and addressed it by reference English case law; and, moreover, endorsing *R v H* and *R v Hayes* as correctly decided.

iv. In *R v B* Davis LJ said in terms at [23] that the meaning and effect of the EURIBOR Code was a matter of law for the trial judge at a criminal trial, citing *R v Spens* [1991] 1 WLR 624; and at [67]-[69] rejecting the submission that it fell to be addressed as an issue of fact by reference to Belgian law, on the grounds that it was a matter for the procedural law of the English criminal courts, the *lex fori*, which had to be applied to determine whether the question was one of fact for the jury or law for the judge; and confirming that Judge Gledhill had been right to treat the meaning of EURIBOR as a matter of law for his determination as the judge.

v. In *R v Bermingham and Palombo* at [80] the court again treated it as a matter of law for the court's consideration, and at [82] approved the decision in *R v B* as correct as a matter of law.

119. In seeking the CCRC reference, the submissions on behalf of Mr Hayes expressly treated the question as one of law, so as to assert an inconsistency with what was said to be the decision of the Second Circuit in *Connolly and Black* on the same question of law:

see for example the CCRC reference at [24(5)], and at [73(3)] recording the submissions on behalf of Mr Hayes as being: "The definition and proper operation of LIBOR were ruled upon as matters of law, both in the English and US Courts". This was the potential conflict which the CCRC perceived (see e.g. [61(2)]), and it is against that background that the ground referred, namely that "there is a realistic possibility that the Court of Appeal will prefer the findings of the US appeal court in *Connolly and Black* to those which were reached in Mr Hayes's own case" must be understood. The reference was specifically on the basis that this was an issue of law on which there were conflicting or potentially conflicting decisions.

120. In Mr Darbishire's submissions to us he identified the relevance of *Connolly and Black* as being that the question of whether there was a prohibition on taking into account trading advantage was treated in that case as a question of fact, the legal duty being limited to giving a genuine opinion, and was relevant as a court in another common law jurisdiction taking the approach to the distinction between fact and law which was described as the key conflict with the approach of the English court in *R v Hayes*. Mr Owen's Note on *Connolly and Black* was to similar effect. However *Connolly and Black* can have nothing to say on whether that is a question of law for the judge or of fact for the jury in an English criminal trial because that is a matter of English procedural law under the *lex fori*, as Davis LJ identified in *R v B*. *Connolly and Black* did not purport to decide what that English procedural law was, and could not do so. *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. Nor is there any trace of a suggestion in the reference that that was a basis on which the English court might want to reconsider its previous decisions. The same applies to Mr Palombo's position under the EURIBOR reference.

121. The question then arises as to whether the court should exercise its discretion under s. 14(4B) to allow the ground to be argued notwithstanding that it does not relate to the reasons for the reference.

122. In *R v Smith* [2023] NICA 86 the Court of Appeal in Northern Ireland said:-

> "The effect of these provisions is that the Court of Appeal may grant leave to appeal on grounds unrelated to any reason given by the Commission for making a reference. The exercise of this discretion is not precluded even if the grounds for making the reference prove unsuccessful. The range of factors that the court can take into account in exercising this discretion are not spelt out. Plainly, the interests of justice will be at the forefront and in considering whether to grant leave in respect of unrelated grounds the court would at a minimum require to be satisfied that the additional grounds are arguable and may undermine the safety of the convictions."

The court in *Smith* went on to describe this as enabling an applicant to "piggyback" grounds of appeal on those related to the CCRC's reference.

123. We agree that the proposed unrelated grounds must as a minimum be arguable grounds which may undermine the safety of the conviction. But in addition it must not undermine the purpose of the prohibition in s. 14(4A) designed to ensure that a reference is not used

an opportunity to argue points which were available at a previous appeal but were not taken. This ground was available at Mr Hayes' and Mr Palombo's appeals, and the dismissal of those appeals should have been the end of the matter. It would be contrary to the purpose of s. 14(4A) to allow them to piggyback these unrelated appeals upon the reference concerned with *Connolly and Black*.

Stare decisis

124. For similar reasons, even if we thought there were arguable merit in the point, the residual discretion would not justify departure from the doctrine of precedent in which there have been five decisions of this court, not just one, treating the point as a bad one.

The merits of the ground

125. Since the ground is one which we should not properly entertain, we do not need to address it. Nevertheless out of deference to the arguments we will do so, albeit more briefly than if it had been an issue properly before the court.

126. The leading authority is the decision in *R v Spens*. In that case, Lord Spens was charged with conspiring to induce shareholders to enter into an agreement by dishonest concealment of material facts and with false accounting, by reason of the conduct of Ansbacher, of which he was Chairman, in supporting Guinness in the notorious take over by Guinness of Distillers. Part of the evidence relied upon by the Crown in that respect, although not crucial to its burden to establish the offences, was that the conduct was in breach of the City Code on Take-Overs and Mergers ('the Take-over Code'). The trial judge determined the meaning of the Take-over Code as a matter for him; the ground of appeal was that it should have been left as a matter of fact for the jury. Watkins LJ, giving the judgment of the court, referred to the decision in *R v Panel on Take-overs and Mergers ex parte Datafin plc* [1987] QB 815, in which the role of the Take-over Panel had been examined. He observed at p. 627E, amongst other things, that a breach or breaches of the Take-over Code could have "serious penalising effects on the transgressor in take-over situations". The ratio of the decision is expressed at p. 632D-F:

> "Having looked at the case law presented to us by counsel, and of course considered the extremely helpful arguments which they presented to us orally and in their cogently expressed skeleton arguments, we have come to this conclusion. We agree that the construction of documents in the general sense is a matter of fact for determination by the jury. From that generality there must of course be excluded binding agreements between one party and another and all forms of Parliamentary and local government legislation in respect of which the process of construction by the judge is indispensable.
>
> ….
>
> As to the present case, our view is 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. We think the judge's ruling is correct."

127. Mr Owen referred us also to *R v Pouladian-Kari* [2013] EWCA Crim 158, which concerned the construction of letters sent by a government department. Other than the passage at [49] confirming that the principles were correctly stated in *Spens*, it contains nothing of relevance to the facts of the current case.

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. We expand briefly on each of these aspects.

Contract

129. Until a very late stage, it was Mr Palombo's own case that EURIBOR was a contract between the panel bank and EBF. That was the common ground which gave rise to expert evidence before Judge Gledhill, on both sides, of the Belgian law principles of contractual construction. The judge confirmed that to be the position in his ruling. That position was not resiled from in *R v B* or *R v Bermingham and Palombo*, which proceeded on the basis that the issue was one of law for the court. The EURIBOR Code was referred to in *R v B* at [26] as a "contract or Code". At [19] of Mr Palombo's grounds of appeal in the present appeal it was expressly asserted that the EURIBOR Code was a contract made between EBF and the panel banks. It was not until a speaking note was served shortly prior to the hearing that Mr Palombo sought to resile from the position.

130. In our view, the position taken on Mr Palombo's behalf until the late *volte face* was the correct one. In return for agreeing to be appointed as one of the panel banks, and the reputational prestige thereby accorded, the panel bank agrees to make the submission in accordance with the Code. It was suggested by Mr Owen that there would be no intention to create legal relations. The question is more properly articulated as whether the agreement was intended to be binding as a matter of Belgian law, which it is agreed covers the Code whatever its status, but the answer is clear. The Code contains detailed terms which both sides would expect to be complied with and binding. This was no mere casual arrangement administered by a trade association, as Mr Owen submitted. It was a formal mechanism for the establishment and operation of a hugely important independent financial benchmark, to be used to govern transactions worth trillions of dollars in international markets. The same considerations apply to LIBOR where the contract was between each panel bank and the BBA.

Akin to legislation in a way demanding construction by the court

131. Mr Owen emphasised that at the time of the indicted conduct, making LIBOR and EURIBOR submissions was not a regulated activity as such under statutory regulations operated by the Financial Services Authority as the then regulator; nor was it a criminal offence *per se* to fail to comply with LIBOR or EURIBOR. That is not, however, determinative. It was not a criminal offence *per se* to fail to comply with the Take-over Code, but that did not stop it being treated in *Spens* as something which demanded construction as a question of law in the same way as primary or delegated legislation. Although compliance with LIBOR or EURIBOR was not directly a regulated activity, it was indirectly so: failure to comply with their provisions could give rise to regulatory consequences. This is clear from the penalty imposed upon Barclays by the FSA of £85 million on 27 June 2012, exercising its statutory regulatory powers under s. 206 of the Financial Services and Markets Act 2000. The penalty was imposed for, amongst other things, manipulating LIBOR and EURIBOR rates as being a breach of PRIN 5 (the Principles for Businesses) which provides that "a firm must observe proper standards of market conduct". The Penalty Notice was expressly on the basis that the definitions of LIBOR and EURIBOR do not allow for submissions to take into account derivative traders' positions. Had Barclays wished to challenge that exercise of statutory powers it would have had to do so by judicial review; and the construction of the Definitions would have been a matter for the High Court as part of a public law decision. The meaning and effect of LIBOR and EURIBOR is akin to legislation demanding a construction by the court because it is part of the framework by reference to which the FSA's statutory powers of regulation are defined. Breach of LIBOR or EURIBOR has penal consequences to just as great an extent as breach of the Take-over Code, if not more so.

Inconsistency

132. It is also, in our view, obvious that it would be highly unsatisfactory for juries not to be given guidance as to what was required as a matter of law by a financial code like LIBOR or EURIBOR, with which they would not be expected to be familiar. Such a course would risk juries reaching inconsistent conclusions on identical evidence and identical findings of fact, not because of differences in how they approached the evidence, but on the basis of different interpretations of a financial code. These are just the sort of "possibly disastrous consequences" which the court had in mind in *Spens*.

Other arguments

133. Mr Darbishire argued that whether a representation was genuine or false was always a question of fact for a jury; there was no law of genuineness or honesty. The only matter of law on which the jury could be properly directed was that a submission had to be a genuine assessment, which hardly needed stating anyway. Whether it was a genuine assessment (or more accurately, because these were conspiracy counts, whether the intended submissions would be genuine assessments) was always a matter for the jury.

134. We reject the argument. The jury in these cases could not address whether the submissions were, or would be, an honest or genuine assessment without being given an answer to the question "assessment of what?" The answer to that question depended upon the true construction of the LIBOR and EURIBOR Definitions, because that is where one has to look to find what question the LIBOR/EURIBOR submission must honestly and genuinely answer.

135. In this connection, Mr Darbishire sought support from *R v Adams* [1994] RTR 220. In that case a defendant was charged with obtaining services and a pecuniary advantage by deception where he had completed a driver's declaration form (on two occasions) for the purposes of hiring a car and obtaining insurance. He had given the answer 'no' to a question divided into three parts, one of which asked whether he had been convicted of driving offences within the last five years (to which the answer 'no' would have been truthful) and another of which asked whether he had "ever been disqualified from driving" (to which the answer 'no' was untruthful because he had been disqualified for four years for causing death by reckless driving just over five years prior to the submission of the forms). The judge decided that the interpretation of the declaration form was a matter for him as a question of law and that it should be read disjunctively, and directed the jury accordingly. On appeal it was held that he was wrong to do so and that the meaning was a matter for the jury, however obvious it might seem (although the conviction was upheld as safe on the basis that it was so obvious that the document was to be read disjunctively that the jury were bound to have reached the same conclusion as the judge). Lloyd LJ, giving the judgment of the court, said at p. 223L-224D:

> "The dividing line between fact and law has been much discussed by [academic writers ever since the House of Lords decided in *Cozens v Brutus* [1973] AC 854 that the meaning of the word 'insulting' in a statute is a question of fact not law: see, for example, Professor Glanville Williams [1976] Crim LR 472 and 532, and D.W. Elliott, *'Brutus v Cozens*; Decline and Fall' [1989] Crim LR 323. The most recent authority appears to be *Reg. v Spens* [1991] 1 WLR 624. In that case this court upheld a ruling of Henry J that the interpretation of the City Code on Takeovers and Mergers was a question of law for the court. But in that case, as Henry J was careful to point out, the meaning of the code was not central to the question of guilt or innocence. Here it is different. Where the central question is whether the defendant has made a representation or not, and, if so, whether it is false, then both aspects of that question are questions of fact for the jury. This is clearly so where the alleged representation is oral. It must equally be so in our judgment where the representation is contained in writing. The question is not in truth as to the meaning of the representation, still less as to the legal effect of the document. The question is simply whether a representation to the effect alleged in the indictment has been made at all. Beyond this we do not think it helpful to generalise ….."

136. Contrary to Mr Darbishire's submission, the issue in that case did not involve construction of a binding agreement, but of a written representation. It would not have come within the exceptions identified in *Spens*. Although *Spens* was identified as involving an interpretation of a document which was not central to the case, that would not of itself have been sufficient to distinguish it. *Adams*, unlike the present case, was concerned with a representation whose truth or falsity depended upon construction of an instrument which was not, in accordance with the principles identified in *Spens*, a matter of law for the court rather than one of fact for the jury. The statement that whether a

representation is false is a matter of fact for the jury was made by reference to the facts of that case, and is not to be treated as a statement of universal application. Where the truth or falsity of a statement depends upon the meaning of an instrument which, in accordance with *Spens*, it is for the court to determine as a matter of law, falsity is a matter for the court not the jury (although honesty will be a matter for the jury). We note that the trial judge in *Adams*, having rejected a submission of no case to answer and given a ruling on what the document meant as a matter of law, expressly directed the jury to consider the questions: "(1) are you satisfied that the accused knew perfectly well that he was being asked about previous disqualification?; (2) Did he deliberately withhold information about his previous disqualification". Those two questions left the issue of fact as to whether there had been deliberate deception fairly and squarely to the jury.

137. Mr Darbishire also subjected Cooke J's third to sixth propositions to the same criticisms as were advanced in *R v Hayes* (and rejected by the court at [34]-[37]), namely that these were matters of fact not law. This is simply mistaken, because they all follow from the correct interpretation of LIBOR as a matter of law. He further submitted that it was unnecessary and therefore unhelpful for these directions to be given when the only relevant question was the (intended) honesty of the submitter. Again we disagree. The prosecution could not make out the indicted offence without establishing that Mr Hayes intended to disregard the proper basis for a LIBOR submission. They therefore needed, and were entitled to guidance on, what would or would not amount to a proper basis for the submission, tailored to the facts of the case which were concerned with the relevance of trading advantage. That was what Cooke J's six propositions quite properly did. We agree with what the court has already said of this submission in *R v Merchant* at [31];

> "What Cooke J had done (and what this court was approving [in *R v Hayes* at [36]]) was giving guidance to the jury on the legal effect, crafted in such a way as to be relevant to the facts of that case, of the definition of LIBOR and the legal obligation placed on the submitter. It was no more than that."

Hayes Ground 2

138. Mr Darbishire's argument started from basic principles, which were not in dispute, that in a charge of conspiracy to defraud the prosecution must prove the agreement which is specifically defined in the indictment. The argument, which was elaborated upon in attractively presented submissions, can be summarised as follows. The indicted agreement in this case required proof that Mr Hayes agreed to a deliberate disregard of the proper basis of LIBOR submissions *knowing* what a proper basis was and *agreeing* that it should be disregarded. His case and evidence at trial was that he thought that what he was seeking to achieve was permitted by LIBOR, because LIBOR permitted a range of genuine assessments of the rate, and that taking account of trading advantage was permissible if the submission were within this range. That went to whether the prosecution had proved an essential element of the indicted agreement. The issue of dishonesty only arose if the indicted agreement was proved. If the jury accepted that Mr Hayes' state of mind was or might have been as he testified, he was entitled to be acquitted. The judge was wrong to direct the jury in a way which withdrew this aspect of his defence from the jury as an ingredient of the indicted offence, and treat the only issue as one of dishonesty. The errors in the approach adopted in the written directions

stemmed from his conclusion to that effect expressed clearly in [1]-[3] of his ruling on 6 July 2015.

Does it relate to the reasons for the reference?

139. Again, the first question is whether this ground relates to the reasons for the reference. Again, the answer is clearly not. It is, in essence, the argument which was advanced on behalf of Mr Merchant on appeal by reference to Judge Leonard's directions to the jury at his trial

140. In Mr Hayes' case, it depends upon a close examination of the directions to the jury given by Cooke J in his summing up. The judge did not direct the jury that the only issue for them was dishonesty. Question 1 of the route to verdict asked:

> "1. Did Mr Hayes agree with any individual as named in the counts, to procure the making of a submission by a bank of a rate which was not that bank's genuine perception of its borrowing rate for the tenor in question in accordance with the LIBOR definition but was a rate which was intended to advantage Mr Hayes's trading?"

141. Had the direction stopped after the words "LIBOR definition", the ground would be unarguable: the jury could only have convicted if satisfied that the indicted agreement were proved and that Mr Hayes knew and intended that what he was seeking to achieve would be contrary to what was permitted by LIBOR. There was no issue that he knew that the LIBOR definition required the submission to be the bank's genuine perception of its borrowing rate for the tenor in question. The addition of the words "but was a rate which was intended to advantage Mr Hayes's trading" would be equally unobjectionable if "but" meant "and", which was the formulation by Cooke J when taking the jury through the ingredients of the offence, saying in respect of the "deliberately disregarding the proper basis" element:

> "That requires a little more explanation. What it says is this: the persons concerned agreed that UBS, in this example, or the other panel banks in question in the other counts, should make submissions of rates to Thomson Reuters, that is into the LIBOR setting possess, which were intended and designed to benefit Mr Hayes' trading or his bank's trading *and* did not represent a genuine assessment of the true rate at which UBS could borrow funds at 11.00 am on the day in question, contrary to the LIBOR definition requirements that I explained to you yesterday."

142. The argument proceeded from the way Cooke J had structured his summing up; his directions to the jury in his six propositions that a submission taking into account trading advantage was necessarily not an honest submission; and the way in which he had dealt with Mr Hayes' case that he did not think he was doing anything contrary to what was permitted by LIBOR under the subjective heading of dishonesty. In those circumstances, it was argued, the "but" in Q1 of the route to verdict would have been treated by the jury as meaning "because" so as to ask only a single question, which would be answered unfavourably to Mr Hayes if the jury were satisfied that he intended the submitter to take

into account trading advantage. The judge thereby removed from the jury consideration of an essential element of the indicted offence, namely whether he made the indicted agreement, which required proof that he knew that the intended submission would be in deliberate disregard of the proper basis for a submission by intending that it should take into account trading advantage; in short that by seeking to get submitters to alter their submissions to take account of his trading advantage, he was doing something he knew was against the LIBOR rules. That was not merely one issue which went to dishonesty, which the jury were told they could accept or reject. If the jury concluded that he thought or might have thought that a submission taking account of trading advantage was a genuine and honest one, permitted by the LIBOR definition, he was entitled to be acquitted because the indicted agreement would not have been made out.

143. This is an argument which depends on a close analysis of the quite lengthy wording of Cooke J's directions in Mr Hayes' case. It is unrelated to, and unaffected by, anything which was under consideration by the court in *Connolly and Black*.

144. This argument was not advanced at Mr Hayes' first appeal against conviction. We have set out the six grounds of appeal above, and examined the grounds themselves in detail. It is true that at [13] of Hayes the court recorded:

> "Before addressing the specific grounds of appeal, Mr Neil Hawes QC, on behalf of the defendant, made certain introductory remarks. In particular, he emphasised that, whilst the key issue before the jury was that of dishonesty, it was not the only issue which the jury had to decide. A prior issue was whether there had been an actual agreement so as to satisfy the requirements of a charge of conspiracy."

145. However, the present argument, which mirrors that on behalf of Mr Merchant in *R v Merchant*, was not advanced on the appeal. Mr Darbishire did not make any criticism of Mr Hawes in that respect and nor would we. Mr Hawes must have been very familiar with the detail and nuances of the evidence in this case; and 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 keep it secret, as well as his frank admissions of dishonesty in the scoping interviews. Both carried the clear implication that he knew that what he was doing was not permitted by the LIBOR rules.

146. As to the former, the evidence was summarised at 83[8] of the CCRC's first Decision of 7 December 2021 (prior to *Conolly and Black*) refusing Mr Hayes' application for a reference in this way:

> "The prosecution particularly relied upon the fact that Mr Hayes often asked for any approach to the LIBOR submitters to be in person rather than in writing (see, for example, p54G of summing-up transcript for 24 July 2015). At 79G-81B of the summing-up on 24 July 2015, the judge summarised the evidence regarding "secretive requests", i.e. Mr Hayes's requests in documents to: "be surreptitious, not in writing,

> catch him on his own, not with his boss, on the way to the toilet, not in public, off line, on mobiles, not on recorded line, a quiet word, keep it super casual, sort of subtly say, don't be pushy, have a casual chat, don't effing put it on chat".

147. As to the admissions in interview, there was a dispute before us as to whether Mr Hayes had not only admitted that what he had done was dishonest (which was undisputed) but had admitted that he had known that what he was doing was contrary to the proper operation of LIBOR. It is not critical to resolve that dispute, because if he did make such admissions, he undoubtedly sought to resile from that position in his evidence. But for what it is worth, we are satisfied that he did so on at least one occasion in relation to discussions with Guillaume at Deutsche Bank in which he was seeking to influence how LIBOR would be fixed over a period of the following eight weeks, when as he accepted in interview he knew he could not justify it because he could not know how LIBOR was going to move in the following eight weeks.

148. Whether or not he made that admission, it affords an example in which his conduct cannot be reconciled with his case that all he was seeking to achieve was a higher or lower rate within a permitted range which would be a genuine assessment of the borrowing rate. So too, to take just one other example, on 21/22 July 2009, Mr Hayes in Bloomberg chats with Mr Read of ICAP wrote "*11th aug is the big date...i still have lots of 6m fixings till the 10th*"; Read replied "*if you drop your 6m dramatically on the 11th mate, it will look v fishy, especially if hsbc and deut go with you. I'd be v careful how you play it, there might be cause for a drop as you cross into a new month but a couple of weeks in might get people questioning you";* Hayes responded "*don't worry will stagger the drops...ie 5bp then 5bp".* Read replied "*ok mate, don't want you getting into shit;* Hayes explained "*us then deut then hsbc then us then deut then hsbc"* to which Read replied "*great the plan is hatched and sounds sensible".*

149. It is, therefore, unsurprising that Mr Hawes had at an early stage identified *the* issue for the jury as whether Mr Hayes was acting dishonestly (as recorded in *R v Merchant* at [24]). This was not the result, as Mr Darbishire submitted, of the judge insisting that he would not have obfuscation. The judge said that, according to a note, at the preparatory hearing on 6 February 2015, whereas the formulation by the defence that *the* issue was one of dishonesty was made at the outset in a document dated 18 November 2013. Mr Hines told us that Mr Hayes' case at trial, that he did not think he was doing or seeking anything which was not permitted by LIBOR, was not framed in the way now identified in Ground 2 but as going to dishonesty. Given the evidence we have seen of Mr Hayes' exchanges, we do not find that surprising. And it is not, therefore, surprising that Cooke J treated it as something to be addressed by the jury under the issue of dishonesty.

150. We have emphasised these matters because they provide the context for why it would not be appropriate to grant leave to advance this unrelated point on the present appeal pursuant to s. 14(4B). Mr Hayes had the opportunity to appeal against conviction and did so, represented by experienced trial counsel. This point could have been taken on the appeal if it had any merit, but it was not. The court determined that his conviction was safe. Mr Hayes could not mount a second appeal save in the exceptional circumstances of a reference by the CCRC. He unsuccessfully sought one on grounds which expressly included this ground, as Ground 14. In its first Decision refusing a reference, this was rejected by the CCRC as a basis for a reference for each of two reasons. The first was

that the court had dealt with the point in *R v Merchant* at [46], and there was no real possibility that a Court of Appeal would overturn his conviction on the basis of the submission (at [193]). The second was that in any event, even if the Court of Appeal were persuaded that there was a misdirection, there was no real possibility that the conviction would be treated as unsafe. In this respect the CCRC referred to the similar conclusion in the case of Mr Merchant at [49] of *R v Merchant*, and expressed the view that in the light of the evidence against Mr Hayes, which it had summarised at [83] and described at [84] as a strong prosecution case, the court would reach the same conclusion in his case for the same reasons ([194]-[195]).

151. In those circumstances it would not be appropriate to grant leave under s. 14(4B) to raise this point, irrespective of the fact that it was expressly considered and rejected by this court in *R v Merchant* at [46]. It would be "piggybacking" on the wholly unrelated *Connolly and Black* reasons for the matter being before the court, so as to have a second attempt to appeal on grounds not taken, but available, at an appeal which was pursued and dismissed; and in the face of a specific conclusion by the CCRC that the argument did not justify a reference. The fact that the point was expressly considered and rejected by this court in *R v Merchant* is an additional powerful reason for refusing to allow it to be raised now.

The merits of Ground 2

152. Since the ground is not one which we should properly entertain, we do not need to address its merits. We will, however, say something about it in order that Mr Hayes understands that it would not have resulted in a successful appeal even if we had reached a different conclusion about the argument being available. We can in these circumstances deal with it quite briefly.

153. Given the context which we have identified as to the evidence and the course of the trial, we do not think that Cooke J can properly be criticised for dealing with the point under the issue of dishonesty. It is significant that Mr Hayes' trial counsel did not seek to do so on the appeal against conviction. In that respect we agree with what was said at [46] of *R v Merchant*. Moreover, we are in any event satisfied that the conviction is safe. The jury's verdict meant they were sure that Mr Hayes acted dishonestly; and they could not have been so satisfied if they had concluded that he thought, or might have thought, that what he was seeking to achieve was permitted by the LIBOR process; and the nature of the conduct identified in the recorded exchanges, his repeatedly expressed desire to keep it secret, and his admissions in the scoping interviews, provided a very strong case against him.

Palombo Ground 3

Ground 3 of Mr Palombo's appeal

154. This argues that Mr Palombo's conviction is unsafe because the indicted conspiracy to defraud was advanced on a basis incompatible with the requirements of legal certainty at common law and/or Article 7 of the ECHR. This ground is not related to any reason given by the Commission for making the reference. Indeed, it is not even mentioned in the CCRC reference in Mr Palombo's case. It cannot be said to arise out of the decision of the

Second Circuit in *Connolly and Black*. That was concerned with what the prosecution had to prove as a matter of evidence to establish the offence of wire fraud in US law.

155. We have already observed that for leave to be appropriate under s. 14(4B), the proposed unrelated grounds must as a minimum be arguable grounds which may undermine the safety of the conviction. In this context it must also be remembered that save in exceptional circumstances, the CCRC may only make a reference because of an argument or evidence "not raised in the previous proceedings" leading to the conviction (Criminal Appeal Act 1995 s. 13(1)(b)). In most cases referred to this court by the CCRC it is fresh evidence which is said to undermine the safety of the conviction; in other cases it is a change in the law. In the present case it was the arguments related to the Second Circuit's decision which the CCRC considered might be said to do so. We do not consider that, save in exceptional circumstances, the discretion given to the court by s. 14(4B) can properly be exercised to allow an appellant to "have another go" at raising the same points of law as were fully considered and rejected in his first appeal.

156. The arguments put forward on Ground 3 are, as Mr Owen frankly recognised, the same as those which he advanced on behalf of Mr Palombo in his original appeal against conviction. In the decision of this court in *R v Bermingham and Palombo* [2021] 4 WLR 113 this court dealt in detail with the argument that the offence of conspiracy to defraud failed the test of legal certainty. The court set out Mr Owen's submissions at para [83]-[93], and at paragraphs [94]-[109] it rejected them, refusing leave to appeal on that ground. It noted that in *R v Barton* [2021] QB 685 this court had expressly rejected the suggestion that the offence of conspiracy to defraud lacked certainty. The court said at [103] that "we are bound by *Barton* but even if we were free to depart from it we would not do as we consider it is undoubtedly correct." They concluded at [104] that "there is simply no basis for a submission that the Applicants were unfairly convicted because they did not realise at the relevant time that what they were doing was wrong and the conduct made them criminally liable".

157. We are bound by the decisions in *R v Barton* and in *R v Bermingham and Palombo*. There is nothing in the US decision which is capable of undermining that conclusion. Mr Owen submitted that the authority of *R v Bermingham and Palombo* on this point was diminished by the fact that this court refused permission to appeal on the point rather than giving permission and then dismissing the appeal. In the Civil Division of this court it is well established that a decision refusing permission to appeal does not carry the force of binding precedent. So too in the Criminal Division with the decision of a single judge refusing permission to appeal, or the decision of a two or three judge court refusing a renewed application for permission to appeal where it has only heard argument from one side. But this principle cannot possibly apply to a fully reasoned judgment of this court following argument from both sides in which, as in *R v Bermingham and Palombo,* the court holds that some or all of the grounds of appeal are so weak that permission should be refused. It would be ironic if the force of that conclusion was any less than a conclusion that the relevant ground of appeal was arguable but nevertheless should be dismissed.

158. This ground therefore fails because:

i. it is not related to the reasons for the reference and there is no good reason to exercise the discretion to grant leave pursuant to s. 14(4B);

ii. we are bound by the doctrine of precedent to follow the decisions of this court in *R v Barton* and *R v Bermingham*; and

iii. it is wrong for the reasons set out in those decisions.

Conclusion

159. For these reasons both appeals are dismissed.