Neutral Citation Number: [2015] EWCA Crim 1944

Case No: 2015/04027/C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
Mr Justice Cooke

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2015

Before:

THE LORD CHIEF JUSTICE
THE PRESIDENT OF QUEENS BENCH DIVISION
and
LADY JUSTICE GLOSTER

- -

Between:

REGINA	**Respondent**
- and -	
TOM ALEXANDER WILLIAM HAYES	**Appellant**

- -

(Transcript of the Handed Down Judgment.
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Neil Hawes QC, **Christopher Convey** and **Catherine Collins** (instructed by **Garstangs Cartwright King**) for the **appellant**
Mukul Chawla QC, Gillian Jones and **Max Baines** (instructed by the **Serious Fraud Office**) for the **respondent**

Hearing dates: 2 and 3 December 2015

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Judgment As Approved by the Court

Lord Thomas of Cwmgiedd CJ, Sir Brian Leveson P and Gloster LJ:

Introduction

1. On 3 August 2015, after a trial lasting 47 days at Southwark Crown Court before Cooke J and a jury, Tom Hayes ("the appellant") was convicted on eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen London Interbank Offered Rate ("Yen LIBOR"). On 3 August 2015, he was sentenced to a

total of 14 years imprisonment. Although indicted for numerous offences of conspiracy with others, both named and unnamed, in the event, the appellant stood trial on his own although there are further trials currently taking place, or shortly to take place, in relation to alleged LIBOR manipulation by others.

2. In short, the prosecution case was that, between 2006 and 2010, the appellant together with others, agreed to manipulate Yen LIBOR in order to advance his trading interests, the profits of the bank for which he worked and indirectly the rewards which he would receive in the form of bonuses and status, to the disadvantage of the counterparties to the trades. Counts 1-4 related to the appellant's period of employment between August 2006 and December 2009 at UBS Securities Japan Limited ("UBS Japan"); counts 5-8 related to the appellant's period of employment between December 2009 and December 2010 at Citigroup Global Markets Japan Inc. ("Citigroup Japan"). The counts related not only to his alleged conspiracy with persons working within UBS Japan and its associated entities (together "UBS"), and Citigroup Japan and its associated entities (together "Citigroup"), but also with employees of other banks and inter-dealer brokers involved in the fixing of Yen LIBOR.

The operation of the LIBOR Market

3. LIBOR itself, as its name suggests, broadly speaking connotes the interest rate which banks can charge each other on commercial loans in the London market. It has operated since 1986 and has become a benchmark for many types of financial transactions and in relation to various currencies. For each currency there are selected a number of prestigious panel banks. Each such panel bank submits its rate for the relevant period or "tenor", doing so without reference (or at least intended to do so without reference) to any other panel bank. The resulting submissions made by the various panel banks are then collated via Thomson Reuters and averaged, typically with the top quartile and bottom quartile submissions being eliminated (or "trimmed"), and the average of the remainder then taken with a view to setting the promulgated rate.

4. From 1998 to 2010, the operative definition of LIBOR was that published by the British Banking Association ("BBA"). That definition was:

> "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".

5. A submission which is not a genuine assessment for the purposes of this definition can impact on the LIBOR rate actually selected.

The Prosecution and Defence Case

6. Based upon uncontested documentation, the prosecution contended that the appellant had attempted (successfully) to move the LIBOR rates or get others to agree to do so, to his or his bank's advantage. The result was that, in December 2012, he was indicted by the US authorities and, on 11 December, arrested in the United Kingdom. He then engaged with the prosecuting authorities pursuant to procedure set out in ss. 73-74 of

the Serious Organised Crime and Police Act 2005 ("SOCPA") and, as a result, was interviewed on 31 January 2014 and 1 February 2013. On 23 March 2013, he entered into a SOCPA agreement and offered assistance in the form of what purported to be full and frank admissions made in further interviews between March and June 2013: these admissions were to the effect that he had acted as the prosecution alleged, that he had done so dishonestly and that he knew his actions were dishonest. Against the background of the documentation, the SOCPA interviews formed a substantial part of the prosecution case at trial.

7. After he had been charged on 18 June 2013, however, the appellant withdrew from the SOCPA process on 9 October 2013. Thereafter and at trial, the appellant contended that the many admissions of dishonesty he had made in the course of his SOCPA interviews had been made out of fear and the desire to avoid extradition to the United States. In order to be charged in the United Kingdom (and therefore avoid extradition) he had needed to admit wrongdoing.

8. The appellant's case at trial, in contradistinction to his extensive admissions in his interviews of dishonesty and his consciousness of that dishonesty, was that he had not been acting dishonestly by the ordinary standards of reasonable or honest people. He also submitted that, even if his conduct had been dishonest by such standards, he had never realised that what he was doing would be considered to be dishonest by honest and reasonable people. In this context, he contended that:

   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) He 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) His 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 appellant did not personally realise that the selection of a figure within that range by reference to a trader's or bank's trading advantage, even though it did not accord with the LIBOR definition, nor properly answered the LIBOR question, was dishonest by the standards of ordinary, reasonable and honest people.

The ruling as to the definition of LIBOR

9. In the course of the preparatory hearings leading up to trial, on 5 December 2014, Cooke J had made a number of rulings in relation to submissions by the defence as to the definition and true effect of LIBOR. Those rulings were the subject of interlocutory appeals pursuant to s. 9 (11) of the Criminal Justice Act 1987. In summary, in refusing leave to appeal to the Court of Appeal, the Court (Davis LJ, Simon and Holgate JJ) said as follows ([2015] EWCA Crim 46):

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.

The judge's direction on dishonesty

10. The central issue for the jury at trial was whether or not the appellant had acted dishonestly. In respect of each count the judge directed the jury on the basis of the decision in *R v Ghosh* [1982] 1 QB 1053 where Lord Lane CJ set out the well known two limb approach to the issue of dishonesty:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

That decision has been consistently applied for over thirty years since it was decided.

11. The judge told the jury that they had to consider three questions, namely:

    i) Did the appellant agree with any individual named in the indictment to procure the making of the submission by the bank of a rate that was not the bank's genuine perception of its borrowing rate in accordance with the LIBOR definition, but a rate intended to advantage the appellant's or his bank's trading?

    ii) If so, was what the appellant agreed to do with the others dishonest by the ordinary standards of reasonable and honest people? There were no different standards that applied to any particular group of society, whether as a result of market ethos or practice.

    iii) If so, did the appellant appreciate that what he agreed to do was dishonest by the ordinary standards of ordinary and reasonable people?

12. The appellant's application for leave to appeal against his conviction was based on six grounds and was referred to the court by the Registrar together with his application for leave to appeal against sentence. We grant leave in relation to ground 1 only and also grant leave to appeal against sentence.

I. THE APPEAL AGAINST CONVICTION

13. Before addressing the specific grounds of appeal, Mr Neil Hawes Q.C., on behalf of the appellant, 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.

1. The evidence relevant to the first limb of the *Ghosh* direction

14. The first ground of appeal was that Cooke J wrongly identified and ruled, as a question of law, that the defence could not refer the jury to matters of fact which the appellant relied upon in defence as relevant to the first 'objective' limb of the test of dishonesty as articulated in *R v Ghosh* even though it was accepted that the evidence was relevant to the second subjective limb and could be taken into account in relation to that.

15. It is pertinent to note that the issue of whether factors fell within the objective or subjective limb of the *Ghosh* test had been raised at a number of hearings prior to the trial. Throughout those hearings, it had been accepted by the prosecution that the appellant could not be precluded, whatever the apparent merits, from relying upon aspects of practice or malpractice in relation to the LIBOR setting process as going to his state of mind and the issue of dishonesty - in other words the second limb of *Ghosh*.

16. In short, the appellant contended that the judge was wrong to rule that matters of fact were irrelevant to the objective limb and that reference to those factual matters could only be for the purpose of diluting the recognised standard required to be applied by the jury. In particular, it was submitted that the judge was wrong to conclude that the evidence relating to the views and conduct of participants in the market was not relevant to the first limb of *Ghosh*. It was not possible to consider the first limb in an evidential vacuum.

17. There was no intention it was submitted on the appellant's part to undermine the standard contained in the first limb of *Ghosh.* However, the defence contended that, in determining that standard, a necessary contextual factor was the standards of the relevant market at the time and how participants in that market operated. The judge should have directed the jury that it should have regard to all the evidence of market activity in deciding whether the conduct in context was dishonest by the standards of ordinary men.

18. During trial, this issue arose specifically in relation to the application to adduce the hearsay accounts of X (Mr Panagiotis Koutsogiannis) and Y (Mr Andrew Walsh), an issue which we specifically address at paragraphs 49 and following below. The approved ruling of the judge, following submissions on 6 July 2015, was dated 8 July 2015. In that ruling, he appeared to say that such evidence was relevant to the objective limb of *Ghosh.* He said:

> "22. The point is now argued, however, in relation to objective dishonesty, it now being said that evidence of X shows a common understanding of employees at UBS and the evidence of Y shows a standard practice at UBS, both of which are prayed in aid by Mr Hayes in support of his contention that reasonable and honest people would not, knowing of all that background and in that context, consider what he did to be dishonest. The ordinary standards of reasonable and honest

people may be affected, it is said, by knowledge of the market or ethos in which Mr Hayes operated.

23, It is right to say that their evidence relates essentially to the position in London, that it does not relate to Yen submissions and they were not in the direct line of management with which he dealt on a regular basis. Nonetheless, these matters appear to me to be matters for the jury. There are matters which Mr Hawes can ask the jury to take into account in the context of their assessment as to what is honest or dishonest by the standards of reasonable and honest people, whether or not Mr Hayes was aware of the understanding of Mr X at the time or the practice adopted as described by him or Mr Y.

24. As I say, I do not consider the subjective beliefs as to the acceptability of those practices on the part of X or Y to be relevant in any event in the absence of communication to Mr Hayes, but the evidence of their market understanding and bank ethos are matters upon which Mr Hawes is entitled to rely on Mr Hayes's behalf and insofar as the evidence as set out in the extracts of the transcripts upon which Mr Hawes wishes to rely in respect of X relate to those matters, they can be adduced."

19. The prosecution submitted that that ruling confused issues that went to the respective objective and subjective limbs in *Ghosh.* The judge appears to have taken the same view because, in a further ruling dated 14 July 2015, by way of an addendum to his earlier ruling dated 6 July 2015, he said:

> "1. On further reflection, when drafting my Directions of Law for the summing up, it appeared to me that my earlier ruling of 6 July 2015 may show the very confusion of thought which I had sought to avoid in previous rulings.
>
> 2. The standard for objective dishonesty is the same for commercial fraud as for any fraud. There is no separate standard which can apply in the commercial context or market context. The Jury must decide whether what was done was dishonest by the ordinary standards of reasonable and honest people. That standard cannot change by reference to market standards or market ethos, standard practice in an industry or any common understanding amongst employees.
>
> 3. Paragraph 23 of my Ruling reads as if I thought that the standards which the jury should apply could vary according to such market practice, ethos or understanding. That cannot be the case, whatever Counsel wish to argue about the standards and the application of those standards to what Mr Hayes did.

4. What I should have made plain, in admitting the evidence in question, was that the objective standard of dishonesty remained the same, regardless of such matters but that the objective existence of market practice, ethos and understanding could be the subject of evidence in the context of Mr Hayes' contention that he was not subjectively dishonest because he knew of such market practice, ethos and understanding. The Defence is entitled to adduce evidence of this in the context of his contention that he did not realise that what he was doing was dishonest by the ordinary standards of honest and reasonable people. See e.g. paragraph 21 of the Ruling.

5. In consequence, none of the matters set out in Paragraph 15 of the Defence statement and the Addendum can affect the standard which the jury have to apply on the first limb of Ghosh. To the extent that paragraph 23 of my earlier Ruling suggested otherwise, it cannot be right."

20. On 20 July 2015, the appellant raised the issue of the addendum ruling. In the course of the submissions the appellant argued that the objective limb was not examined or judged in a vacuum, and that a jury in applying the *Ghosh* standard were entitled to have regard to the circumstances in which the appellant found himself without offending or undermining that standard. The following passage summarises the content of the exchanges between counsel for the appellant, Mr Hawes, and the court:

> "Mr Hawes: "…At the end of the day, we agree, I think we all agree, objective/subjective are factual matters for the jury to resolve, but just addressing the point where we say it conflates the standard to be met with the evidence which they are entitled to take into consideration when applying that standard. That's the distinction between us.
>
> "So, in other words, we would be entitled, and I hope your Lordship won't preclude us from saying on the reasonable and honest individual, you are entitled to take into account that which was taking place in the market. That doesn't dilute the standard that they need to apply to it, but they are entitled to have regard to the practice that was going on. If they come to the conclusion that it was perverted practice at that stage, then the standard will have been met and they'll move on to stage 2, but just simply because there is…"
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> Mr Justice Cooke: "Mr Hawes I think the position is this: I cannot shut you out from arguing what you want to argue […] in relation to the objective standard of dishonesty, but when it comes to my directions I have to tell them that it is simply the standards of reasonable, honest people that counts and whatever bankers may have thought and whatever banking practice was and whatever the market ethos was is actually

neither here nor there in that context. I can't see how I can do anything else, because otherwise you are diluting the standard because you're asking them to take into account other things than what the reasonable honest person thinks. Otherwise what's the point of you bringing this stuff in? […] It's in order to say that because market practice is X, the standard is then going to be different, otherwise…"….

Mr Hawes: "I'm asking them to take the factual matters that were prevalent in the market at that time and then apply them, using the standard of a reasonable, honest person. If the factors in the market at that time bear no weight against that standard, then they will disregard it, but that's why I submit than any – even on the objective limb, a jury is entitled to – they don't look at it in a vacuum. Your Lordship is going to direct them, rightly in our submission, that they will use their common sense and they will use their life experience and so on and so forth….."

"Well, as part of that factor they're entitled to have regard to that which was taking place at the time. It's not just simply the subjective. One is entitled to take those factors into account in applying the objective standard against the objective evidence as they find it."

"Take for example X. If they were to come to the conclusion that they were to accept his evidence […] it demonstrates, as we argued before and why your Lordship admitted it, objectively the existence of practice, the existence of range, the existence of the way in which requests were made. It is wrong, in our submission to exclude them at that stage from those considerations as against that test."

Mr Justice Cooke: "(referring Mr Hawes to para 13.1(a) of the directions, relating to the objective limb), I take it that you don't have a problem with that the way it is phrased?"

Mr Hawes: "Well, only to this extent […] here's the difficulty […] we submit that they are entitled, as I have to your Lordship's question, to take some of those matters into account. So where your Lordship has put, not by the standards of brokers or bankers in the market, we agree in the sense that it is the reasonable, honest individual. That's the standard.

"What I'm concerned about is that removes the factual consideration, rather than the legal consideration. So your Lordship is right in law but it's the factual context in which that objective standard is being judged. As you say, they must form their own judgment as to what the standards are."

> Mr Justice Cooke: "They know what the facts are, but in terms of how that would impact on this standard it can only be because you want to dilute the standard. You can't say that there are particular facts which result in a lower standard being applied than you would otherwise apply. That's actually the only purpose of all of those arguments, which is why I think I fell into error in my first ruling on the point. The objective fact that there is a market practice is relevant when you come to look at Mr Hayes' subjective belief. He may not know of X and what he's doing, but he's imbibed, he says, the ethos, and there's evidence of that ethos, and then it comes in on subjective belief and that way it all comes in on the subjective limb but not the objective."
>
> Mr Hawes: "We agree with that, but of course, the point will be made, I'm sure, that there's a narrow gateway for the subjective. So what did Mr Hayes know at the time?"
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> Mr Justice Cooke: "Yes"
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> Mr Hawes: "So that is why we submit, if one looks at it from the subjective back towards objective, the jury are entitled to look at the relevant facts outwith Mr Hayes' knowledge. Where would that sit? It wouldn't submit, in our submission in subjective, it sits in objective."
>
> Mr Justice Cooke: "It sits in subjective to this extent, as I indicated in my addendum to the ruling, the existence of that as a market practice can be established by external evidence […] We had this discussion about experts that could have been adduced in theory at least, if not in practice, as to the way the thing worked."
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> Mr Hawes: "Yes"
>
> Mr Justice Cooke: "And so it supports your case on subjective dishonesty to say he's not making all this up about market ethos […] That is, I think, the beginning and end of it myself".

21. Against that background, we turn to defence counsel's closing speech. The complaint is that, despite the judge's statement in the above exchange that:

> "I cannot shut you out from arguing what you want to argue […] in relation to the objective standard of dishonesty,"

nonetheless, during the closing speech of the defence to the jury, the judge intervened and did just that. Further, the appellant complains that, in stopping his counsel during his speech, the judge limited – expressly, and as a question of law – the factual matters upon which the defence could rely as relevant to the first limb of *Ghosh*.

22. What actually happened was that counsel, in his closing speech to the jury on behalf of the defence, said the following:

> "Dishonesty is, you may think […] one of the main central themes or central issues that you need to resolve in this case. It's a two-stage process that you will need to consider. Was what Mr Hayes did dishonest by the standard of reasonable and honest people? For ease, just in terms of identifying what that test is, it's the objective limb. We shall return to examine the evidence that we say is relevant to that particular limb of the test in a moment or two, but we do submit that you should conclude on the available evidence that the prosecution has not made you sure that by those standards, your standards, that Mr Hayes was dishonest.
>
> "If however, […] you conclude by that standard that you are sure he was dishonest, that is not the end of the matter. You would then need to move to the second limb, which is the subjective limb, and ask yourselves the following: are you sure that the prosecution have proved that Mr Hayes appreciated that what he was doing was dishonest by those standards? In other words, did he, by the standard of the reasonable and honest person think what he was doing was dishonest at the time?
>
> "For the reasons that we suggest, both on the objective limb, and if you feel the necessity to get there, the subjective limb, but for the reasons that we suggest are overwhelming in this case, the openness of his behaviour, the way in which LIBOR was viewed at the time as a non-regulated product, the lack of rules that surrounded it and perhaps, most importantly of all […] that the submissions or requests made, fell within the range of all of the figures that he regarded as being legitimate and honest responses to the LIBOR question…"

23. The judge intervened at that point in order to take the matter up with counsel in the absence of the jury. The judge made clear that, in his opinion, counsel's comments to the jury had been "directly contrary" to the directions on the law which would ultimately be given to the jury and of which all were well aware as a result of the previous discussions and the judge's rulings on the law in the absence of the jury. The focus of the judge's complaint was the fact that counsel was seeking to introduce into the jury's consideration of the objective limb of the *Ghosh* test a range of evidential factors which, according to the judge's previous rulings, were simply not relevant to that limb. After some discussion, counsel accepted that, in his closing speech, he would invite the jury's consideration of the relevant factual matters simply in relation to the subjective limb of the test in *Ghosh*.

24. Turning to the summing up, the judge directed the jury as follows:

> "In order for you to be sure of Mr Hayes' guilt, you need to be sure that he was acting dishonestly. That means 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."

25. On this appeal the appellant submitted that, because of the judge's ruling, his subsequent intervention in the closing speech and his subsequent direction to the jury, the defence was wrongly precluded from putting forward matters of evidence as relevant to the jury's consideration of the first objective limb of *Ghosh*. In summary, that evidence was said to be the following:

    i) the ethos of the banking system at the time regarding LIBOR;

    ii) the prevalence of commercial LIBOR requests from traders to LIBOR submitters (specifically in UBS, the appellant's first bank on the indictment, counts 1-4); in this respect the defence relied upon evidence of over one hundred of these requests, in currencies other than Yen, between 2006-2009, which were within the defence jury bundle; the appellant had not been involved in these requests;

    iii) the prevalence of commercial LIBOR submissions in banking generally;

    iv) the use of interdealer brokers to discuss potential LIBOR submissions;

    v) the attitude of the BBA, which operated LIBOR and which (since at least 2005) knew of the association between LIBOR submissions and the panel banks' commercial positions and that the benchmark rate was not 'accurate';

    vi) the attitude of the Bank of England and the Financial Services Authority (now the Financial Conduct Authority ("the FCA")) towards the benchmark, i.e. a refusal to step in or regulate LIBOR until the US Regulator, the Commodity Futures Trading Commission (the CFTC), commenced an investigation in 2008, despite knowing that (a) the benchmark suffered from flawed governance and (b) the LIBOR rate was not accurate.

    It was said that these six factors militated against the suggestion that banks or individuals within the banks who were engaged in the LIBOR market were acting dishonestly. The factors were all evidence of contemporaneous market practice

relevant to contemporaneous market practice and would not have undermined the *Ghosh* standard the jury were bound to apply.

26. It was further submitted that the judge's intervention and directions on the law to the jury, excluded, or at least reduced, the jury's consideration of the evidence regarding activities relevant to the first limb of *Ghosh*. The judge's direction undermined the relevant factual matters which the jury were entitled to consider under the first limb of *Ghosh.* In reality, the import of the judge's ruling was to withdraw all factual matters from the jury's consideration of the objective limb; that the judge had ruled that no factual matters could be relied upon to undermine the relevant standard to be applied. The logical conclusion of such a ruling was that a jury's consideration of the first limb of *Ghosh* was not an evidential one. It was submitted this was a clear error of law and practice which was an issue of central importance in cases where dishonesty was an element of the offence. We were referred to the authority of *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378, at page 389 C, where the Privy Council stated that the objective limb meant 'not acting as an honest person would in the circumstances'. In reliance on that case, it was submitted that the reference to 'the circumstances' imported an evidential consideration into the objective limb, without affecting the standard to be applied to the evidence.

27. It was also submitted on behalf of the appellant that the issue of dishonesty was the central issue in the case as the jury were directed. Thus, the evidence and nature of the prosecution and defence cases required the jury to consider both the objective and subjective limbs of *Ghosh* carefully by reference to that evidence. Because of the flaw in the judge's direction, the jury was unable to do so and accordingly the convictions could not be sustained.

28. In our judgment, as we have made clear above, the issue was whether the evidence in relation to the market, summarised at paragraph 25, which was admissible and relevant to the jury's consideration of the second limb of the *Ghosh* direction, was relevant to the jury's consideration of the first limb – that is to say the determination of the objective standards of honesty.

29. The first limb sets out the objective standard or the standards of ordinary and reasonable people. The submission made on behalf of the appellant was that although there was no dispute that an objective standard had to be determined, it was right that it should be determined by taking into account the standards of the market. It is clear therefore in our view that the only purpose of arguing that the evidence to which we have referred was relevant, was that the jury would be asked to set an objective standard for a market or a group of traders (whatever that standard might be) and not the ordinary standards of honest and reasonable people.

30. There is nothing in any of the decisions of this court that can be used as a basis for that contention. Nor is there anything in *Royal Brunei Airlines v Tan.* The reference by Lord Nichols of Birkenhead to "acting as an honest person would in the circumstances" relied upon by the appellant was not a reference to matters that would affect the objective standards of or the principle that honesty is determined by objective standards of honest and reasonable people; persons are not free to set their own standards. This is clear from the whole of the relevant passage in the opinion he delivered in the Privy Council:

> "Whatever may be the position in some criminal or other contexts (see, for instance, *R v. Ghosh*), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour"

31. We were referred to no case that calls in to question that the standard of honest behaviour is the ordinary standard of honest and reasonable people. There is nothing in any of the many cases applying what has been described as the magisterial opinion of Lord Nichols that supports the view advanced on behalf of the appellant. For example, in *Twinsectra v Yardley* [2002] AC, Lord Hoffmann said of the principles set out in *Royal Brunei Airlines* (at para. 20)*:*

> "They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour."

32. Not only is there is no authority for the proposition that objective standards of honesty are to be set by a market, but such a principle would gravely affect the proper conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. Each of the members of this court has seen such cases and the damage caused when a market determines its own standards of honesty in this way. Therefore to depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people is not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets.

33. Thus although the evidence to which we have referred was irrelevant to the determination of the objective standards of honesty, it was plainly relevant to the second limb subjective limb. The judge expressly directed the jury to have regard to it

and summarised the evidence at length. In the circumstances, although in the light of the argument advanced we considered we should grant leave to appeal on this ground, we reject the argument in its entirety as misconceived.

2. Exclusion of relevant evidence

34. As this court, in January 2015, had determined the definition of LIBOR as a matter of law (as we have set out at paragraph 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 judgement 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.

3. Conclusions of Tullett Prebon disciplinary hearing

38. The third ground of appeal was that the judge wrongly refused to admit hearsay evidence under s. 117 or, in the alternative, under s. 114 of the Criminal Justice Act 2003 ("the CJA 2003") of the conclusions of internal disciplinary proceedings conducted by the inter-dealer broker, Tullett Prebon plc ("Tullett"), into the activities of one of its employees, Noel Cryan ("Mr Cryan") who was a named co-conspirator on count 4 of the indictment faced by the appellant. Together with others, he is currently standing trial at Southwark Crown Court on similar counts of alleged LIBOR manipulation.

39. Prior to the trial of the appellant, he sought admission, pursuant to s. 114(1)(d) of the CJA 2003, of excerpts of Mr Cryan's interview under caution conducted by the Serious Fraud Office in relation to the events which gave rise to the charges against the appellant. The judge heard argument and refused the application. Leave to appeal that ruling was refused and the matter was not then further pursued.

40. On 1 July 2015, during trial, the appellant sought permission to adduce into evidence proposed admissions in the terms of a summary document as to the findings of an internal investigation conducted at Tullett in 2013 into Mr Cryan's involvement in wash trades in 2008 and 2009 between UBS and RBS; electronic communication exchanges conducted over Bloomberg Messenger between Mr Cryan and the appellant during the same period; and ongoing LIBOR investigations including the SFO charge against the appellant in relation to Yen LIBOR. Mr Cryan had made representations to Tullett in relation to the allegations under investigation at an internal disciplinary meeting held on 11 September 2013 and the source of the proposed admissions was a letter dated 27 September 2013 from Mr. Paul Dunkley, a Managing Director at Tullett, to Mr Cryan informing him as to the outcome of the disciplinary meeting on 11 September 2013. It summarised documentation from the Tullett internal investigation which had been disclosed to the appellant.

41. Although reduced into a written admission, in summary, the findings of the Tullett internal investigation which the appellant wished to adduce into evidence were that:

i) Mr Cryan had arranged wash trades with the appellant, on the mutual understanding and upon the expectation (at least on the latter's part), that Mr Cryan would contact Tullett's Yen cash brokers with the intention of asking them to assist the appellant with the manipulation of Yen LIBOR in a certain direction;

ii) Mr Cryan had acknowledged at the meeting that the Bloomberg chats between him and the appellant could be seen as "damning" as they detailed Mr Cryan telling the appellant that Mr Cryan was actively speaking to brokers on the Tullett Yen cash desk with a view to influencing LIBOR;

iii) However Mr Cryan had maintained that throughout this period he was only giving the appellant the impression that he was speaking to the Yen cash desk and trying to get them to manipulate Yen LIBOR when in fact he did not contact them for those purposes;

iv) Mr Dunkley had interviewed a number of people, some at management level, others on the Yen OBS desk, and on the cash desk; they stated that the cash desk had not been approached by Mr Cryan to action Mr Hayes' requests;

v) In all the circumstances Mr Dunkley was minded to agree with Mr Cryan's version of events to the effect that Mr Cryan did not seek to manipulate the Yen LIBOR despite the request from the appellant to do so and notwithstanding that the Bloomberg messages indicated the contrary;

vi) Mr Dunkley rejected Mr Cryan's assertion that the Tullett management were made aware that Mr Cryan was arranging wash trades and the expectations of the appellant in respect of the wash trades;

vii) Arranging wash trades and receiving substantial payments as a result of such trades fell below the standards that Tullett expected of its brokers and had had serious regulatory and reputational consequences for Tullett, which were likely to bring it into disrepute;

viii) As a result, Tullett had decided to terminate Mr Cryan's employment with the company.

42. The appellant relied on s. 117 of the CJA 2003 as the route to admissibility, namely that (as was common ground) the letter dated 27 September 2013 was a business document and, in the alternative, on the more general provisions of s. 114. Suffice to say that in his ruling, the judge rejected the application to adduce the proposed admissions. Recognising that the letter of 27 September 2013 was a business document, he went on:

> "In the context of s. 117 a statement contained in a document is admissible of any matters stated if oral evidence given in the proceedings would be admissible as evidence of that matter. Evidence of the conclusions of Mr Dunkley are irrelevant and inadmissible, whether given orally or in writing. His investigation impinges on the very matter that the jury has to decide, namely whether there was any executory intention on the part of Mr Cryan, if that matter be put in issue.
>
> These statements that were made by individuals to Mr Cryan no doubt could be matters adduced, if they were relevant, by calling the witnesses who made those statements. There is no basis for the matter to be dealt with by hearsay evidence, whether under s. 114 or s. 117. There is no direct evidence from them in this letter. It is merely double hearsay, in as much as Mr Dunkley sets out what it is that he has been told.
>
> So far as Mr Cryan's account is concerned, that is self-evidently self-serving and for the all the reasons I gave in relation to his interview could not possibly be admissible under s. 114.
>
> I could go through each of the individual factor that are referred to in s. 114(2) and none of those would militate in favour of this evidence being admitted. There is therefore no basis upon which the letter in its current form or any of the material upon which it is based can be adduced by the defence and therefore no basis upon which the prosecution should be asked to make any admissions."

43. Before this court, it was argued on behalf of the appellant that the admission of the evidence relating to the conclusions of Tullett's internal disciplinary proceedings was relevant and necessary for a number of reasons:

i) The prosecution case relied heavily on a number of business documents, admitted as hearsay under s. 17 CJA 2003 and/or acts by co-conspirators in

furtherance of the alleged conspiracy. The interpretation to be placed on the meaning of such documents, absent the alleged co-conspirators attending to give evidence as to the nature of the communications, was a key issue. Many of those to whom communications had been made, or from whom communications had been received, were co-defendants, charged on a separate indictment, and co-conspirators. The prosecution contended that adverse inferences arose from that documentation against the appellant. The appellant was in an invidious position in that, without evidence from those involved in the communications, he was unable to challenge the inferences which the prosecution sought to draw from a particular document, notwithstanding that there was other evidence available, such as the findings of the Tullett internal investigation, as set out in the letter dated 27 September 2013, which countered or undermined the inferences or interpretation contended for.

ii) The thrust of the opening, and the prosecution case generally, was that the requests made by Mr Hayes to Mr Cryan were passed to cash brokers internally at Tullett, and therefore: (i) there was an agreement between the appellant and Mr Cryan, and (ii) the agreement was operative in that Mr Cryan made efforts to affect LIBOR submissions by onward communications inside the firm and outside to the market. Those inferences were contrary to prosecution material, beyond statements made by Mr Cryan himself in his interviews (which were not before the jury), which suggested the converse was true.

iii) The presence or absence of a dishonest agreement with Mr Cryan was material to the jury's conclusion on Count 4, but also more generally in relation to the issue of 'false inferences', as set out in the Defence Statement and articulated in the course of the trial. In particular, it was the appellant's case that, although it frequently appeared from his communications with interdealer brokers that he agreed with a broker that they would engage in LIBOR manipulation, in fact, the broker had taken no positive steps after the conversation, or had simply lied to the appellant about what he had done or would do. The evidence regarding Mr Cryan, if admitted, would have significantly undermined the inferences that the prosecution contended for and illustrated, by way of independent example, that the defence case on false inferences was well founded.

44. In those circumstances it was contended that the judge was wrong in not admitting the evidence of the findings of the Tullett internal investigation, as taken from Mr Dunkley's letter under s. 117 or, in the alternative, s. 114 of the CJA 2003. In support of this contention the appellant submitted that the judge was wrong to rule that the hearsay evidence was inadmissible because the witnesses could be called. In so concluding the judge thereby accepted that the evidence, if it had been given in that form, was both (i) relevant and (ii) admissible.

45. Further, the letter was a business document, which was admissible in its own right, pursuant to s. 117. The admissibility of a hearsay statement under s. 117 of the CJA 2003 did not require the putative attendance of a witness to speak to its contents. Rule 34.2(5) and the legend below it in the Criminal Procedure Rules 2015 (as at 1 April 2015) state that no notice is required in the case of s. 117 documents, and, as the prosecution contended for the purposes of their own case, business documents were

'automatically' admissible, subject to the statutory conditions being met. In this instance the statutory conditions were met. Once met, the only remaining matter was what weight would be attached to the hearsay statement. That was a matter for the jury, not for the judge.

46. In our judgment, the judge was entirely correct to exclude the conclusions of the internal Tullett disciplinary hearing as evidence under s. 117. The critical conclusions, which the appellant was concerned to adduce in evidence, were that Mr Dunkley was minded to accept Mr Cryan's evidence that throughout the relevant period Mr Cryan had only given Mr Hayes the impression in the telephone conversations and Bloomberg chats that he was speaking to the Yen cash desk and trying to get them to manipulate Yen LIBOR whereas Mr Cryan had not, in fact, contacted the relevant individuals who sat on the Yen cash desk for such purposes.

47. Although a statement of opinion by Mr Dunkley came within the definition of "statement" contained in s. 115 of the CJA 2003, the exclusion of Mr Dunkley's conclusions was correct. That was because his opinion as to whether Mr Cryan, and indeed the other individuals who sat on the Yen cash desk, were telling the truth about whether they had sought to manipulate the Yen LIBOR, consequent upon the appellant's request, was indeed irrelevant and inadmissible, albeit that it met the definition of a statement under s. 115. As the judge pointed out, his investigation impinged on the very matter that the jury had to decide, namely "whether there was any executory intention on the part of Mr Cryan, if that matter be put in issue". Accordingly Mr Dunkley's views on the matter, in a different inquiry not conducted to the criminal standard, were of no relevance to the jury and oral evidence could not have been given by him, even if he had been called at trial about the conclusions of his disciplinary inquiry. For that reason the requirements of s.117(1)(a) were not satisfied.

48. We add only that, although we consider that the judge's decision that double hearsay should be excluded was incorrect (because s. 117(2)(a)-(c) and s. 121 of the CJA 2003 clearly envisage that multiple hearsay can be the subject of a s. 117 statement), it is inevitable that, if he had addressed the matter on that basis, he would have considered that the discretion under s. 117(6) and (7) enabled him to make a direction that the statement was not admissible, notwithstanding that it was a business document, on the grounds that the statement's reliability as evidence for the purpose for which it was tendered was doubtful. In the light of his ruling in relation to the individual factors referred to in s. 114(2), he would, for similar reasons, rightly, have regarded the statements made by Mr Cryan and the other Tullett employees as wholly unreliable as evidence that no such agreement as alleged had been concluded, or that no manipulation had taken place, given the self-serving nature of the statements and the fact that they had been made in the context of an internal disciplinary inquiry where any admission by an employee that attempts had been made to manipulate Yen LIBOR, or that he knew about such matters, would have been fatal to his continued employment. Thus, on analysis, this ground has no arguable merit; leave to appeal is accordingly refused.

4. Hearsay evidence from Andrew Walsh

49. The fourth ground of appeal is that the judge wrongly refused to admit the hearsay evidence of Andrew Walsh (referred to in the rulings as Y) set out in an interview

transcript, dated 9 July 2014 recording what he said to the FCA when he was interviewed under compulsion in Australia (to which we have already referred at paragraph 18 above). The appellant relied on s. 116 of the CJA 2003 which permits such hearsay evidence where oral evidence would be admissible and the maker is outside the United Kingdom, it not being reasonably practicable to secure his attendance. To process servers, Mr Walsh had said that he would be unwilling to assist the appellant or to give evidence.

50. The appellant had also applied to admit the hearsay evidence of a Mr Koutsogiannis (referred to in the rulings and submissions as "X" as we have set out at paragraph 18 above) pursuant to the same provisions. It was submitted that the relevance of their evidence was that each man:

i) would be able to give oral evidence of his understanding of the range, and the setting of a LIBOR submission within that range, taking into account the commercial position of the bank;

ii) would be able to give evidence of management encouragement of commercially driven submissions, and the perception of this amongst bank employees and other market participants at the time.

51. Both men were outside the country at the time of trial and both had given evidence in interview. The judge admitted Mr Koutsogiannis' hearsay statement into evidence under s. 116 of the CJA 2003 but refused to admit that of Mr Walsh.

52. Mr Walsh was a trader at UBS. He was required to appear pursuant to s. 10(2)(c) of the Australian Mutual Assistance in Business Regulation Act 1992 ("the 1992 Act") before a representative acting on behalf of the Australian Securities and Investments Commission ("ASIC") pursuant to regulation 4(c) of the 1992 Act at an interview which took place on 9 July 2014 in Sydney. Two representatives of the FCA were also present at the interview and were themselves permitted to ask questions of Mr Walsh under s. 11 (2)(e) of the 1992 Act.

53. At the start of his interview, Mr Walsh was told that he was required to answer all questions which the FCA representatives put to him but that he could claim the benefit of s. 14 of the 1992 Act and claim privilege in relation to any answer which tended to incriminate him. In the event, Mr Walsh prefaced every answer to the questions which he was asked with the claim to privilege so that all the information that he provided was covered by the claim to privilege against self-incrimination.

54. In relation to these applications, on 6 July 2015, the judge ruled that the material contained in the interview evidence of both Mr Koutsogiannis and Mr Walsh was relevant to the second (subjective) limb of *Ghosh.* He said at paragraph 24 of his ruling:

> "As I say, I do not consider the subjective beliefs as to the acceptability of those practices on the part of X or Y [Mr Walsh] to be relevant in any event in the absence of communication to Mr Hayes, but the evidence of their market understanding and bank ethos are matters upon which Mr Hawes is entitled to rely on Mr Hayes's behalf and insofar as

> the evidence as set out in the extracts of the transcripts upon which Mr Hawes wishes to rely in respect of X relate to those matters, they can be adduced."

55. In relation to Mr Walsh, the judge ruled that the conditions for admissibility of his interview evidence pursuant to s. 116 of the CJA 2003 were met, save for the conditions stipulated in s. 116(1)(a). He went on to conclude that there was an insuperable problem in relation to its admissibility, observing:

> "He prefaced every answer he made with a claim to privilege. In consequence, in my judgment, every answer that he gave was indeed a privileged answer. Such answers cannot therefore be admitted in the context of these proceedings. If the question was asked in relation to privileged material as between Y and his solicitors, the answer would be self-evident. It could not be admitted. The material is privileged and is privileged against him and cannot be used in this context at all."

56. In summary, the submissions made on behalf of the appellant in relation to this ground were as follows:

i) The summary of Mr Walsh's evidence was admissible because, the s. 116 conditions having been met, the section provided for the admissibility of the content of hearsay evidence. In this instance the hearsay statement was the written document. Evidence, had it been given orally by Mr Walsh, would not have been hearsay.

ii) Mr Walsh had not been charged in any criminal proceedings. If he had been, his compelled statement would not have been admissible as against him in those proceedings. But that did not mean that it was not admissible in any proceedings against another (as would be the case in the United Kingdom: see s. 174(1) of the Financial Services and Markets Act 2002).

iii) The judge fell in to error in assuming that privilege against self-incrimination would have been claimed had Mr Walsh been called to give live evidence in the appellant's trial. This was used as a complete answer to the appellant's application at trial. That approach collided two entirely different scenarios, one where Mr Walsh was being interviewed under compulsion and he was at risk of prosecution (and hence the claim) and one where Mr Hayes was facing prosecution, and Mr Walsh was a witness not at risk.

iv) Reliance was placed on the decision of Andrew Smith J in *The Financial Services Authority v Asset L. I. Inc (trading as Asset Land Investment Inc) and others* [2013] EWHC 178 (Ch), a civil case in which the judge permitted hearsay statements of a possibly self-incriminatory character to be adduced in evidence against the defendant who was not the maker of the statement albeit that he did so on the basis "the supposed risk" of self incrimination to the witness in that case was "unreal".

57. It was submitted before us on behalf of the prosecution that support for the judge's approach could be found in the decision of the Supreme Court in *Phillips v News*

Group Newspapers Ltd [2012] AC 1, in which Lord Walker (at paragraphs 34-35) emphasised that, in forming a view as to whether any criminal proceedings were likely to be commenced, and, if so, on what charges, the civil court has to proceed on the realistic assessment of what charges are likely in practice, rather than possible in theory. However, in our judgment that authority was of little assistance since it focused specifically on the meaning and effect of s. 72 of the Senior Courts Act 1981 in the context of civil proceedings.

58. In our judgment, the judge was entitled in all the circumstances to conclude that the overwhelming probability was that, if Mr Walsh had been called to give oral evidence at the criminal trial, he would have relied upon his rights against self-incrimination and declined to have given evidence in the terms of his interview. The risk of Mr Walsh's prosecution for alleged manipulation of LIBOR if he were to come to England to give such evidence would clearly have been a live one. Even if, strictly, his evidence in such circumstances would have been "admissible", albeit not "compellable", as Andrew Smith J suggested, nonetheless there would have been no realistic possibility of such statements being actually admitted into evidence at trial and in that sense being "admissible" for the purposes of s. 116(1)(a).

59. Nor, contrary to the appellant's submissions, was there any realistic possibility of certain parts of Mr Walsh's interview statement not being subject to a claim for privilege against self-incrimination. There was no justification for cherry picking certain parts of the interview, since the privilege had been maintained in relation to all answers, which to lesser or greater extent were self-incriminatory.

60. Finally, under this head we reject the appellant's submission that the judge's ruling subverted the purpose of s. 116 of the CJA 2003. The appellant's submission that, if the judge's approach were correct "there would be no provision within the 2003 Act for the admission of hearsay evidence from those who make statements, but are reluctant to attend through fear*"* is misplaced. In such a situation there would be an admissible statement capable of being read to the court. Thus, this ground is also without any arguable merit and we refuse leave to appeal.

5. Disclosure of the appellant's daily "Profit and Loss, daily risk and "trade blotter"

61. This ground of appeal centres on the judge's refusal to order the prosecution to obtain and then disclose various records showing the appellant's daily "profit and loss" ("P & L"), his daily risk and his "trade blotter". The case for the prosecution was that the appellant was motivated by a desire to maximise his own and his bank's profits, and thereby to increase his status and remuneration; this "obsession" to do so lay behind his attempts to manipulate the LIBOR submissions. It was never part of the prosecution case, however, that the appellant, as a trader, was only successful as a result of his attempts to manipulate LIBOR, or that it was possible to identify what proportion of the profits made by him was attributable to his alleged manipulation of Yen LIBOR.

62. There was clear evidence, contained in the appellant's contemporaneous exchanges with brokers and other traders, and in his own SOCPA interviews (both of which were before the jury), of his statements as to the substantial benefits which would flow to him and/or his trading desk from the rigging of LIBOR; this included, for example,

the statement in interview that "my trading book directly benefited from that"- being an obvious reference to the movement of LIBOR on a particular day.

63. There was also clear and specific evidence given by the appellant himself in his SOCPA interviews that:

i) approximately 70% of his trades were related to Yen LIBOR;

ii) that it was impossible to quantify the amount on a daily basis what either he or his trading desk would have made as a result of moving LIBOR up or down;

iii) that he would not necessarily seek to move LIBOR by reference to his fixing risk on a particular day, because he might well need to have regard to his LIBOR exposure over a 3 or 6 month period, or indeed by reference to a bigger overall net exposure that he wanted to trade out of the following day; and

iv) that he thought that:

> "approximately - about 5% of my P & L results as this [i.e. is attributable to manipulation of rates] but realistically it is very, very hard to put a number on it, an exact number and an exact percentage".

64. Prior to the trial, there was argument in relation to disclosure of financial materials and a vast quantity was disclosed by the prosecution, including a spreadsheet which listed each and every one of the appellant's 45,000 trades (referred to as exhibit PMC0584). In August to November 2014, the SFO provided further samples of material held by the SFO in an attempt to identify the precise nature of the documents requested but reserved its position as to whether full disclosure of all such items was required by the Criminal Procedure and Investigations Act 1996 "CPIA").

65. When a Defence Statement compliant with the provisions of the CPIA was served, complaint was made there had been inadequate disclosure of the necessary financial materials which went to issues such as: the appellant's alleged greed and motivation; the extent to which the appellant's remuneration related to his LIBOR trading; the defence assertion that LIBOR trades "represented but a small fraction of his trading"; and "the degree to which his profit was generated outside of LIBOR". The last two assertions were directly contrary to what the appellant had said in his interviews.

66. On 10 April 2015, the records were sought at an interlocutory hearing. It was submitted on behalf of the appellant that:

i) the relevance of the material which the defence sought was among other things to meet the prosecution's assertion that the appellant's alleged offending was motivated by greed;

ii) that the daily profit and loss was required in order to address why the appellant did, or did not act, in a given way on the particular day in question; that would be vital as (a) the pursuit of profit was to be a central theme in the prosecution's case; (b) the desire to maximize that profit was said to be the reason for the requests made by the appellant; and (c) individual requests were

to be examined by the prosecution, i.e. specific requests on specific days, as illustrated in the jury Core Bundles;

iii) thus, the only way in which the motivations of the appellant on any given day could be analysed would be through knowing what his "profit and loss" and 'risk' were on that day; without those the appellant would be denied the tools that he relied upon at the time to inform his decision making process.

67. The prosecution, having relied upon excerpts of Mr. Hayes' SOCPA interviews as summarised above, submitted that, for reasons identified by the appellant in his SOCPA interviews, the exercise envisaged by the defence (i.e. a reconstruction of daily profit by reference to LIBOR on a particular day), would be a distraction, have no relevance to the issues and constitute an exercise that could not, in all practicality, be conducted. It was further submitted that to try to do that exercise in the presence of a jury would make a mockery of the trial and inevitably lead to obfuscation. The judge agreed observing that the appellant needed only "the overall picture".

68. The judge, in the course of argument, was supportive of the prosecution's position. He stated:

> "But in terms of what his motivation is, which for these purposes is what is my overall P&L, and therefore how are my employers going to regard me as a success or failure and am I, therefore, going to get something out of this for myself, you do not need anything on a daily basis. You just need the overall picture"

69. The judge remained of that view notwithstanding further submissions. Following further argument, however, he asked whether the percentage profit attributable to LIBOR related trading could be ascertained. As a result, information was sought from UBS who wrote:

> "UBS has not retained trading data...in such a form as to enable it to segregate the profits and losses from trades in products referenced to JPY LIBOR as opposed to other trades...UBS also confirms that the PnL data is not segregated by currency or product".

70. At the further hearing on 24 April 2015, the appellant continued to seek disclosure of this material pursuant to s. 8 CPIA. Having heard the application, the judge refused the applications in the following terms:

> "So far as profit and loss accounts are concerned, I still remain at a loss to see how this can advantage the defendant's case. The annual figures now, on the information available, are not capable of being allocated on a profit and loss basis as between products referenced to Yen LIBOR, as opposed to other trades. So that matter can go no further.
>
> So far as the daily figures agree concerned, I adhere to what I said on the previous occasion: it does not seem to me that this

> can be ultimately of any assistance. In relation to any given day and any given movement of the rate by reference to a sample transaction, the order of profit or loss can no doubt be worked out. But to think that you can work out on a daily basis in a way that is going to assist the jury, or indeed the defendant, across the board seems to me unnecessary and impossible."

71. In the submissions made to us on behalf of the appellant the argument was repeated before us. In our judgement, the judge was plainly correct to refuse to order the disclosure of the material sought. Whereas the annual breakdown of P&L as the material which might have been capable of assisting, a daily analysis of the appellant's P&L would not and nor would it have been capable of addressing the prosecution's contention that his conduct was motivated by financial profit.

72. At trial, the appellant was examined in chief and cross-examined about his profits and his motivation for making LIBOR fixing requests. Our reading of the transcripts demonstrates that it is wholly unreal to suggest (as the appellant did in cross examination) that he had been disadvantaged by the lack of disclosed materials, or that he had been deprived of an opportunity to recreate his fixing risk for any given moment, which might (or might not) have demonstrated whether, as a matter of fact, any requested movement in LIBOR would actually have advantaged his position. Such an exercise, in our judgement, would have been wholly irrelevant to the question of his motivation; and would have wrongly addressed the question of the daily outcome of his/his bank's trades rather than the intent behind his attempts to rig LIBOR. In particular, an analysis of his daily outcomes would have been irrelevant in the light of the clear evidence which he had given in his interviews that, in many cases, in seeking to set LIBOR, he was looking to the further horizon, or at least to trading out of his positions on the following day.

73. Having said that, the appellant was able to deploy evidence (of which he said he had been deprived) in his evidence. In examination in chief, by reference to the spreadsheet to which we have already referred (Exhibit PMC0584), the appellant analysed his, and the trading desk's, particular fixing risk on a particular day. Thus, dealing with a request which he had made to the UBS submitter Darin, he referred to the exhibit and said that he:

> "… was able to work out what my exact fixing risk for each different tenor was in relation to LIBOR on every single day. And I found that quite often my requests would actually be opposite to my fixing risk. I think 39 per cent of my requests were opposite to the fixing risk I had on my book. Eight per cent of my requests were on days where I had no fixing risk on my book and 53 per cent of the requests correlated to the fixing risk I had on my books. So I can have a look at that data at lunch and come back to you and tell you exactly what my fixing risk was on that day on my own book…"

74. It is important to underline that the obligation on the prosecution under the CPIA (whether as a primary obligation under s. 3 or as a consequence of a specific request under s. 8) is to disclose material which reasonably be capable of undermining the case for the prosecution or assisting the case for the defence. The legislative scheme

is not intended to require disclosure of a document simply on the basis that it may be relevant in some undefined or diffuse way other than undermining the prosecution or assisting the case for the defence. Neither is it appropriate for the judge to require the prosecution (or a third party) to perform an exercise of tangential significance.

75. In our judgement no complaint can justifiably be made of the judge's refusal to order further disclosure. He approached the matter in accordance with the correct principles and with particular care; he was entitled to decide that it would lead to obfuscation of the issues before the jury. The notion that a meticulous examination of the day-to-day profit/loss which the appellant had made on his proprietary trading book would have assisted the jury in coming to a just verdict is, in the circumstances set out above, misconceived. So is the notion that the appellant suffered any injustice as a result of further disclosure not being provided to the defence. This ground is also without any merit and leave to appeal is refused.

6. The refusal to admit medical evidence relating to the appellant's mental health

76. The appellant initially wished to argue that medical evidence was relevant and admissible in respect of the issue of dishonesty. That submission to the judge was later abandoned. In his evidence, however, the appellant was questioned about the SOCPA agreement and explained that he had been "going crazy", "going bonkers", "was not in a sane state of mind", "was near suicidal", was "basically having a breakdown", and observed that "you're assuming I was a rational state of mind that time in my life and I wasn't."

77. It was then argued on the appellant's behalf that the medical evidence was admissible as it was relevant to "an issue of importance to the jury, including Mr Hayes's truthfulness", in respect of his reasons for entering the SOCPA process. He was content to rely on a summary produced by the prosecution expert in these terms:

> "Mr Hayes has, I believe, experienced mental ill-health as a result of the criminal justice proceedings that had onset in December 2012 when he was charged by the USA authorities. Mr Hayes describes then a sudden deterioration in his mood with increased anxiety and emotional distress. Mr Hayes developed, in my opinion, an adjustment disorder at the time which are states of subjective distress and an emotional disturbance usually interfering with social functioning and performance and which arise following a significant life change or stressful life event. Mr Hayes' Adjustment Disorder led to a mixed anxiety and depressive reaction evidenced by his persistent low mood, social withdrawal, and thoughts of suicide. I am pleased to note that Mr Hayes' Adjustment Disorder has improved over subsequent months without the need for psychiatric intervention following the consistent positive support from his wife and family. Mr Hayes is not currently presenting with any signs of depressive disorder although is understandably anxious regarding the forthcoming trial."

78. After argument, the judge ruled the evidence inadmissible. He did so on the grounds that:

> "4. The prosecution has never challenged the evidence of low mood with increased anxiety and emotional distress, described as an adjustment disorder. There is however no evidence that Mr Hayes did not understand the SOCPA process into which he entered or that his depressed emotional state impacted upon his comprehension. His own evidence was that he did understand the terms of the agreement as he specifically said he did at the time, although his evidence to the jury was that he did not give a lot of thought as to what he was signing up to at the time since he was only trying to survive through the next 24 hours and his focus was upon being charged. He said he had difficulty in processing information because of the state he was in. "
>
> 5. At no prior point have the defence ever sought to say that Mr Hayes' medical condition impacted upon Mr Hayes' conclusion of the SOCPA agreement or his ability to comprehend it. There is nothing in the defence statement which raises the point and there is nothing in the medical evidence which supports any such assertion.
>
> 6. It is also fair to point out that Mr Hayes said in his evidence that he was relieved to be accepted on the SOCPA programme because the prior anxiety arose from the existence of the US proceedings and the fear of extradition and acceptance into the SOCPA programme with the likelihood of a resulting charge in the UK reduced that possibility.
>
> 7. The medical evidence set out above in any event depended upon what Mr Hayes had said in 2015 about his mental state in December 2012 and not upon any examination by a medical practitioner at the time. He never then suggested in 2015 that it impacted upon the conclusion of the SOCPA agreement or his ability to understand it or to make rational decisions about the wisdom of entering into it.
>
> 8. In all the circumstances I can see no basis upon which the expert medical evidence upon which the defendant wishes to rely is relevant or admissible. "

79. Before this court, it was argued on the appellant's behalf that the evidence was relevant and admissible to establish that the appellant's arrest, the warrant in the United States and the SOCPA process had had a deleterious effect on his mental health and was suffering from mental distress and a depressive disorder when he signed the agreement. This evidence supported that contention and was not disputed and the fact that the history came from the appellant was not a matter the experts considered undermined their opinion; the evidence was independent and authoritative and his state of mind (and understanding) at the time of entering into the SOCPA

agreement was critical. The state of the appellant's mind at that time was an important matter in issue, as demonstrated by the sustained cross-examination concerning the appellant's understanding of the SOCPA process.

80. The appellant had given evidence that he had been prepared to say anything during the SOCPA interview process in order to ensure that he was charged with criminal activity in this jurisdiction to avoid extradition and his account to the jury was that a visceral fear of extradition drove him to enter the SOCPA process and make admissions to ensure he was charged in this jurisdiction and protected from extradition. Thus, it was submitted that the credibility of his reasons for entering the SOCPA process was vital to the explanation he advanced in evidence and, in denying him the opportunity to rely on the agreed medical evidence, in circumstances where the jury were aware of some medical evidence being available to them, gave the impression that the his fears were baseless rather than credible.

81. We are unable to accept the submissions made on behalf of the appellant. Quite apart from the reasons identified by the judge, the jury did not need medical evidence to understand the pressure (and the consequent distress) that the appellant must have been under at the relevant time. Neither was it suggested that the depressive disorder (which is the only mental illness to which reference is made) affected his ability to understand what was happening.

82. The classic statement of admissibility of expert evidence in these circumstances is the observation of Lord Pearce in *R v. Toohey* [1965] AC 595 at page 608 who, using the analogy of physical disease (that it would be permissible to call a surgeon who had subsequently removed a cataract from a witness to say that the extent of his suffering loss of vision would have prevented him from seeing what he thought he saw) went on to the effect that it:

> "must be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise."

83. In *R v H* [2014] EWCA Crim 1555, this court analysed this observation and said (at paragraph 26):

> "The analogy with physical disease is not, however, either appropriate or apt although it might be that the approach to mental illness in 1965 was rather less well informed than it is today. The cataract would prevent the witness seeing that which he or she purported to see. The fact of mental ill health, however, does not mean that the witness … cannot accurately be describing what has happened to her or that it would prevent her from (or make her incapable of) being reliable in her account. These issues of fact are not for resolution by doctors but are to be determined by the jury: as Kay LJ put it in *R. v Bernard V*, ([2003] EWCA Crim 3917 at para. 29), evidence is admissible when it is necessary:
>
> > 'to inform the jury of experience of a scientific and medical kind of which they might be unaware, which they ought to

> take into account when they assess the evidence in the case in order to decide whether they can be sure about the reliability of a particular witness'."

84. Mental distress is a concept which would have been readily understood by the jury who would not have been assisted by a diagnosis of a depressive illness to assess the issue in the case which was not whether he would or would not have made admissions of the type which he made in the SOCPA interviews but, rather, whether what he said was true. That had to be assessed in the light of all the evidence and not on the basis of a medical opinion reached three years later, based on the appellant's description of his state of mind in respect of which it had never been suggested that it had impacted on his comprehension of the SOCPA process or his ability to engage in it.

85. In all the circumstances, the judge was entitled to conclude that the expert medical evidence upon which the appellant wanted to rely was irrelevant or of no, or minimal, probative value. Thus, we refuse permission to appeal in relation to Ground 6.

Conclusion on the appeal against conviction

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.

II. SENTENCE

88. When passing sentence, the judge, conscious of the vital significance of the financial markets in the UK, considered that it was hard to overstate the seriousness of the appellant's conduct and observed:

> "High standards of probity are to be expected of those who operate in the banking system, whether they are bankers in dealing with deposits and the lending of money or traders in an investment banking context. What this case has shown is the absence of that integrity that ought to characterise banking."

89. Other matters identifying high culpability were that the appellant had developed the manipulation of Yen LIBOR when he joined UBS and the practice of using other

traders to manipulate the market and doing favours for each other; he had played a leading role in the manipulation of Yen LIBOR, pressurising others more junior to engage in manipulation and made corrupt payments to brokers for their assistance. In addition, he was at the centre of the conspiracy working as a market maker whose trading according to what the appellant had said to a witness, represented 40% of the Yen derivative trading in the market; he committed offences which were carefully thought through and involved sophistication.

90. Similarly, the harm caused was at a high level. Although it was impossible to assess the scale of the loss to the counterparties, it was clear from the differences that one basis point made to his book that the amounts were very substantial as the attempts to influence LIBOR had been huge in number.

91. As regards his personal circumstances, the appellant was born on 14 October 1979 (and thus was a young man when this offending commenced). He had obtained good academic qualifications, excelling at maths. He had married in 2010 and has a young child (for whom he was the primary carer since his employment had come to an end). He had been diagnosed with Asperger's syndrome shortly before the trial which may have impacted on his personality. He was of prior good character.

92. Other features of mitigation were few. He was a trader and not a manager, whose conduct was condoned, if not encouraged, by his immediate managers even if his own conduct took the extent of the manipulation of LIBOR to new levels. The renunciation of the SOCPA process had removed the mitigation that would have resulted from that and his admissions.

93. The judge considered that maximum sentence of 10 years imprisonment for a count of conspiracy was generally considered too low, the starting point for a Category A case of high culpability based on a loss figure of £1m being 7 years. In this case, he concluded that the figures exceeded that maximum "by a distance" and that the number of counts drove the sentence up. He said that that the conduct had to be marked out as dishonest and wrong and

> "a message sent to the world of banking accordingly. The reputation of LIBOR is important to this city as a financial centre and to the banking industry in this country. Probity and honesty are essential, as is trust which is based upon it. The LIBOR activities in which played a leading part put all that in jeopardy"

94. He considered that the right approach was to look at the counts relating to the time he was at UBS and at Citibank separately and take into account totality. In that way he arrived at the sentences of nine and a half years imprisonment for each of the conspiracies in which the appellant was engaged at UBS, to run concurrently and four and a half years imprisonment for each of the conspiracies in which he was engaged while at Citibank, those sentences also to run concurrently to each other but consecutive to the UBS sentences. Thus, the sentence of 14 years' imprisonment was reached. Confiscation proceedings stand adjourned.

95. It was submitted on behalf of the appellant that as the course of conduct was continuous and there were no other factors pointing in that direction, consecutive

sentences were inappropriate. The judge was bound to have regard to the statutory maximum and from his observation that the maximum was too low, it was clear he had used the consecutive sentences to overcome that maximum.

96. In any event, it was argued that the sentence was manifestly excessive. The judge was not entitled to sentence on the basis of actual harm caused, as the loss could not be quantified; the only proper approach was to treat the case as one of risk of loss; the judge should not have sentenced on the basis of value obtained. The judge had wrongly assessed the position of the counterparties who were all market professionals many of whom were engaged in similar practices.

97. For our part, we have no doubt that the judge adopted the correct approach in determining that consecutive sentences were appropriate for the offences committed by the appellant. His criminality was grave. It continued over a very substantial period of time. It involved conspiracies with several different parties and several different types of market manipulation as exemplified in the indictment.

98. The judge, in our view, correctly set out the appellant's high level of culpability, the serious harm caused and the need for deterrence. The consideration that called for a deterrent element was not the operation of the LIBOR market, but the operation of all financial markets. Those who act dishonestly in these markets must receive severe sentences to deter others from criminality that is often hard to detect and has such a damaging effect not only on the markets, but more broadly on the general prosperity of the state.

99. The only issue in the appeal is whether, in the light of the appellant's culpability, the harm done, the need for deterrence and the mitigating factors, the judge set a starting point that was too high and which did not sufficiently take into account the mitigating factors specifically applicable to the appellant.

100. As the judge rightly observed, his decision to abandon the SOCPA process and seek to explain away his admissions of dishonesty had the consequence that he was not able to avail himself of what would have been a mitigating factor which would have resulted in a very much shorter sentence.

101. In the light of the evidence and argument, it is appropriate to consider the position of the appellant in a little more detail He was about 27 when he began to manipulate the market. Although only that age and a trader, regard must be had to his remuneration. In 2006, it was £40,726 (the bonus component being £11,983). By 2009, his remuneration was £409,821 (the bonus component being (£112, 911). He was paid £1.96m for the month of December 2009 when he joined Citibank; his remuneration in the 9 months from January to September 2010 was £1.54m (the bonus component being £943, 225).

102. His mental state was examined as it was contended on his behalf that it might be relevant to his defence and to the conduct of the trial (as we have set out at paragraphs 76-80 above). It is certainly something to which we ought to have regard at this stage and, given the prominence that it has attracted, set out the detail.

103. In April 2015, the appellant was diagnosed by Dr Alison Beck, a consultant clinical and forensic psychologist instructed by the appellant's solicitors as having

characteristics consisted with a diagnosis of mild Asperger's Syndrome and a general anxiety syndrome. He was diagnosed by Dr Dene Robertson, a consultant psychiatrist in neurodevelopmental disorders at the Bethlem Royal and Maudsley Hospitals as having an autism spectrum disorder with a mild Asperger's syndrome; a subsequent addendum to that report diagnosed him possibly as having hyperactive and impulsive symptoms of attention deficit hyperactivity disorder (ADHD).

104. Subsequently he was examined on behalf of the prosecution by Dr Tim McInerny, a consultant forensic psychiatrist at the Bethlem Royal Hospital. He agreed that there were some features that provided support for a diagnosis of Asperger's syndrome, but if he had that syndrome, it was a very mild condition.

105. In June 2015, Dr Robertson and Dr McInerny agreed in a joint statement for the court that the appellant had a diagnosis of mild Asperger's syndrome. They disagreed whether he had ADHD, but were agreed it had no relevance to the offences. Both agreed that the diagnosis of Asperger's syndrome was "unlikely to have affected his ability to determine if an action was potentially illegal or fraudulent, unless this was communicated by subtle social means". They also agreed that the diagnosis was "not relevant to or an explanation of the alleged offences." A further agreed statement dated 1 July 2015, confirmed that the Asperger's syndrome had not affected his actions in the LIBOR market.

106. We asked for a report on his present condition. We were provided with a report dated 9 December 2015 by a mental health nurse employed by the Nottingham Health Trust. The report stated that the appellant was not demonstrating any symptoms of Asperger's syndrome and had no other mental health problems.

107. The judge approached his decision on sentence with great care and correctly identified all the relevant factors. The culpability was high and the harm serious. A deterrent element was plainly required. However, we are of the view that taking into account all the circumstances (in particular his age, his non-managerial position in the two banks, and his mild Asperger's condition), that the overall sentence was longer than was necessary to punish the appellant and to deter others.

108. We therefore grant leave to appeal against sentence, quash the total sentence of 14 years and substitute in its place a total sentence of 11 years, comprising a sentence of 8 years on each of Counts 1- 4 and a consecutive sentence of 3 years on each of counts 5-10.

109. However, this court must make clear to all in the financial and other markets in the City of London that conduct of this type, involving fraudulent manipulation of the markets, will result in severe sentences of considerable length which, depending on the circumstances, may be significantly greater than the present total sentence.