[2017] UKUT 82 (TCC)
Reference number: FS/2015/0006

FINANCIAL SERVICES – third party rights-procedure-whether amendments to Authority's Statement of Case should be permitted-Rules 2, 5(3)(c) and para 4 Sch 3 Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHRISTIAN BITTAR **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 11 and 12 January 2017

Andrew Hunter QC and Andrew Scott, Counsel, instructed by K&L Gates LLP, for the Applicant

Paul Stanley QC, instructed by the Financial Conduct Authority, for the Authority

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DECISION

Introduction

1. This decision relates to an application by the Authority for a direction permitting it to amend its Statement of Case in relation to the reference made by the Applicant ("Mr Bittar") on 12 May 2015. The reference relates to a decision notice ("the Decision Notice") given by the Authority to Deutsche Bank AG ("the Bank") on 23 April 2015.

2. The Decision Notice notified the Bank that the Authority had decided to impose on it a financial penalty of £226,800,000 as a result of serious misconduct by the Bank through, amongst other things, its attempted manipulation of two benchmark interest rates, namely LIBOR and EURIBOR (referred to in this decision together as "IBOR") and by exercising improper influence over IBOR submissions. The Decision Notice was followed by a final notice ("the Final Notice") on the same day as a consequence of an agreed settlement between the Bank and the Authority in respect of the matters to which the Decision Notice related.

3. Mr Bittar is a former employee of the bank, holding the position of Manager of the Money Markets Derivatives ("MMD") desk in London during the period which is relevant for the purposes of this decision.

4. Mr Bittar complains that the Authority, in promulgating the Decision Notice and Final Notice, has included reasons which identify him and are prejudicial to him and which he has had no opportunity to contest. Accordingly, he has referred that matter to the Tribunal under s 393 (11) of the Financial Services and Markets Act 2000 ("FSMA").

5. On 10 November 2015 the Tribunal released a decision (cited as [2015] UKUT 0602 (TCC) on the preliminary issue as to whether Mr Bittar had been identified in the relevant sense and manner, as provided in s 394 FSMA (the "Preliminary Issue Decision"). The preliminary issue was decided in Mr Bittar's favour, although consideration of an application by the Authority for permission to appeal against that decision has been stayed pending the release of the judgment of the Supreme Court on the Authority's appeal against the judgment of the Court of Appeal in *Financial Conduct Authority v Macris* [2015] EWCA Civ 490. In the meantime, pursuant to directions released on 9 June 2016, the Authority has served its Statement of Case in respect of this reference, Mr Bittar has served his Reply and the Authority has served a Rejoinder.

6. On 6 January 2017, in accordance with further directions made by the Tribunal, the Authority applied to the Tribunal for permission to amend its Statement of Case in the light of the way in which Mr Bittar's case is pleaded in his Reply. Some of those amendments the Authority wishes to make have been agreed, but Mr Bittar opposes a significant number of the amendments and the question as to whether those amendments should be permitted is the subject of this decision.

Background to the reference

7. The provisions of the Final Notice which are relevant to this reference were set out at [12] to [17] of the Preliminary Issue Decision and there is no need to repeat them again in full here.

8. In summary, the Final Notice made findings that the Bank breached Principle 5 of the Authority's Principles for Businesses by attempting to manipulate and improperly influence IBOR rates. Principle 5 requires firms regulated by the Authority to observe proper standards of market conduct. In particular, paragraph 2.6 of the Final Notice records that over at least 5 years, across a range of LIBOR currencies and EURIBOR, the Bank's MMD and Pool Trading desks engaged in a course of conduct to manipulate the Bank's IBOR submissions and improperly influence other banks' IBOR submissions in order to profit. It is further stated in this paragraph:

> "This misconduct was routine and involved instances of collusion with a number of external parties and trading activity designed to maximise the potential impact of the misconduct on the IBOR rates. Managers at [the Bank] were central to this misconduct. There was a culture within GFFX to increase revenues without proper regard to the wider integrity of the market."

9. Paragraphs 4.6 to 4.8 of the Final Notice described the process for the setting and publication of IBOR rates, and in particular fact that during the relevant period they were set by reference to the assessment of the interbank market made by a number of Panel Banks, selected by the British Bankers Association (BBA) (in relation to LIBOR) and the European Banking Federation ("EBF") (in relation to EURIBOR), the process involving each Panel Bank contributing rate submissions on each business day pursuant to an obligation to exercise their subjective judgment in evaluating the rates at which money may be available in the interbank market when determining their submissions.

10. Paragraphs 4.9 to 4.13 of the Final Notice made the following additional findings as to the definitions of LIBOR and EURIBOR and their importance in relation to the financial markets:

> "4.9. Interest rate derivative contracts typically contain payment terms that refer to benchmark rates. LIBOR and EURIBOR are by far the most prevalent benchmark rates used in OTC interest rate derivatives contracts and exchange traded interest rate contracts.
>
> 4.10. Both LIBOR and EURIBOR have definitions that set out the nature of the judgment required from Panel Banks when determining their submissions:
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> • Between 1998 until February 2013 (the end of the Principle 3 Relevant Period), the LIBOR definition published by the BBA was as follows *"the rate at which an individual contributor Panel Bank could borrow funds, were it to do so by asking for then accepting interbank offers in reasonable market size just prior to 11:00am London time"*.

• Since 1998, the EURIBOR definition published by the EBF has been as follows: *"The rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the EMU zone at 11am Brussels time"*.

4.11. The definitions were therefore different. LIBOR focused on the contributor bank itself and EURIBOR made reference to a hypothetical prime bank. However each definition required submissions related to funding from the contributing banks. The definitions did not allow for consideration of factors unrelated to borrowing or lending in the interbank market.

4.12. LIBOR and EURIBOR are important to Derivatives Traders and Money Market Traders because they impact on the value of transactions within their trading books. Both benchmark rates affected Traders' payment obligations pursuant to certain contracts underlying their derivatives transactions. The Traders therefore stood to profit or reduce losses in respect of certain trades as a result of movements in LIBOR and EURIBOR. Traders monitored the exposure of their trading positions on a daily basis. Traders commonly referred to the determination of a floating rate contractual amount referenced to LIBOR or EURIBOR on a particular day as a "fixing".

4.13. During the Principle 5 Relevant Period it was commonplace that the P&L of Derivatives and Money Market Traders' books was a factor in the determination of the size of their bonuses and opportunities for advancement."

11. Paragraph 4.15 of the Final Notice referred to the fact that the responsibility for making EURIBOR submissions was delegated to submitters based in Frankfurt who were also money market traders. Paragraph 4.19 of the Final Notice referred to the fact that derivatives traders in euro denominated instruments were located in London and that money market traders and derivative traders were actively encouraged by the Bank's Managers to share information about currency and Markets, with no specific limitation on what the traders could or should discuss regarding EURIBOR.

12. Paragraphs 4.22 to 4.28 of the Final Notice gave some examples of what the Authority found to be misconduct on the part of the Bank's derivatives traders and also on the part of employees who were responsible for the Bank's LIBOR or EURIBOR submissions. In particular, the Authority found that derivatives traders routinely made requests to submitters with the goal of influencing the Bank's EURIBOR submissions in order to benefit their trading positions by attempting to influence the final benchmark rates, requests which the Authority found to be improper.

13. Paragraphs 4.35 to 4.37 of the Final Notice gave examples of what the Authority found to be collusion and trading activity in an attempt to improperly influence the IBOR submissions of other banks. In particular, the Authority found that in response to requests from derivative traders for favourable submissions on occasion the Bank's EURIBOR submitters would offer cash at lower rates than they otherwise would have done in an attempt to influence the EURIBOR submissions to be made by other Panel Banks, the motivation being to move the final EURIBOR rate to benefit the Bank's derivative positions. The Authority found that the trading consequent upon such requests was improper.

14. Paragraphs 4.38 to 4.41 of the Final Notice gave further examples of what the Authority found to be improper collusion with other Panel Banks, in particular by routinely making requests to traders at other banks for high or low EURIBOR submissions with the aim that the final published EURIBOR rate would improve the profit or reduce the loss of the trading positions of the derivatives trader making the requests.

15. As the Authority sets out in its Statement of Case, in a number of the paragraphs of the Final Notice referred to at [12] to [14] above, the Authority expressed certain opinions relating specifically to the conduct of an employee of the Bank referred to in the Final Notice as "Manager B". In particular, those opinions were the following:

> (1) Manager B routinely made improper internal requests as described at [12] above;
>
> (2) Manager B was aware of the practices described at [13] above;
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> (3) Manager B colluded with other Panel Banks by routinely making external requests as described at [14] above with the aim of improving the profit or reducing the loss of his trading positions; and
>
> (4) In making those external requests Manager B was aware that external traders were requesting submissions as a result of those requests, and that this increased the chances of EURIBOR be manipulated to benefit trading positions of the Bank for which Manager B was responsible.

16. A further opinion was expressed in relation to Manager B in the section of the Final Notice setting out what the Authority found to be breaches of Principle 5 on the part of the Bank. Paragraph 5.4 of the Final Notice so far as relevant states:

> "It is also notable that a number of Managers were central to this misconduct. In particular, Manager B was aware of improper requests across most of the currencies referred to in this Notice; in addition he routinely made requests both internally at Deutsche Bank and externally to other Panel Banks as set out above..."

17. In the Preliminary Decision, the Tribunal determined that Mr Bittar was identified in the Final Notice as Manager B. As a consequence, Mr Bittar's reference was admitted on the basis that he had third party rights pursuant to s 393 (4) FSMA. The Authority has accepted that the opinions summarised above are prejudicial to Mr Bittar. The relief sought by Mr Bittar on his reference is a determination that the opinions expressed in relation to him are not justified and for the Authority to be directed to remove all such opinions and to reissue the Decision Notice in a form which fully excises them.

Other proceedings

18. Mr Bittar is currently involved in two other sets of proceedings which relate to the subject matter of his reference.

19. Mr Bittar is a defendant to criminal proceedings brought by the Serious Fraud Office (SFO) in respect of a charge of conspiracy to defraud. In those proceedings, I understand that it will be alleged by the prosecution that, among other things, Mr Bittar conspired with others to manipulate EURIBOR. The trial has been listed to commence in September 2017. I was told that there would be an earlier hearing, on 7 or 8 February 2017, to consider how the questions of Belgian law which relate to the determination of EURIBOR (which are referred to in more detail below) are to be dealt with in the context of the criminal proceedings. The substantive hearing of this reference will not take place until after those criminal proceedings have concluded and accordingly, proceedings on this reference continue to be progressed independently of the criminal proceedings.

20. Mr Bittar is also the subject of regulatory proceedings brought against him by the Authority in respect of some of the matters which were the subject of the Final Notice. Mr Bittar was issued with a Warning Notice by the Authority on 15 May 2014 in which the Authority proposed to impose a financial penalty of £10 million on Mr Bittar on the basis that he was knowingly concerned in the Bank's contravention of Principle 5 through the making of improper requests to submitters and other banks which were high or low relative to the submissions that should have been made. The Authority also proposed to prohibit Mr Bittar from carrying on any regulated activity for any regulated firm on the grounds of his alleged dishonesty and lack of integrity.

21. Those regulatory proceedings were originally stayed by the Authority at the request of the SFO before Mr Bittar had the opportunity of making representations on the Warning Notice to the Authority's decision-maker, the Regulatory Decisions Committee (RDC). Since the Final Notice was issued in April 2015 Mr Bittar has strongly opposed the continuation of the stay on those proceedings and therefore made his third party reference in order to challenge the opinions expressed by the Authority in the Final Notice in order that those matters could be considered notwithstanding the stay on his regulatory proceedings.

22. Following observations by the Tribunal following an earlier case management hearing on this reference, the stay on the RDC proceedings has now been lifted and Mr Bittar's oral representations on the Warning Notice will be heard by the RDC at a meeting scheduled for 22 and 23 February 2017. It is expected that at that meeting, the Authority will seek to advance the arguments in support of its proposed regulatory action which are broadly the same as those which it now seeks to make in this Tribunal on the current reference through its amended Statement of Case and Rejoinder and that Mr Bittar will seek to answer them through the arguments that he now puts forward in his Reply to the Authority's Statement of Case.

23. It is therefore apparent that the RDC's decision following the oral representations meeting can be expected relatively shortly, and certainly well before the criminal proceedings commence. The timing of its decision is likely to be such that if a Decision Notice is issued and a reference made to this Tribunal that such reference would be consolidated with the existing third-party rights reference.

Current pleadings in respect of the reference

24. In his reference notice, Mr Bittar challenges the criticisms made of him in the Final Notice primarily on the basis that he was not aware that the requests which he and many others at the Bank and other banks made regarding EURIBOR submissions were improper. He contended that he only ever made requests which he honestly believed were fair and accurate, applying the EURIBOR definition, and that it reflected industry practice at the time to make requests motivated at least in part by his desire to protect the profitability of his own positions.

25. Pursuant to directions released by the Tribunal on 9 June 2016 the Authority filed its Statement of Case and list of documents in compliance with paragraph 4 of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") on 1 August 2016.

26. The Statement of Case was drafted on a different basis to that envisaged by the strict wording of the Rules, which are drafted only to cater specifically for proceedings where the Authority is seeking a sanction against the applicant in respect of a reference. In this reference, as Mr Stanley observed, the Authority is not asking the Tribunal to determine whether Mr Bittar has committed any misconduct in the statutory sense (that issue is currently being considered by the RDC), but simply whether the facts about Mr Bittar's involvement in the matters dealt with in the Final Notice are accurately set out in that notice and whether, insofar as Mr Bittar is criticised in that notice, the terms of that criticism are fair. Accordingly, the Statement of Case seeks to set out the matters on which the Authority has relied in expressing the opinions it has given about Mr Bittar's actions in the Final Notice. I did not take Mr Hunter to disagree with that approach.

27. In those circumstances, the expectation will be that the Statement of Case will, at least, set out the relevant facts and matters on which the Authority relies to support the opinions it expresses regarding Mr Bittar in the Final Notice and in particular, the primary facts on which the Authority relies. These matters must be expressed to an appropriate level of detail so that Mr Bittar understands the case that he has to answer which he is required to do in his Reply. The dispute between the parties which is the subject of this decision is whether, if the amendments sought by the Authority were approved, the Statement of Case would meet the required standard.

28. The key provisions of the original Statement of Case can be summarised as follows:

> (1) Paragraph 5 states that opinions were expressed in the Final Notice as described at [15] above in respect of Mr Bittar in relation to the following four areas:
>
> > (a) routinely making improper internal requests for EURIBOR submissions which were designed to advantage his trading position;
> >
> > (b) his knowledge of improper requests being made by others for both EURIBOR and LIBOR submissions;

(c) his knowledge of the practice of "pushing cash", that is offering cash in the market at prices which were designed to give a misleading impression to other market participants in order to influence their submissions; and

(d) collusion with traders at other Panel Banks about submissions;

(2) EURIBOR was a widely used benchmark for interest rates globally, and was widely used in over-the-counter interest rate derivatives contracts and exchange traded interest rate contracts. The EURIBOR Code of Conduct provided that Panel Banks (of which the Bank was one) were to submit rates "to the best of their knowledge" and consistently with the definition of EURIBOR, which was defined as the rate at which Euro interbank term deposits were offered by one prime bank to another prime bank within the EMU zone at the relevant time (paragraphs 8 to 11);

(3) The Bank was obliged to observe Principle 5 of the Authority's Principles for Businesses, which requires that a firm must "observe proper standards of market conduct" (paragraph 18);

(4) The proper approach to EURIBOR and LIBOR submissions required a submitting bank to submit a rate which represented its genuine assessment, to the best of its knowledge, of the rate at which (in relation to EURIBOR) Euro interbank deposits were offered by one prime bank to another prime bank within the EMU zone for the applicable maturity and at the applicable time or (in relation to LIBOR) the rate at which an individual contributor Panel Bank could borrow funds, were it to do so by asking for and accepting interbank offers in reasonable market size for the applicable maturity and that the applicable time (paragraph 19);

(5) Although a submitter might have to exercise judgment and the figure to be submitted might lie within a range of possible figures, depending on the judgment of the submitter, the submitter was required to arrive at a figure which represented the genuine assessment of the Panel Bank as to the rate in question and in making a submission, a Panel Bank was not entitled to take into account in any way at all that which would advantage its own commercial interest (paragraphs 20 and 21);

(6) Consideration of the Bank's trading advantage, or that of any other bank or person, was an illegitimate factor which could not properly be taken into account in any respect at all in making a EURIBOR or LIBOR submission and would not accord with the EURIBOR or LIBOR definitions. Any submission taking those matters into account would be improper (paragraph 23);

(7) Mr Bittar routinely made requests to the Bank's submitters in which he sought to influence their submissions of EURIBOR rates in order to benefit his trading book and in so doing Mr Bittar is asking submitters to cause the Bank to fail to observe proper standards of market conduct, in breach of Principle 5 (paragraphs 30 to 35);

(8) At all material times Mr Bittar knew or ought to have known that he was requesting the submitters to make improper submissions, and seeking thereby to cause the Bank to fail to observe proper standards of market conduct, in particular:

(a) It was self-evident from the definition of EURIBOR that the rate was intended to reflect only the submitter's genuine judgment of the rate at which interbank deposits were offered;

(b) as an experienced and successful trader of derivatives who knew that market participants relied upon EURIBOR rates to be set properly and consistently with their definition it was or ought to have been obvious to Mr Bittar that to alter a EURIBOR submission to advantage the submitting bank was inconsistent with the definition of EURIBOR, unfair to other market participants, and improperly used a Panel Bank's position to manipulate the EURIBOR rates for its advantage even if the submission fell within or outside the reasonable range of submissions (paragraphs 36 to 37);

(9) Mr Bittar was aware of widespread practice of making requests to rate setters for high or low submissions and knew or ought to have known that the practice was improper (paragraphs 38 to 41);

(10) Mr Bittar was aware of the Bank's practice of offering or bidding cash at rates in the market in order to create the impression of an increased or reduced supply of cash in order to influence other banks' EURIBOR submissions and was aware that this practice was contrary to proper standards of market conduct, alternatively he should have known that the practice was improper (paragraphs 42 to 46); and

(11) Mr Bittar and traders at other Panel Banks colluded in relation to the EURIBOR submissions that each bank would make, by sharing information about submissions or trading positions privately for the purposes of benefiting their trading positions, such practices being contrary to proper standards of market conduct, as Mr Bittar knew or ought to have known (paragraphs 47 to 56).

29. On 28 October 2016, having been granted a one month's extension of time to do so, Mr Bittar filed his Reply in compliance with paragraph 5 of Schedule 3 to the Rules.

30. The Reply is a lengthy document at 55 pages long. One of the reasons for that is that the central point on which Mr Bittar relies is that the Authority's case is based solely on its contention that the requests induced Panel Banks to breach their obligations under the EURIBOR Code of Conduct and thereby failed to comply with prevailing standards of market conduct. Mr Bittar contends that case is unsustainable because it is premised on the Authority's misunderstanding of the nature of those obligations and its failure to have regard to the applicable governing law of the

EURIBOR Code of Conduct which is Belgian law. Mr Bittar contends that properly construed in accordance with Belgian law, the EURIBOR Code of Conduct did not preclude the conduct of which the Authority complains. Detailed points are then made regarding the impact of Belgian law from which Mr Bittar concludes that two key aspects of his case provide a complete answer to the Authority's case.

31. Those two key aspects are first that the Authority's case is unsustainable having regard to the true nature of Panel Banks' obligations under applicable Belgian law and secondly that there is no sustainable case that Mr Bittar knew that it would be in breach of their obligations under the EURIBOR Code of Conduct for Panel Banks to make rate submissions taking account of their own commercial interests.

32. As far as the first aspect is concerned, Mr Bittar refers to the Authority's pleading at paragraph 23 of the Statement of Case that consideration of the Bank's trading advantage or that of any other person was an illegitimate factor which could not properly be taken into account in any respect at all in making a EURIBOR submission. However, Mr Bittar contends that the proper standards of market conduct to be observed with those set out in the EURIBOR Code of Conduct and that Code included no obligation that a Panel Bank was required to disregard its own commercial interests when determining its EURIBOR submissions.

33. Mr Bittar contends that the obligations of a Panel Bank under the EURIBOR Code of Conduct are contractual in nature and governed by Belgian law. The Authority has omitted to plead any case based on the EURIBOR Code of Conduct construed in accordance with Belgian law as its applicable law. Mr Bittar contends that is fatal to the Authority's case against him. The Authority is wrong to elide the requirements in respect of LIBOR and EURIBOR and to apply principles of English law to both.

34. Mr Bittar relies upon expert evidence in respect of his case under Belgian law.

35. Mr Bittar contends that the correct position, applying Belgian law as the true applicable law, is that the definition of EURIBOR is a hypothetical rate to be subjectively assessed by Panel Banks, based on the best of their knowledge and that provided a Panel Bank genuinely believed to the best of its knowledge that the rate to be submitted did correspond to the EURIBOR definition, submission of such a rate would be in accordance with the Panel Bank's contractual obligations under the EURIBOR Code of Conduct. Where a Panel Bank genuinely believed to the best of its knowledge that a range of rates would correspond to that definition, the EURIBOR Code of Conduct left to the discretion of that Panel Bank which particular rate to submit. There is no basis under Belgian law for contending that the EURIBOR Code of Conduct should be interpreted to preclude a Panel Bank from taking account of its commercial interests when determining within such range what rate to submit. Among other things, that would be inconsistent with the fact that there had been no guidance issued by the EURIBOR Steering Committee as regards EURIBOR submissions, leaving the matter to the discretion of Panel Banks and was inconsistent with the widespread practice among Panel Banks, of which the entities involved in the

operation of EURIBOR were aware, that EURIBOR submissions were typically made after taking account of the commercial interests of the relevant Panel Bank.

36. As far as the second aspect is concerned, Mr Bittar contends that the Authority's Statement of Case has failed to plead any case that Mr Bittar knew that the request for submissions made by Mr Bittar and others were improper. No claim of actual knowledge of impropriety has been properly pleaded, the Authority pleading only that Mr Bittar knew or ought to have known that he was requesting the submitters to make improper submissions.

37. In any event, Mr Bittar contends that he only ever made requests for EURIBOR rates which he believed were within a reasonable range and hence fair and accurate, applying the definition under the EURIBOR Code of Conduct. There is no basis for the Authority's assertion that as an experienced and successful trader of derivatives, it was or ought to have been obvious to Mr Bittar that a Panel Bank could not make a proper EURIBOR submission if it had regard to its own commercial interests. Mr Bittar's experience of the market was exactly the opposite of that, namely that this was the widespread practice known to senior management of the Bank and other Panel Banks and other traders in both the Bank and other Panel Banks.

38. Simultaneously with filing his Reply, Mr Bittar made an application for the Tribunal to determine three preliminary issues, (i) the question as to whether Belgian law governed the EURIBOR Code of Conduct, (ii) if so, what were the relevant provisions of Belgian law and (iii) whether, in the light of such provisions, a Panel Bank would comply with its obligations under the Code of Conduct by submitting a rate which fell within a range otherwise corresponding to the definition of EURIBOR under the Code of Conduct which was selected having regard to the Panel Bank's commercial interests and/or following communications with other Panel Banks about rate submissions.

39. The Authority opposed this application. It also indicated that it wished to amend its Statement of Case in the light of the Reply and also to respond on the Belgian law issues. Accordingly, following a case management hearing on 20 December 2016 the Authority was directed to serve an application for permission to amend its Statement of Case to advance the case that the proper standards of market conduct are based on what market participants generally were entitled to expect and did expect as regards EURIBOR submissions and that Mr Bittar actually knew that the making of requests for EURIBOR submissions which took into account of the Bank's commercial interests was improper. The Authority was also directed to state whether it accepted that Belgian law governs the interpretation of the EURIBOR Code of Contract as a contract between Panel Banks and other EURIBOR entities and was given permission to file a Rejoinder to Mr Bittar's Reply.

40. The Authority has now accepted that Belgian law governs the interpretation of the EURIBOR Code of Conduct as a contract between Panel Banks and other EURIBOR entities. In its Rejoinder, which was filed on 10 January 2017, the Authority takes issue with Mr Bittar's contentions as to Belgian law, as summarised at [35] above. In short, the Authority contends that the rate selected by a Panel Bank in

respect of a submission to be made was to be made to the best of the bank's knowledge of the rate which accurately reflected the definition and on no other basis and it was at all material times logically irrelevant and expressly or implicitly contrary to the EURIBOR definition and the Code of Conduct for a Panel Bank to take into account its own commercial advantage in deciding what rate to submit. The Authority contends that although the contractual relationship between Panel Banks and the entities operating EURIBOR was governed by Belgian law, the identification of proper standards of market conduct for the purposes of Principle 5 is a matter of English law and it was not inconsistent with Belgian law for contracting parties to owe duties other than under the contract to which they are party, including to third parties. The Authority contends that the EURIBOR Steering Committee was content to leave it to Panel Banks to decide how to make submissions that were consistent with the Code of Conduct and that did not demonstrate that the Steering Committee considered it acceptable for Panel Banks to take into account their commercial interests in making submissions. It is denied that the Steering Committee did anything during the relevant period to show that it assented to or approved of the practice of Panel Banks taking into account their commercial interests when making EURIBOR submissions.

41. Mr Bittar is no longer pursuing his application for the Belgian law issues to be determined as preliminary issues. The Tribunal has now directed that each party may rely on expert evidence on Belgian law in the proceedings.

Proposed amendments to the Statement of Case

42. The amendments that the Authority now wishes to make to its Statement of Case can be summarised as follows:

(1) To expand upon the description of the Code of Conduct, and particular, to refer to the requirement that Panel Banks refrain from any activity "damageable" to EURIBOR and a EURIBOR technical features document which provided that Panel Banks provide a daily quote which each Panel Bank "believes one prime bank is quoting to another prime bank for interbank term deposits within the euro zone";

(2) To amend paragraph 23 so as to provide specifically that a submission which took account of a bank's trading advantage as well as not according with the EURIBOR or LIBOR definitions would be contrary to proper standards of market conduct;

(3) To include a new paragraph 23A which sets out what the Authority contends are the proper standards of market conduct concerned. These were summarised as:

(a) obligations owed by the Panel Banks as a matter of contract which, as regards EURIBOR, were obligations owed under or pursuant to Article 6 of the Code of Conduct; and

(b) regardless of the contractual position, standards which a Panel Bank operating in the London market had to comply with

in order to adhere to proper standards of market conduct as a matter of law. In that respect the Authority contends:

(i) all market participants who used EURIBOR and LIBOR as money market reference rate in a wide variety of transactions were entitled to rely on the published definitions for those benchmarks and were entitled to expect rates to be set by Panel Banks in accordance with those definitions, and in accordance with the purpose of EURIBOR and LIBOR as a money market reference rates;

(ii) neither EURIBOR nor LIBOR could have functioned effectively as a reference rate nor had the confidence of market participants if those participants had believed that submissions were or might be influenced by the commercial advantage of a Panel Bank and not made solely on the basis of the Panel Bank's honest judgment of the relevant rate;

(iii) Panel Banks did not inform market participants generally that they took their own commercial advantage into account when making submissions, and have subsequently accepted that it was not consistent with proper standards of market conduct do so; and

(iv) it would not have been fair, reasonable, and honest conduct for panel banks who had entered into transactions with third parties indexed to EURIBOR and LIBOR to have taken into account their individual commercial interests in making submissions because to do so would have been aimed at giving them an unfair commercial advantage and would have undermined public confidence in the market;

(4) To amend the rolled-up pleading of "knew or ought to have known" so as to make alternative allegations that it was self-evident from the definition of EURIBOR and would have been obvious to any honest and experienced market participant, and therefore it is to be inferred that it would have been obvious to Mr Bittar as an experienced and successful trader of derivatives, that the rate was intended to reflect only the submitter's genuine judgment of the rate at which interbank deposits were offered and could not properly be influenced by the submitting bank's commercial advantage or, if he did not have knowledge of those matters, he ought to have known them as an experienced trader;

(5) To plead that other employees of the Bank have made statements from which it is to be inferred that they knew that it would be improper to take the Bank's commercial advantage into account in making submissions, those statements demonstrating that the impropriety of the requests was known to Mr Bittar's colleagues at the material time and it is to be inferred that it was known, or alternatively ought to have been known, to Mr Bittar also as an experienced trader;

(6) To make similar amendments in relation to the allegations regarding Mr Bittar's collusion with traders at other Panel Banks; and

(7) To make additional allegations that collusion with traders at other Panel Banks constituted conduct which was intended or likely to have an adverse effect on the competitiveness of the market

43. Mr Bittar opposes these amendments, save for those summarised at subparagraph (1) above, for the following reasons.

44. Mr Bittar contends that by paragraphs 23 and 23A of the draft amended Statement of Case, the Authority seeks to introduce a new case on market conduct, namely that in respect of EURIBOR submissions, there were, during the relevant period, applicable standards of market conduct other than and independent of those under the EURIBOR code of conduct. Mr Bittar opposes these amendments on three grounds (i) they have no real prospect of success; (ii) there is no justification for permitting the Authority to introduce them at this late stage; and (iii) there is no justification for permitting the Authority to introduce them in the vague form set out in the amended draft.

45. As far as the first of these three grounds is concerned, Mr Bittar submits that it is contrary to the rule of law and to the requirement of legal certainty for the Authority to purport to rely as a proper standard of market conduct on anything other than those standards which derive from the EURIBOR Code of Conduct. Mr Bittar submits that there is no basis for contending that a Panel Bank operating in the London market should have complied with the standard as regards EURIBOR submissions which differed from that which it had contracted to comply, and which were set out in the sole governing document, namely the EURIBOR Code of Conduct in circumstances where the Authority had taken no steps to regulate Panel Banks' conduct in making EURIBOR submissions with any positive rules of conduct.

46. As far as the second ground is concerned, Mr Bittar submits that it would be contrary to the overriding objective to permit the introduction of the new extra-contractual case at this late stage which would cause Mr Bittar to suffer prejudice through the inevitability of further delay in progressing the proceedings.

47. As far as the third ground is concerned, Mr Bittar submits that the proposed amendments suffer from a material lack of clarity, the Authority, among other things, having provided no proper particulars of the alleged "London market" and having failed to take into account the fact that the submissions were not made in London but from the Bank in Frankfurt to the EURIBOR entities in Belgium. Neither has the Authority provided any proper particulars of who were the alleged market participants

who used EURIBOR as a money market reference rate, any particulars as to why those market participants would expect EURIBOR rates to be set otherwise than in accordance with the definition of EURIBOR or explained why it would have been unfair, unreasonable, and dishonest for a Panel Bank to make EURIBOR submissions which took account of its commercial interests if that was in accordance with the EURIBOR Code of Conduct of which the parties would reasonably have been aware when transacting.

48. Mr Bittar objects to the proposed amended case on actual knowledge of impropriety on two grounds, namely (i) they have no real prospect of success; and (ii) there is no justification for permitting the Authority to advance them at this late stage.

49. As far as the first of these grounds is concerned, similar allegations have been rejected in similar circumstances to those involving Mr Bittar by the RDC and the Authority has in any event failed as a matter of law to plead a sustainable case that Mr Bittar actually knew during the relevant period that making the request concerned was improper.

50. As far as the second of these grounds is concerned, for the reasons mentioned above, it would be contrary to the overriding objective to permit the Authority to introduce the new case at this late stage.

51. Mr Bittar also objects to the attempt to introduce the case that the alleged collusion with other traders pleaded was intended or likely to have an adverse effect on the competitiveness of the market which would require investigation of complex matters such as market definition, the impact of the alleged conduct and its compliance with prevailing standards of permissible competition.

Relevant law

52. The approach to be taken by the Tribunal as to whether to permit amendments to a party's pleadings was common ground.

53. Pursuant to Rule 5 (3) (c) of the Rules, the Tribunal has power to "permit or require a party to amend a document." This provision clearly applies to the Authority's Statement of Case. The Tribunal must exercise that power in accordance with the overriding objective as set out in Rule 2 of the Rules. As Mr Hunter correctly identified, a particular factor of relevance in the present case is the need to avoid delay, so far as compatible with proper consideration of the issues, as provided for in Rule 2 (2) (e).

54. As Mr Hunter also correctly identified, in exercising its power under Rule 5 (3) (c), the tribunal should have regard to the well-established principles that apply to the exercise of the Court's equivalent powers to permit amendments to statements of case under the Civil Procedure Rules. These include that an applicant for such permission must establish that the proposed amendments have real prospects of success, the test being the same as that which would apply in an application for summary judgment. As has been established in a number of cases, the word "real" distinguishes "fanciful" prospects of success: see Lord Woolf in *Swain v Hillman* [1999] EWCA Civ 3053 at

[7]. The criterion to be applied is not one of probability; it is absence of reality: per Lord Hobhouse in *Three Rivers District Council v Bank of England* [2001] 2 AER 513 at page 568b.

55. As Mr Hunter also submitted, further relevant considerations include the timing and circumstances in which the proposed amendments are advanced; whether there is a good reason why the relevant allegations were not advanced sooner; and whether the proposed amendments have been formulated with sufficient clarity and particularity: see *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) per Coulson J at [14] to [19].

56. The Authority founds its whole case on the question as to whether the criticism of Mr Bittar's behaviour in the Final Notice was justified on the basis that he caused the Bank to fail to observe proper standards of market conduct, in breach of Principle 5 of the Authority's Principles for Businesses.

57. That part of the Authority's Handbook known as PRIN has provisions which set out the application and purpose of the Principles. PRIN 1.1.6 provides that Principle 5 applies to world-wide activities of a firm regulated by the Authority which might have a negative effect on confidence in the financial system operating in the United Kingdom but that in considering whether to take regulatory action under the Principles in relation to activities carried on outside the United Kingdom, the Authority will take into account the standards expected in the market in which the firm is operating. This provision is relevant in considering the extent to which Principle 5 can be said to be applicable in relation to the activities of the Bank in respect of its EURIBOR submissions, involving as it did conduct taking place in London, Brussels, and Frankfurt.

58. I was referred to a number of authorities in relation to Mr Hunter's submissions that the Authority's amended case lacked clarity and particularity to the extent that Mr Bittar was not able to know in advance what legal consequences flowed from his actions with the result that the Authority's revised case failed to meet requirement of there being a sufficiently foreseeable legal basis for its actions, contrary to the rule of law. I deal with those authorities when dealing later with Mr Hunter's submissions on this issue.

59. I was also referred to other authorities regarding some of Mr Hunter submissions relating to Mr Bittar's other objections to some of the proposed amendments and again I refer to those authorities when dealing with the issues in question.

Discussion

60. It is convenient to deal with Mr Bittar's objections to the amendments to the Authority's Statement of Case as follows.

61. First, I shall consider the three grounds on which Mr Bittar objects to paragraphs 23 and 23A of the draft amended Statement of Case.

62. Secondly, I shall consider the two grounds on which Mr Bittar objects to the amended case on actual knowledge of impropriety.

63. Finally, I shall consider Mr Bittar's objections to other amendments proposed by the Authority.

Amendments to paragraphs 23 and 23A

(i) whether the amendments have no real prospects of success

64. As is clear from the summary of the relevant provisions of Mr Bittar's Reply set out at [30] to [35] above, Mr Bittar's case is that the terms of the EURIBOR Code of Conduct, which creates contractual relationships between the Panel Banks and the operators of EURIBOR, properly construed in accordance with Belgian law, the governing law of the contract, provide a complete answer to the Authority's case because the Code of Conduct did not preclude the conduct of which the Authority complains.

65. The Authority contends that the amendments it seeks to make at paragraph 23 of its Statement of Case and by the introduction of the new paragraph 23A, whilst accepting that the contractual obligations arising under the Code of Conduct are one of the market standards to be complied with, in the same way as the obligations of Panel Banks to the BBA in respect of LIBOR was a relevant standard in respect of that benchmark, make it clear that those were not the only relevant standards. It seeks to plead that regardless of the contractual position a Panel Bank operating in the London market also had to comply with the additional standards outlined in paragraph 23A of the draft amended Statement of Case in order to be compliant with Principle 5.

66. The terms of Mr Bittar's Reply would suggest that he contends that for the purposes of Principle 5 there is no scope for any additional standard to apply in respect of EURIBOR in relation to conduct taking place in the London market beyond those provided for by the Code of Conduct. In his submissions Mr Hunter did not go so far as that. His objection to the relevant amendments are on the grounds that to apply any standard other than that prescribed by the Code of Conduct would breach the important constitutional principle that public authorities are bound to respect the rule of law. His basis for that submission is that it is a fundamental requisite of the rule of law that the law should be made known in advance so that individuals may have fair opportunity to determine their conduct by reference to it. He relies on *Black-Clawson International Limited v Papierwerke Waldhof -Aschaffenburg AG* [1975] AC 591, per Lord Diplock at page 638 and a number of other later cases that have repeated that proposition and I did not take Mr Stanley to dispute it.

67. Additionally, as Mr Hunter submitted, the European Court of Human Rights attaches importance to the rule of law and its corollary in terms of legal certainty, or legality, which is inherent in the European Convention on Human Rights as a whole, and which requires that domestic rules, in order to provide a potential basis for justifying interference with Convention rights, be sufficiently accessible and precise

to be compatible with the rule of law. He relies on the following passage from *Centro Europa 7 Srl v Italy* [2012] ECHR 974 at [141]:

> "One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that it is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, while certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice…"

68. The ECHR also referred at [143] of its judgment that a rule is "foreseeable" when it affords a measure of protection against arbitrary interference by the public authorities.

69. Mr Hunter submits that tested against requirements of the rule of law, the Authority's case on proper standards of market conduct is unsustainable in circumstances where the sole published standard was set out in the EURIBOR Code of Conduct, the EURIBOR body responsible for providing guidance on EURIBOR submissions had provided no guidance beyond that contained in the Code and the Authority had taken no steps to regulate Panel Banks' conduct in making EURIBOR submissions with any positive rules of conduct or any guidance.

70. With regard to the last point, Mr Hunter observes that the Authority has not as a matter of practice left the relevant standard required by Principle 5 solely to the words of the Principle itself. Its approach has been to publish detailed guidance on what is or is not permissible, for example in the Code of Market Conduct, which taken together with the wording of the Principle, satisfies the legal certainty test. He refers to the fact that the Authority has published MAR 8 as a market code for benchmarks which was promulgated after the events in question in this case. No published code had previously said anything about benchmarks and Mr Hunter submits that the Authority must be taken to have assumed that it was content for that area to be governed by the EURIBOR Code of Conduct. In those circumstances, it is impermissible for the Authority to say that there were throughout the relevant period standards of the nature that are now reflected in the published guidance. Mr Hunter also relies on the Authority's guidance in its Enforcement Guide at the relevant time which indicated that regulated firms must be able reasonably to predict, at the time of the action concerned, whether the conduct concerned would breach the Principles.

71. I am not persuaded by Mr Hunter's submissions that the Authority's contentions set out at paragraphs 23 and 23A of its amended Statement of Case have no reasonable prospects of success. In my view the arguments the Authority raises as to why proper standards of conduct in relation to EURIBOR submissions go beyond the contractual position merit full argument. Whether or not those arguments will probably succeed, it cannot be said that there is an absence of reality in the

contentions made. Bearing in mind that I should not seek to conduct a mini-trial of the issues at this stage, I will give brief reasons for this conclusion.

72. First, as is apparent from PRIN 1.1 6, Principle 5 applies to worldwide activities which might have a negative effect on confidence in the financial system operating in the United Kingdom. The behaviour of Mr Bittar which is the subject of the Authority's criticism in the Final Notice took place in the United Kingdom and may have had an effect in relation to derivatives contracts entered into by market participants in the United Kingdom. If the Authority is right in its contentions, then confidence of market participants in relation to the London market in such instruments may have been undermined. In my view that comes fairly within the scope of the terms of PRIN 1.1.6.

73. Secondly, it is not unusual for a global institution such as the Bank and its employees to be faced with complying with the regulatory provisions of multiple regulators in different jurisdictions. The fact that the activity in question may fall to be regulated by one regulator in the jurisdiction which governs the term of the instrument in question (in this case EURIBOR, being governed by a Belgian law contract) does not preclude the additional application of the regulatory standards of another jurisdiction where the activity in question has an effect in another jurisdiction. That is arguably the position in this case for the reasons described at [72] above. In those circumstances, the institution concerned has to ensure that its behaviour is compliant with the relevant standards in all the jurisdictions concerned.

74. Thirdly, neither is it unusual for a contractual relationship to be overlaid with additional regulatory obligations. For example, a firm may wish to define the extent of its duties in a contract and deal with a customer or counterparty purely on the basis of the terms of that contract. Mr Bittar contends that is the position here; his duties in relation to EURIBOR submissions being solely defined by the terms of the contract between the Panel Banks and the EURIBOR operating entities. However, that does not mean that there cannot be additional regulatory obligations applying to the activities concerned which are imposed as a matter of applicable law. For example, a duty defining clause in an investment management contract which permits the investment manager to deal for a customer notwithstanding the existence of conflicts of interest cannot prevail over the regulatory duty to take whatever steps are necessary to ensure fair treatment for customers.

75. Fourthly, in the light of the Court of Appeal's judgments in the *Hayes* cases, discussed below, it cannot be said that there is no realistic answer to Mr Bittar's contention that he could not foresee, to a degree that is reasonable in the circumstances, the consequences which may flow from his actions.

76. As Mr Stanley submitted, the essence of the Authority's case is that it was dishonest behaviour, and therefore amounted to a failure to observe proper standards of market conduct, to submit a rate which the relevant bank knew did not represent the bank's assessment, to the best of its knowledge of the rate at which Euro interbank deposits were offered by one prime bank to another prime bank for the applicable maturity at the applicable time and that Mr Bittar knew or alternatively ought to have

known, that to be the case. Therefore, in determining that question the relevant tribunal or court has to decide what amounts to "dishonesty" in the circumstances, a term which is necessarily vague but, as recognised by the ECHR in *Centro Europa,* a term whose interpretation and application are questions of practice.

77. In a judgment handed down on 21 January 2015 the Court of Appeal dealt with an interlocutory application made for permission to appeal against certain rulings made by Cooke J in various preparatory hearings relating to the trial of Tom Hayes. In particular, Cooke J had made a number of rulings in relation to submissions by the defence as to the definition and true effect of LIBOR. As summarised by the Court of Appeal at [9] of its judgment in the substantive appeal brought by Mr Hayes against his ultimate conviction for conspiracy to defraud by manipulating the LIBOR rate *(R v Hayes [2015] EWCA Crim 1944*) in refusing leave to appeal to the Court of Appeal, the Court (Davis LJ, Simon and Holgate JJ) said as follows (*R v H* [2015] EWCA Crim 46):

> (1) 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.
>
> (2) Any submission made had to be made under an obligation that the submitter genuinely and honestly represented its assessment.
>
> (3) 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.
>
> (4) 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.
>
> (5) 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.

78. Bearing in mind the similarity of the LIBOR and EURIBOR definitions, it cannot be said that there is no realistic argument that similar principles should be applied when ascertaining the proper standards of market conduct for the purposes of Principle 5 in relation to EURIBOR. The Court of Appeal clearly had no difficulty with the principle of legal certainty in interpreting the concept of dishonesty in its application to the operation of LIBOR. These principles are clearly reflected in the way the Authority presents its case in paragraphs 23 and 23A of its draft amended Statement of Case.

79. Furthermore, in the *Hayes* trial, Cooke J directed the jury on the well-known two limb approach to the issue of dishonesty established in *R v Ghosh* [1982] 1 QB 1053, that is whether according to the ordinary standards of reasonable and honest

people what was done was dishonest and, if it was dishonest by those standards, whether the defendant himself must have realised that what he was doing was by those standards dishonest on the following basis. Cooke J said in relation to the first objective limb of the test that the jury had to decide whether what Mr Hayes agreed to do with others was 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, or the standards of bankers or brokers in the market even if many, or even all, regarded it as acceptable.

80. The Court of Appeal held at [32] that there was no authority for the proposition that objective standards of honesty are to be set by a market and that such principle would gravely affect the proper conduct of business because the history of the markets has shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people. It did, however, hold at [33] that evidence as to the patterns of behaviour adopted by the market were relevant to the second subjective limb.

81. In in the light of the approach laid down by the Court of Appeal, by which of course this tribunal is bound, it cannot be said that there is no realistic prospect of the Authority establishing that these principles apply to conduct in relation to EURIBOR submissions taking place in the London market even if they do not apply by the application of Belgian law to the EURIBOR Code of Conduct. Neither in my view, can it be said that there is no realistic answer to the contention that such principles fail the test of legal certainty.

82. The fact that the Authority had not itself issued any guidance regarding the application of Principle 5 to benchmarks at the relevant time does not weaken that analysis. I do not accept that simply because the Authority had not itself issued any guidance it must have been taken to have endorsed the EURIBOR Code of Conduct as setting out exclusively the relevant standard. Nor do the terms of the Enforcement Guide assist Mr Bittar; the guidance makes it clear that the "reasonable predictability test" to be taken into account in deciding whether to take enforcement action or not was not considered to be a legal test to be met in deciding whether there has been a breach of the Authority's rules (including the Principles).

83. Therefore, in my view the amendments summarised at sub-paragraphs (2) and (3) of [42] above have a realistic prospect of success.

(ii) whether the Authority should be permitted to introduce the amendments at this stage

84. Mr Hunter submits that by its Amendment Application, the Authority seeks to make fundamental changes to its case in circumstances where it has had ample opportunity to investigate and state its case. More than 20 months have elapsed since the Final Notice was given to the Bank and it is in the interests of justice that Mr Bittar should be able to pursue his statutory rights as expeditiously as possible. None of the proposed amendments is properly to be regarded as responsive to Mr Bittar's Reply but each is instead a reformulation of the Authority's case and the Authority

has provided no explanation for its failure to seek before now to advance the case that it now wishes to.

85. In my view these criticisms of the Authority are unjustified. As the summary of the Authority's original Statement of Case set out at [28] above clearly demonstrates, the Authority's case has always been that Mr Bittar routinely made improper requests to the Bank's submitters and in so doing caused the Bank to fail to observe proper standards of market conduct, in breach of Principle 5. It is clear that that case was formulated on the basis that it could be determined purely by reference to the English law interpretation of Principle 5 by establishing what the proper standards of conduct were in relation to activities carried on in the London market. The amendment proposed to be made to paragraph 23 merely clarifies that the standards expected in the London market are relevant to the issue, notwithstanding the issues raised by Mr Bittar in his Reply as to the applicability of Belgian law. New paragraph 23A must be regarded as responsive to the case pleaded by Mr Bittar in his Reply as to the applicability of Belgian law to the Code of Conduct and to Mr Bittar's contention that the case originally pleaded was based solely on the contention that the requests induced Panel Banks to breach their obligations under the EURIBOR Code of Conduct and for that reason alone thereby failed to comply with prevailing standards of market conduct. In the light of the Reply, it was perfectly proper for the Authority to seek to amend its Statement of Case to explain the extent to which it considered Belgian law relevant to the issue and its interaction with the UK regulatory regime.

86. It is clear to me that the Authority did not prepare its original Statement of Case having in mind the fact that the relevant standards were to be found in the Code of Conduct. That only became an issue in the proceedings when Mr Bittar raised it in his Reply. It is clear that Mr Bittar himself decided to raise the argument only at the stage in which he was preparing his Reply, as evidenced by the fact that he sought an extension of time so as to deal with it. He did not in his reference notice make any reference to Belgian law and in my view the Authority cannot be criticised for not dealing with the issue in its original Statement of Case. It was a matter that could have been raised at or at any time after the case management hearing that was held in May 2016, following which directions were made for the future conduct of the reference, including the filing of the Statement of Case and the Reply.

87. Nor in the circumstances, will allowing the amendments cause any further delay in the proceedings. The trial date has now been provisionally fixed for the first quarter of next year and permitting the amendments will not prejudice that timetable. There will be no interference with the timetable for completing disclosure and preparing the necessary evidence, including expert evidence. The RDC proceedings are still ongoing and, if a Decision Notice is issued, will be consolidated with this reference.

88. For these reasons, I should not refuse the Authority to make the amendments on the ground that to do so would not be consistent with the overriding objective to avoid delay. In my view permitting the amendments is compatible with the proper consideration of the issues arising on the reference.

(iii) whether the proposed amendments materially lack clarity

89. In my view none of the criticisms Mr Bittar makes as to the particularity of paragraph 23A, as summarised at [47] above, are justified.

90. As far as the references to the "London market" are concerned, no further clarification is necessary. It is self-evident that the term is being used as shorthand for regulated activities taking place within the United Kingdom and subject to the Authority's jurisdiction, as provided in PRIN 1.1.6. The fact that the submissions themselves were not made in London and the fact that some of the Panel Banks did not operate in the London market at all is of no consequence. The Authority is entitled to regulate behaviour insofar as it might have a negative effect on confidence in the financial system operating in the United Kingdom, notwithstanding that the activity concerned is only part of the process leading to the making of submissions in another jurisdiction, and particularly in a case where the behaviour complained of (namely the allegations that the submissions process was manipulated) took place in the United Kingdom.

91. Neither can there be any doubt about what is meant by "market participants". As would be readily apparent to a market participant of Mr Bittar's experience it would include at least those who deal in the London market in financial instruments which are affected by the setting of the EURIBOR rate. The pleading is sufficiently clear for Mr Bittar to understand the case that is being made.

92. Nor do I accept that it is incumbent upon the Authority to plead particulars as to why market participants would expect EURIBOR rates to be set otherwise than in accordance with the definition of EURIBOR. It is clear that that statement is made as a consequence of the Authority's contention that there are other standards of market conduct expected beyond those prescribed by the Code of Conduct. As Mr Stanley observed, it is open to Mr Bittar to argue that market participants were not entitled to expect that a Panel Bank would not take its own commercial interests into account when making submissions.

93. As far as Mr Bittar's criticisms of the Authority's contentions that EURIBOR could not have functioned effectively if market participants believed that submissions were or might be influenced by the commercial advantage of a Panel Bank and not made solely on the basis of the Panel Bank's honest judgment of the relevant rate, in my view it is self-evident without further particularisation that this pleading reflects the principles set out in the *Hayes* case, as summarised above and therefore Mr Bittar is capable from the pleading as it stands to understand the nature of the case against him.

94. I also reject Mr Bittar's criticism that the Authority should particularise its pleading that Panel Banks did not inform market participants generally of their approach to EURIBOR submissions in terms of taking account of commercial advantage. Mr Hunter submits that pleading requires clarification in circumstances where the approach should be taken by Panel Banks to EURIBOR submissions was set out in the Code of Conduct which did not preclude the taking account of commercial advantage. In circumstances where the Authority is pleading that there

are other relevant market standards, in my view the pleading is sufficiently clear as it stands.

95. Finally, Mr Bittar criticises the Authority's contention that it would not have been fair, reasonable and honest conduct for Panel Banks to take into account their individual commercial interests in making submissions because to do so would have aimed at giving them an unfair commercial advantage and would have undermined public confidence in the market. Mr Hunter submits that the pleading fails to explain why that would be the case in circumstances where the Code of Conduct, of which third parties would reasonably have been aware when transacting, did not preclude those matters being taken into account. Again, in circumstances where the Authority is pleading that there are other relevant market standards, in my view the pleading is sufficiently clear as it stands. It is readily apparent from the pleadings as a whole as to why the Authority believes that such conduct was not fair, reasonable and honest.

96. I therefore reject all the criticisms that Mr Bittar makes of the particularity of the pleadings in paragraph 23A of the amended draft Statement of Case. In my view, as the pleading stand Mr Bittar will be capable of fully understanding the case that is being made and can respond accordingly.

97. Therefore, the Authority should be permitted to amend its Statement of Case so as to make the amendments summarised at sub-paragraphs (2) and (3) of [42] above.

Amendments to the case on actual knowledge of impropriety

(i) whether the amendments have no real prospects of success

98. First, Mr Bittar contends that similar allegations to those made against Mr Bittar have been rejected in similar circumstances to those involving Mr Bittar by the RDC. In particular, Mr Bittar refers to the regulatory proceedings brought against an employee of another Panel Bank, Mr Koutsogiannis, where the RDC declined to issue a Decision Notice and the proceedings were discontinued. Those proceedings were considered in some detail in this Tribunal's recent decision in *Hussein v FCA* [2016] UKUT 549 (TCC) at [115] to [135] of the decision. There is no evidence from the brief record of the RDC's decision in that case that it was rejected on the basis that the RDC did not accept that actual knowledge of impropriety is to be inferred from the EURIBOR definition itself on the basis that the alleged standards are so obvious that an experienced trader must be assumed to know them. What appears from the record of the decision is that RDC decided the case on the basis of what it considered to be the extent of Mr Koutsogiannis's awareness that the practice of making a request to submitters in an attempt to influence LIBOR and EURIBOR submissions with a view to benefiting the bank's trading positions was wrong. In other words, it was a question of fact in all the circumstances as to the extent of Mr Koutsogiannis's knowledge, which the RDC did not consider was sufficient to establish culpability on his part.

99. In those circumstances, in my view the findings of the RDC in Mr Koutsogiannis's case have no relevance to the question as to whether the Authority's

pleading in respect of Mr Bittar's knowledge or awareness has a reasonable prospect of success.

100. Secondly, Mr Bittar contends that the Authority has failed as a matter of law to plead a sustainable case that Mr Bittar actually knew during the relevant period that making requests for submissions which took account of his trading positions was improper.

101. Mr Hunter submits that the Authority's proposed particulars of actual knowledge of impropriety are those previously advanced in purported support of an allegation of constructive knowledge of impropriety, that is the particulars advanced to support the original pleading that Mr Bittar knew or ought to have known of the matters on which the Authority relied. Mr Hunter submits that as a matter of law, such matters are incapable of supporting an inference of actual knowledge of impropriety because an inference of actual knowledge is not more likely than one of innocence (Mr Bittar's case) or negligence (as is the Authority's original case).

102. Mr Stanley candidly explained that after the Statement of Case had been filed, he appreciated that the rolled up pleading of "known or ought to have known" was not sufficient to support an allegation of actual knowledge or dishonesty and it had always been the Authority's intention to plead a case of actual knowledge with an alternative case of negligence. This was not a case of the Authority seeking to rely on primary facts which were only consistent with a finding of negligence.

103. I was referred to *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 3073 (Comm) where Flaux J reviewed the relevant authorities regarding the proper pleading of allegations of fraud at [12] to [23] of his judgment. In so doing, he approved the following passage from the judgment of Nicholas Strauss QC, sitting as a Deputy High Court Judge, in *Abbar v Saudi Economic & Development Company Real Estate* [2010) EWHC 2132 (Ch) at [3]:

> "In the present case, the claimants have alleged fraud and, in the alternative, negligence. Mr Reed submitted that this, by itself, must mean that the primary facts were consistent with honesty, and that fraud therefore could not be pleaded. This, if correct, would apply to all cases, and it would never be open to a claimant to plead alternative claims of fraud and negligence. Such alternative claims are of course commonplace, and this submission is wrong. If there are facts which "tilt the balance" and justify an inference of dishonesty, then dishonesty may be alleged. Alleging negligence in the alternative involves no inconsistency: it simply recognises that the court may find that the defendant was not dishonest but merely negligent."

104. It seems to me that the amendments that the Authority wishes to make at paragraph 37 and 37A of the amended draft Statement of Case achieve precisely the result described in the above passage, namely a series of primary facts which are alleged to show actual knowledge of the matters pleaded on the part of Mr Bittar with an alternative case that if he did not know those matters he ought to have known them as an experienced trader. For these reasons, in my view if the amendments were permitted, the Authority has, subject to the points discussed below, pleaded its case in

such a manner that it is clearly open to the Tribunal to determine whether the more probable explanation as to what occurred is as a result of either dishonest or negligent behaviour on the part of Mr Bittar. I therefore reject Mr Hunter's submissions on this point.

105. Aside from that point, Mr Hunter submits that the new matters on which the Authority seeks to rely provide no basis for inferring actual knowledge of impropriety by Mr Bittar. He submits that the alleged knowledge of other employees of the Bank is irrelevant to Mr Bittar's knowledge and as a matter of law provide no basis for inferring intentional wrongdoing by him and it would be procedurally unfair to permit the Authority to rely on these new matters, which entail alleged "comments" and "admissions" made in interviews in regulatory and other proceedings in which Mr Bittar was not involved.

106. In my view whilst, as accepted by Mr Stanley, these facts on their own would not be sufficient to establish actual knowledge on the part of Mr Bittar, at paragraphs 110 to 113 of his Reply Mr Bittar pleads that senior management of the Bank had extensive knowledge of the practice of making requests of submitters which took into account the commercial interests of the Bank and the practice was never questioned. In these contentions, Mr Bittar naturally seeks to persuade the tribunal that there is no reason why he should have thought that it was wrong to make such requests. I therefore accept Mr Stanley's submission that it must follow that it is appropriate for the Authority to plead that there were other individuals at the Bank who did regard the practice as improper. The Tribunal will have the task of considering the state of knowledge across the Bank and the extent to which it has informed Mr Bittar's own knowledge. It will also have to decide what weight to put on the evidence which supports the pleading. The Authority will need to amend its list of documents to refer to the additional material on which it seeks to rely. I therefore reject Mr Hunter submissions on this point.

107. Mr Bittar also objects to the Authority seeking to rely on what Mr Bittar is alleged to have said when interviewed by lawyers instructed by the Bank as providing an inference that he knew that it was not improper to seek to influence submitters by reference to the commercial advantage of the Bank. The Authority seeks to use this as an example of Mr Bittar not being open and frank in circumstances where Mr Bittar presents a different picture in his Reply. Mr Bittar disputes the account of the interview but in my view if proved as a primary fact it is capable taken together with the other matters pleaded of giving rise to inferences as to Mr Bittar's knowledge and is therefore properly pleaded. The question as to whether the Tribunal accepts the Authority's evidence of what was said at the interview and what weight the Tribunal puts on it is of course a different matter.

108. I therefore conclude that the revised pleadings on actual knowledge are sufficiently arguable that, subject to Mr Bittar's second ground of objection, the amendments should be permitted.

(ii) whether the Authority should be permitted to introduce the amendments at this stage

109. Having accepted Mr Stanley's reasons as to why it was felt necessary to amend the pleadings so as to plead the case of actual knowledge appropriately, bearing in mind that a number of the amendments are responsive to the points raised by Mr Bittar in his Reply, and for the reasons set out at [87] and [88] above I permit the Authority to make the amendments summarised at sub-paragraphs (4) to (6) of [42] above.

Objections to other amendments

110. Mr Bittar objects to the proposed amendment to paragraph 43 of the draft Amended Statement of Case to add five alleged new instances of the practice of pushing cash. It seems to me that these allegations are closely related to the existing pleading. There will be no delay to the proceedings in including them and Mr Bittar will have sufficient time to address them. I am therefore satisfied that making the amendments will not prejudice Mr Bittar and I therefore permit them.

111. Finally, Mr Bittar objects to the proposed amendment to make additional allegations that collusion with traders at other Panel Banks constituted conduct which is intended or likely to have an adverse effect on the competitiveness of the market. Mr Hunter submits that there is no justification for permitting the Authority to advance a new case based on alleged anti-competitive conduct. Such a case would require investigation of complex matters such as market definition, the impact of the alleged conduct, and its compliance with prevailing standards of permissible competition. It would be inappropriate to permit the Authority to introduce such a complex investigation into the present proceedings.

112. Mr Stanley submits that it is not intended that the pleading should open a whole new substantive case of anti-competitive behaviour necessitating a full-blown competition investigation similar to the one previously carried out by the relevant competition authorities. He submits that the Tribunal is simply having to decide whether it was consistent with market practice to have discussions of the nature complained of, not whether there was actually any effect on competition.

113. That may be so, but as currently drafted the pleading is unclear as to how extensive the evidence will be to support the allegations and what in particular Mr Bittar will have to contest. The amendment goes beyond the scope of what was envisaged when directions were made last December as to the basis on which the Authority may seek to amend its Statement of Case. If the new case is as limited as the Authority says it is, then it seems to me that it does not add significantly to what is already pleaded but if it is not, in my view permitting the amendment at this stage is potentially prejudicial to Mr Bittar. On that basis, I conclude that it is not in the interests of justice to permit the amendment.

Conclusion

114. The Authority has permission to amend its Statement of Case as requested, save in respect of the amendment proposed to paragraph 54 (b) of that document.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 20 FEBRUARY 2017