



**“Criminalising anti-competitive behaviour:
cartel offence or conspiracy?”**

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GILLIAN JONES

LIBOR MANIPULATION

02/09/2009 07:00:11 TOM HAYES: do you know your cash desk?

02/09/2009 07:00:25 TOM HAYES: ie the guy who covers yen on your cash desk

02/09/2009 07:00:37 BROKER X: yes mate i do

02/09/2009 07:00:55 TOM HAYES: right from now on i need you to ask him a favour on the fixes

02/09/2009 07:01:04 TOM HAYES: i will make sure it comes back to you

02/09/2009 07:01:11 TOM HAYES: i alrteady do it with icap

02/09/2009 07:01:28 TOM HAYES: basically can you ask him to broke 3m cash ie libor lower for me today

02/09/2009 07:01:53 TOM HAYES: i will look after you off the back of it

02/09/2009 07:01:58 TOM HAYES: i do that for rpms too

02/09/2009 07:02:10 TOM HAYES: so emphasise the importance to you

02/09/2009 07:02:36 TOM HAYES: just suggest it looks a little softer to his accounts

02/09/2009 07:02:38 BROKER X: ok mate i understand i will go and speak to Him

02/09/2009 07:02:42 TOM HAYES: stuff like that

02/09/2009 07:02:46 TOM HAYES: thanks mate

02/09/2009 07:02:53 TOM HAYES: is very important to me today

02/09/2009 07:07:05 BROKER X: just spoke to them and they are on the case

02/09/2009 07:09:16 TOM HAYES: ok mate much appreciated

02/09/2009 07:09:34 TOM HAYES: if we do this going forwards it will come back to you in spades

02/09/2009 07:09:44 TOM HAYES: did you emphasise the importance?

02/09/2009 07:09:54 BROKER X: i did

02/09/2009 07:10:04 TOM HAYES: ta

CRIMINAL PROSECUTIONS

- The Prosecution Case, in essence, was that between 2006 and 2010 Tom Hayes together with others, agreed to manipulate Yen LIBOR in order to advance his trading interests (through his derivative trading), 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.
- The trader Tom Hayes was convicted but the brokers were acquitted.
- How does that come about?

CONSPIRACY TO DEFRAUD

R v Hayes [2015] EWCA Crim 46, Interlocutory Application - per Davis L.J:

“The common law offence of conspiracy to defraud is controversial... It undoubtedly potentially has a very broad reach indeed, something **which some would advance as a merit and others would advance as a vice**. But Parliament has expressly preserved it by the provisions of section 5(2) of the Criminal Law Act 1977 and it continues to play a significant part in the criminal justice system in England and Wales.

Nevertheless, and no doubt because of its potential width, the common law has imposed certain limitations. Thus conduct which may be commercially or morally reprehensible cannot necessarily be criminalised solely by invocation of the common law offence of conspiracy to defraud. By way of one example, participation in a secret price-fixing cartel is not necessarily to be taken as an offence under the common law: see **Norris v Government of the USA** [2008] AC 920. There needs in such circumstances to be what has been called an "aggravating factor". A further reflection of this approach is the general principle that an agreement to achieve a lawful object by lawful means is, at all events in the ordinary way, not capable of constituting a common law conspiracy to defraud: see, for example, **R v Evans** [2014] 1 WLR 2817.”

THE OFFENCE: Conspiracy to Defraud

- An agreement:
- With an intention to defraud;
- Involving two or more people;
- It is not necessary for the agreement to be put into effect or to achieve its desired result, as long as there is an agreement with the intention to commit the criminal offence in question;
- To act fraudulently or to defraud, is **dishonestly** to prejudice or injure someone else's rights or, dishonestly to take the risk of prejudicing or injuring someone else's rights, knowing that you are not entitled to do so;
- If Mr Hayes' trades made money or lost less money because the rates were manipulated for his trading advantage, the counterparty to that trading contract stood to lose its own money or, to gain less money and its rights were thereby prejudiced or injured.

DISHONESTY

“Dishonesty” is a key element in the commission of fraud

R v Ghosh [1982] Q.B. 1053 continues to provide the definition:

Question 1:

Was what the Defendant 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 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”

per Hamblen LJ

DISHONESTY

Question 2:

Did the defendant realise that what he agreed to do would be regarded as dishonest by those standards?

“It is dishonest for a person to act in a way which he knows ordinary reasonable and honest people consider to be dishonest even if he thinks he is justified in acting in the way he does, whether because he thinks that others in the market do it, or thinks that everyone tries to do it, or because his employers or others encourage him to do it or appear not to object to him doing it.”

per Hamblen LJ

LIBOR AND CARTEL ACTIVITY

“What is shocking about the LIBOR and EURIBOR scandals is not only the manipulation of benchmarks, which is being tackled by financial regulators worldwide, but also the collusion between banks who are supposed to be competing with each other. Today's decision sends a clear message that the Commission is determined to fight and sanction these cartels in the financial sector. Healthy competition and transparency are crucial for financial markets to work properly, at the service of the real economy rather than the interests of a few.”

Joaquín Almunia, Commission Vice-President in charge of competition policy.

- The European Commission fined 8 international financial institutions a total of € 1,712,468,000 for participating in illegal cartels in markets for financial derivatives covering the European Economic Area (EEA);
- Four institutions participated in a cartel relating to interest rate derivatives denominated in the Euro currency;
- Six participated in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese Yen;
- Collusion between competitors is prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement;
- Both decisions were adopted under the Commission's cartel settlement procedure; the companies' fines were reduced by 10% for agreeing to settle.

(LIBOR) BENCHMARK OFFENCE

The Statutory Offence – s. 91 Financial Services Act 2012:

S. 91 Misleading statements etc in relation to benchmarks

(1) A person (“A”) who makes to another person (“B”) a false or misleading statement commits an offence if—

(a) A makes the statement in the course of arrangements for the setting of a relevant benchmark, §

(b) A intends that the statement should be used by B for the purpose of the setting of a relevant benchmark, and

(c) A knows that the statement is false or misleading or is reckless as to whether it is.

(2) A person (“C”) who does any act or engages in any course of conduct which creates a false or misleading impression as to the price or value of any investment or as to the interest rate appropriate to any transaction commits an offence if—

(a) C intends to create the impression,

(b) the impression may affect the setting of a relevant benchmark,

(c) C knows that the impression is false or misleading or is reckless as to whether it is, and

(d) C knows that the impression may affect the setting of a relevant benchmark.

(3) In proceedings for an offence under subsection (1), it is a defence for the person charged (“D”) to show that the statement was made in conformity with—

(a) price stabilising rules,

(b) control of information rules, or

(c) the relevant provisions of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

(4) In proceedings brought against any person (“D”) for an offence under subsection (2) it is a defence for D to show—

(a) that D acted or engaged in the conduct—

(i) for the purpose of stabilising the price of investments, and

(ii) in conformity with price stabilising rules,

(b) that D acted or engaged in the conduct in conformity with control of information rules, or

(c) that D acted or engaged in the conduct in conformity with the relevant provisions of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

(5) Subsection (1) does not apply unless the statement is made in or from the United Kingdom or to a person in the United Kingdom.

(6) Subsection (2) does not apply unless—

(a) the act is done, or the course of conduct is engaged in, in the United Kingdom, or (b) the false or misleading impression is created there.

- In force 1 April 2013.

SENTENCING CONSPIRACY TO DEFRAUD IN MARKET MANIPULATION

R v Hayes

At first instance:

"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." per Cooke J in R v Hayes.

On Appeal:

"...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." per Lord Chief Justice in R v Hayes.

BACK TO LIBOR MANIPULATION

29 MAY 2009

TOM HAYES: Make some efforts for me on the LIBOR particularly when it goes over the turn, right.

BROKER X: Yeah.

TOM HAYES: If you get that up, when it crosses the turn, if you get that up, I will fucking reward you.

BROKER X: Right, no worries, I'll go and speak to him again.

TOM HAYES: Between you and me I've got two and half million bucks pointing at it, so if it goes up, I'm marking it at one a half points then, if it goes up three points then obviously I make an extra \$4 million or something so.

BROKER X: You're going to hear nothing about the six-month LIBOR going up over the turn then for the next-

TOM HAYES: Yeah, yeah.

BROKER X: weeks.

TOM HAYES: Yeah, it's not really so much from now, but the next month it has to be one of those things.

BROKER X: Yeah.

TOM HAYES: Any favours they can call in whatever, you know, take, basically you take the guys out for like a strip club or whatever the night before.

BROKER X: Yeah, done. I'll go and make sure we're sorted.

TOM HAYES: You know, I'm always good to my word when I say I'll make sure I share the love. Okay.

BROKER X: No worries, mate.