



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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CLA EVENING MEETING: MONDAY 22 FEBRUARY 2016

Venue: Addleshaw Goddard (AG), Milton Gate

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

Speakers

Mukul Chawla QC, 9-12 Bell Yard

Gillian Jones, Red Lion Chambers

Iain Morley QC, 23 Essex Street

Chair

James Flynn QC, Brick Court

Introduction

- 1 James Flynn, chairing the discussion, introduced the speakers and their recent work. Mukul Chawla QC and Gillian Jones led the LIBOR criminal prosecutions against Tom Hayes and a number of former brokers, based on conspiracy to defraud. Iain Morley defended Clive Dean in the cartel offence prosecution that came out of the OFT's Galvanised Steel Tanks case. The focus of the event was to compare and contrast the common law conspiracy to defraud and the statutory cartel offence and to consider implications for future prosecutions.

Mukul Chawla QC and Gillian Jones: The Libor trials

- 2 Mukul and Gillian gave some background to the LIBOR trials, which started at the time of the Barclays settlement with the then FSA. The SFO considered whether to take the case on for investigation and its new Director David Green CB QC came to Mukul with the key question: "is there a criminal offence to prosecute here, and if so, what is it?" Having discussed the likely options (conspiracy to defraud, cartel offence) with Gillian, the recommendation (and SFO decision) was to consider the offence of conspiracy to defraud.
- 3 Tom Hayes was a trader, first at UBS and then at Citigroup. He is the first person to be prosecuted for rigging LIBOR, which he did using a variety of methods, many of which were quite blatant. He left a trail of evidence, including reams of messages to brokers and other banks using 'Bloomberg chat', examples of which Mukul showed us. Some of these messages were brought into evidence at trial, as well as recorded phone calls and other

communications, all of which assisted in securing the conviction. He was found guilty on eight counts of conspiracy to defraud, covering his work at both UBS and Citigroup.

- 4 Hayes initially co-operated in order to avoid extradition to the US, but later changed his plea to not guilty. His defence was based on arguments that: he had not been trained on LIBOR; those submitting a LIBOR figure had chosen the rate submitted and may have done so without his suggestion; he had not had any compliance training; his superiors were aware of the practice and condoned it; and, equally, the market as a whole was aware of the practice and others were involved in similar conduct.
- 5 The offence of conspiracy to defraud has been criticised for being broad, ill-defined and difficult for the layman to grasp. However the broadness of the offence is also its strength: it is a useful offence where no more specific offence applies and can be used where the case is built by painting a whole picture of behaviour.
- 6 The key issue at trial was whether the jury could be persuaded that Tom Hayes had acted dishonestly. The defence relied on *R v Norris* and *R v GG PLC and others* in which the lack of an "aggravating factor", or an instance of ascertainable dishonesty, had been fatal for the prosecution case. Mukul clarified two important aspects of the legal test of dishonesty which were helpful in the prosecution of Tom Hayes:
 - (a) The common law offence of conspiracy to defraud only requires an intention to agree "dishonestly to prejudice or injure someone else's rights"; it is not necessary to prove loss.
 - (b) The definition of dishonesty in *R v Ghosh* has an objective and a subjective limb. At first instance Hamblen LJ noted that the first limb is judged "not by the standards of the market in which he operated...but by the standards of reasonable, honest members of society." Hayes' attempt to run a "market ethos" defence failed at first instance and on appeal.
- 7 The brokers' trial was on largely the same facts and similar evidence. The prosecution argued the brokers conspired with Hayes to make a profit, but the jury acquitted them on all counts. The juries in the Tom Hayes' trial and in the brokers' trials reached different conclusions on dishonesty; it may be that the brokers were seen to be "doing their job" and trying to keep a difficult client (Hayes) happy.
- 8 The sentencing of Hayes took into account the importance of maintaining the international reputation of the financial sector in the City of London. Although his original sentence of 14 years was reduced to 11 years on appeal, the Court of Appeal noted that future convictions may lead to longer sentences.

Iain Morley QC: Galvanised Steel Tanks cartel offence

- 9 Galvanised Steel Tanks was the first cartel offence prosecution to be fully argued before a jury. Iain found himself thrust into it by chance, being asked to defend Clive Dean under legal aid, and was pleasantly surprised to discover just how interesting cartel cases can be.
- 10 The case involved price fixing and customer allocation agreements that lasted a number of years. Clive Dean was originally a salesman employed by Vulcan, one of the key players, but later became a consultant operating from his own home. The cartel came to light when the MD of Vulcan was replaced and his successor, having uncovered the arrangements, notified Vulcan's US owner, CST Industries.

- 11 An immunity deal was reached with the CMA for Vulcan and its employees, but as Clive Dean was no longer an employee of Vulcan he could not benefit from it. When interviewed, Clive Dean agreed that the activity sounded dishonest, but denied involvement, unaware that the CMA had plenty of evidence of his participation.
- 12 Clive Dean pleaded not guilty and despite the large amount of evidence against him, including interview transcripts, he (and his co-defendants) were acquitted. Key to this, Iain believes, was that he approached the case as a criminal barrister, in a manner that was relevant to the jury, whereas the CMA treated the trial like a regulatory matter.
- 13 Iain put the issue of dishonesty before the jury by relating it to concepts of sin and of the behaviour which "your mother told you was wrong as a child"; he invited the jury to conclude that Clive Dean's behaviour did not fall into this category. Critically, there was a lack of demonstrable greed in the case - the defendants were "just trying to make a living", they were not buying helicopters or yachts. Without the agreement there could well be job losses and possible company failures. The jury were entertained and won over.

Questions

- 14 The panel were asked what the cartel offence will be like to prosecute, now there is no dishonesty requirement. It was agreed a jury would not take well to it in its new form, as to convict they like to see the defendant has done something wrong (acted dishonestly). Mukul said that if a jury can't condemn then they tend not to convict. A jury needs to identify either victims or dishonesty; without either, an offence is unlikely to lead to a conviction. In the LIBOR trial, the prosecution focused on dishonesty, as showing there were victims/loss was going to be fraught with difficulty. Now the cartel offence contains neither.
- 15 The panel were also asked about upcoming LIBOR-related prosecutions. They mentioned an upcoming USD LIBOR-rigging trial in the UK, other related ongoing investigations, a New York trial against Rabobank traders which is going to sentencing in March, and a criminal trial related to EURIBOR-rigging which will go to trial in 2017. It's a case of watch this space.