Trinity Term
[2025] UKSC 29
On appeal from: [2024] EWCA Crim 304

JUDGMENT

R (Respondent) *v* Hayes (Appellant); R (Respondent) *v* Palombo (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
23 July 2025

Heard on 25, 26 and 27 March 2025

First Appellant (Hayes)
Adrian Darbishire KC
Tom Doble
(Instructed by Karen Todner Ltd)

Second Appellant (Palombo)
Tim Owen KC
Jonathan Crow CVO, KC
Katherine Hardcastle
Tim James-Matthews
Elizabeth Walsh
(Instructed by Hickman & Rose Solicitors)

Respondent
Sir James Eadie KC
James Hines KC
James Waddington KC
Gillian Jones KC
Max Baines
(Instructed by the Serious Fraud Office)

LORD LEGGATT (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lady Simler agree):

I. INTRODUCTION

1. The history of these two cases raises concerns about the effectiveness of the criminal appeal system in England and Wales in confronting legal error. The two appellants, Tom Hayes and Carlo Palombo, were each convicted after a trial in, respectively, August 2015 and March 2019 of conspiracy to defraud. The charges against them related to attempts to influence key benchmark rates of interest used in financial markets: in Mr Hayes' case, the London Inter-bank Offered Rate ("LIBOR"); and in Mr Palombo's case, the Euro Inter-bank Offered Rate ("EURIBOR"). Upon his conviction Mr Hayes was sentenced to 14 years' imprisonment, reduced on appeal to 11 years. Mr Palombo was sentenced to 4 years' imprisonment. Appeals against these convictions were in each case dismissed by the Criminal Division of the Court of Appeal.

2. One of the grounds of Mr Hayes' appeal against conviction was that the judge had misdirected the jury about what they had to decide. The prosecution case was that Mr Hayes had dishonestly agreed with others to submit interest rate figures used in setting LIBOR which were false or misleading, because they were not genuine assessments of the interest rate at which the bank submitting the rate could borrow funds and were intended to influence LIBOR to the benefit of Mr Hayes' trading in derivatives. Counsel for Mr Hayes argued that the judge had wrongly directed the jury that, as a matter of law, a submission could not be genuine or honest if the person making it had taken any account of his or the bank's (or anyone else's) commercial interests. They submitted that the effect of this direction was to remove from the decision of the jury a key question of fact which should have been for them, and not the judge, to decide.

3. That ground of appeal was summarily rejected by the Court of Appeal. Jury directions given in later cases, including at the trial of Mr Palombo, followed in material respects those given at the trial of Mr Hayes. A further attempt to challenge the correctness of those directions was also rejected by the Court of Appeal. Eventually, in 2023, the Criminal Cases Review Commission ("the Commission") referred the convictions of Mr Hayes and Mr Palombo back to the Court of Appeal, so that the Court of Appeal could hear fresh appeals. The occasion for these references was a decision of a United States court which, on similar facts, adopted a different legal analysis from the English courts.

4. On their second appeals to the Court of Appeal the appellants made another attempt to argue that the jury directions given at their trials had removed from the jury's consideration a key question of fact. Once again, the argument was summarily rejected. The Court of Appeal decided that this ground of appeal should not be entertained at all as

it did not relate to the reasons given by the Commission for making the reference. They also said that they saw no arguable merit in the point and that, even if they had, they would have rejected it anyway as "there have been five decisions of this court, not just one, treating the point as a bad one": see [2024] EWCA Crim 304; [2024] 2 Cr App R 6, para 124.

5. Under section 33 of the Criminal Appeal Act 1968, no appeal lies to the Supreme Court in a criminal case unless the Court of Appeal certifies that a point of law of general public importance is involved in the decision. Unless the Court of Appeal so certifies, the Supreme Court cannot grant permission for an appeal even if the Supreme Court itself considers that a point of law of general public importance is involved. Although the Court of Appeal dismissed the second appeals of Mr Hayes and Mr Palombo, it certified that the following point of law of general public importance was involved in that decision:

> "Whether as a matter of law upon the proper construction of the LIBOR and EURIBOR definitions:
>
> (a) If a LIBOR or EURIBOR submission is influenced by trading advantage, it is for that reason not a genuine or honest answer to the question posed by the definitions; and
>
> (b) the submission must be an assessment of the single cheapest rate at which the panel bank, or a prime bank, respectively, could borrow at the time of submission, rather than a selection from within a range of borrowing rates."

The Court of Appeal did not itself grant permission to appeal, saying that it "should be for the Supreme Court to decide whether the point of law is one which it ought to consider in the light of the consistent series of decisions of the Court of Appeal".

6. The Supreme Court decided that the certified point of law is one which it ought to consider and granted permission to appeal in both cases.

7. For the reasons given in this judgment, I would answer "no" to both limbs of the certified question. The one that matters more to the safety of the appellants' convictions is the first. The question posed by the LIBOR and EURIBOR definitions required a bank on the contributor panel of banks to submit the rate at which that bank (in the case of LIBOR), or a prime bank (in the case of EURIBOR), could borrow money at the time of the submission. The identification of this rate required a qualitative assessment of various data sources and was a matter of subjective opinion rather than empirical fact. Whether a

submission was genuine or honest did not turn on how a court construes the LIBOR and EURIBOR definitions. It turned on the state of mind of the submitter and whether the stated opinion of the borrowing rate was one which that person actually held. That is a question of fact which, in a criminal trial, is the province of the jury and not the judge.

8. It was wrong for the judge to direct the jury that, if the submitter took any account of the commercial interests of the bank or a trader, the rate submitted was for that reason not a genuine or honest answer to the question posed by the definitions as a matter of law. The law could not dictate whether or not the answer given represented the submitter's genuine opinion. The jury might well have regarded the fact that a submission was influenced by trading advantage as supporting an inference that the figure submitted was not in truth a rate at which, in the submitter's opinion, the bank, or a prime bank, could borrow money at the relevant time. But it was for the jury to decide whether to draw that inference, and not for the judge to tell them they must do so because the law required it.

9. In each case there was ample evidence on which a jury, properly directed, could have found the appellant guilty of conspiracy to defraud. But the jury was not properly directed. Mr Hayes admitted that, when there was a range of potential borrowing rates, he had tried to influence submitters to put forward numbers within that range which would advantage his trading; but he denied that he had attempted or conspired to induce submitters to put forward rates which did not represent their genuine opinion. The effect of the judge's directions was to remove consideration of that defence from the jury by instructing them that, if any consideration had been given to trading advantage, the rate submitted could not as a matter of law be a genuine or honest assessment of the bank's borrowing rate. That misdirection undermined the fairness of the trial. In Mr Palombo's case, the jury directions given are not open to the same degree of criticism; but they still involved the same essential error of treating this question of fact as if it were a matter of law. The errors in that case too were sufficiently material to make the conviction unsafe. Accordingly, both appeals should be allowed.

10. To explain these conclusions, it is necessary to unpick the long procedural history of these cases, to identify when and how they took a wrong course and show how attempts made to raise the errors in how the jury was directed at Mr Hayes' trial were rebuffed by the Court of Appeal. Because there is so much ground to cover, this judgment is correspondingly long. It is in three main parts:

(i) Part II outlines the commercial and procedural background to these appeals.

(ii) Part III examines Mr Hayes' case, focusing on the nature of the prosecution case, the judge's directions to the jury, the legal errors in those directions, and the reasons given by the Court of Appeal for upholding his conviction.

(iii) Part IV is a similar, briefer examination of Mr Palombo's case.

II. BACKGROUND

(1) LIBOR

11. The London Inter-bank Offered Rate (LIBOR) was in its heyday the most widely used benchmark rate of interest in the world. Some commentators called it "the world's most important number". A benchmark rate is a rate, intended to reflect the current cost of borrowing in a market, which can be used as a reference point for setting other variable rates of interest. For example, the rate at which interest is payable on a loan may be fixed by reference to a benchmark rate, such as a rate fixed at 2% above LIBOR for six-month deposits.

12. As well as being widely used in commercial and consumer lending, LIBOR was commonly used as a benchmark rate in financial derivatives, such as forward contracts and interest rate swaps. A financial derivative is an instrument which derives its value from an underlying financial risk – such as movements in an interest rate or the exchange rate for a currency or a share price or the price of a commodity. It is an instrument which can itself be traded.

13. An interest rate swap is a contract under which the parties agree to exchange interest payments on a notional principal amount on specified dates. (The principal amount is notional because it is never itself payable by one party to the other.) In the simplest type of interest rate swap, sometimes called a "plain vanilla" swap, Party A agrees to make periodic payments to Party B calculated at a fixed rate of interest and Party B agrees to make payments to Party A on the same dates calculated at a floating rate of interest. On each settlement date the payments due from each party to the other are netted off, and the difference is payable. Which party pays money to the other depends on whether, on the settlement date, the floating rate of interest is higher or lower than the fixed rate of interest. Movements in interest rates will also affect the price at which the swap can itself be traded. In broad terms the price of the swap will depend on the length of the contract and the present value of the future fixed and floating rate payments.

14. In many such interest rate swaps and other derivatives linked to interest rates which were traded in global financial markets at the relevant time (2006-2010), the floating rate of interest was defined by reference to LIBOR.

15. Interest rates in financial markets are often measured in terms of "basis points". One basis point is one hundredth of one per cent, ie 0.01%. In derivative transactions

which are highly leveraged even a small change in the underlying financial risk can result in a big profit or loss. For example, under an interest rate swap if the notional principal amount is very large, a movement in the floating rate of interest of even a single basis point could have a significant effect on the payment due on a settlement date and the price at which the swap can be traded.

16. The importance of LIBOR to global financial markets at the relevant time is hard to overestimate. According to the Wheatley Review of LIBOR, published in 2012, p 3, the overall value of contracts worldwide using LIBOR as a benchmark rate of interest at that time was well in excess of US$ 300 trillion.

(2) How LIBOR was set

17. LIBOR was administered by the British Bankers' Association ("BBA"), a trade association representing the interests of banks operating in London. LIBOR was published each day, originally for three currencies (the US dollar, sterling, and Japanese yen) and at the relevant time for ten currencies. Rates were fixed for a variety of borrowing periods, known as "tenors", ranging from overnight to 12 months. The rates were calculated from figures submitted each day by contributor banks to Thomson Reuters, which acted as the BBA's agent in calculating and publishing the daily LIBOR rates.

18. For each currency there was a panel of at least eight contributor banks. For major currencies, such as the US dollar, sterling and Japanese yen, the panel comprised 16 banks. The contributor banks were selected by the BBA on the basis of reputation, scale of activity in the London market and perceived expertise in the currency concerned, with consideration also given to credit standing.

19. The BBA published a document entitled "The BBA LIBOR Fixing Definition", which I will refer to as "the LIBOR document". According to the LIBOR document, on every business day each contributor panel bank was to contribute (for each tenor of the currency concerned) "the rate at which it could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 1100" London time. Additional criteria were that the rates submitted must be for deposits "made in the London market in reasonable market size; that are simple and unsecured; governed by the laws of England and Wales; [and] where the parties are subject to the jurisdiction of the courts of England and Wales". Contributor banks were required to input their rates between 1100 and 1110 hours, London time, without reference to rates contributed by other banks, and to specify rates to at least two decimal places but no more than five decimal places. (This was later replaced by a requirement to submit rates to five decimal places.) Each contributor bank was asked to nominate one or more individuals who were responsible for submitting rates on its behalf for the currency concerned.

20. For each tenor of each currency, the published LIBOR rate was calculated by ranking the rates submitted by the contributor banks in order, disregarding the highest and lowest quartiles and computing the arithmetical average (mean) of the figures in the middle two quartiles. So, where the panel comprised 16 banks (eg for the US dollar), the highest four and the lowest four figures submitted would be disregarded and the average (mean) of the remaining eight submitted rates would be the rate published as LIBOR for that day.

21. Deciding what rate to submit was not simply a matter of reading a number off a screen. In a highly liquid market in which trading frequency is high, prices offered and accepted may fluctuate from one moment to the next. Even within a fairly narrow window of time, different rates are likely to be available from different counterparties for loans in the same currency and tenors of different sizes. The LIBOR document referred to "offers in reasonable market size". This itself required judgment about what was a "reasonable market size" and could encompass a range of different sizes for which different rates were available. In times of illiquidity, the contributor bank might not be seeking offers, or there might be no offers available, for the currency and tenor in question. In such circumstances the submitter would still have to form an opinion of the rate at which he or she perceived the bank could borrow. Such an opinion might be based on a variety of data sources, such as the rate at which the bank had recently borrowed cash, the prices at which transactions were taking place in other, connected markets (eg for commercial paper or derivatives), or predictions made by brokers or other third parties about where LIBOR would be set for that day. This was explicitly recognised in the Terms of Reference for LIBOR Contributor Banks issued by the BBA in July 2009, which stated, at para 2:

> "The rate at which each contributor submits must be formed from that bank's perception of its cost of funds in the inter-bank market. In the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds."

22. It was thus in the nature of the exercise that there would on any given day be a range – which might be narrower or wider depending on market conditions – of different rates that could reasonably be selected: the figure submitted depended on the subjective judgment of the submitter. These features were reflected in the very process for setting LIBOR, which sought to allow for variability and uncertainty by collecting a set of different estimates and calculating the average of these rates after excluding the outliers.

(3) EURIBOR

23. EURIBOR (the Euro Inter-bank Offered Rate) was created when the euro currency was created in 1999 as a benchmark rate of interest for transactions denominated in euros. It was devised by the European Banking Federation (Fédération Bancaire de l'Union Européenne), a trade association representing national banking associations in countries of the European Union and the European Free Trade Association, in cooperation with ACI Financial Markets Association, a trade association representing the interests of participants in global financial markets. EURIBOR was administered by EURIBOR-FBE and EURIBOR-ACI, entities established under Belgian law by these two trade associations.

24. As with LIBOR, EURIBOR was calculated from submissions made each day by a panel of banks. The number of such panel banks fluctuated but reached as many as 48. The criteria for membership of the panel, the obligations of panel banks, the definition of EURIBOR and the process for setting it were set out in a document described as the EURIBOR Code of Conduct ("the Code"), issued in 1999. EURIBOR was defined in the Code as "the rate at which euro inter-bank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 am Brussels time ('the best price between the best banks')". As with LIBOR, there was a variety of tenors: in the case of EURIBOR, from one week to one year. The daily rate for each tenor was calculated by ranking the submissions made by the panel banks in order, excluding the highest 15% and lowest 15% of the submissions and computing the arithmetical average (mean) of the remaining submissions.

25. The same subjectivity was inherent in the selection of the rate submitted by a panel bank as with LIBOR. Indeed, the degree of imprecision and subjectivity was arguably greater, as there was no definition of a "prime bank" and the submitter was asked to consider not just the borrowing rates available to his or her own bank but the rates offered by any prime bank to any other prime bank – which might encompass a variety of different quotations or transactions between different parties involving deposits of different sizes. Again, the rate fixing process relied on a method of averaging different estimates to reduce the "noise" in each individual judgment.

(4) Interest rate manipulation

26. From around 2008, regulators in the United States and the United Kingdom began to investigate allegations that contributor banks or traders within such banks were attempting to influence LIBOR and other benchmark rates of interest for commercial advantage. It became apparent that during the financial crisis some banks were making LIBOR submissions which deliberately understated the rates at which they could borrow funds to give a false impression of their creditworthiness. This practice was colloquially

referred to as "lowballing". The motivation for lowballing was to avoid reporting a cost of borrowing higher than that of the bank's competitors, which would be perceived as a sign that the bank was in financial trouble. What was less easy to detect but also gradually came to light was that some contributor banks were inflating or deflating rates submitted in setting LIBOR to benefit their trading in derivatives linked to LIBOR. This would not be evident from observing the rate submitted. Whether the bank, or a trader within the bank, would profit from a lower or higher interest rate for a particular currency and tenor on a particular day would depend on the particular structure of their trading book at that particular time.

27. An example of how a bank or trader could make a financial gain from influencing LIBOR is given in the judgment of the US Second Circuit Court of Appeals in *United States v Connolly and Black*, 24 F 4th 821 (2nd Cir 2022) – the decision which prompted the Commission to refer the cases of Mr Hayes and Mr Palombo to the Court of Appeal. The judgment quotes an email exchange involving one of the defendants in that case, Matthew Connolly, who worked at the New York City office of Deutsche Bank, where he supervised several derivatives traders. In November 2005 Connolly sent an email to Curtler, an employee in the London office of the bank who worked on the US dollar cash desk and was responsible for making US dollar LIBOR submissions on behalf of Deutsche Bank. Referring to the fixing of one-month LIBOR for that day, Connolly wrote: "WE WOULD PREFER IT HIGHER ... WE HAVE ABOUT 15 BB 1MO RECEIVES" – meaning that the derivatives traders supervised by Connolly were expecting to receive payments calculated by reference to one-month LIBOR on notional amounts totalling some US$15 billion and would benefit financially if one-month US dollar LIBOR was higher. Curtler, who had estimated that Deutsche Bank's LIBOR submission for that tenor was "looking like 29" (meaning 4.29%) accommodated Connolly's request by submitting a rate of 4.295 rather than 4.29 and informed Connolly "we went in 295 for u". Deutsche Bank's submitted figure of 4.295 was one of the middle eight panel bank submissions used to calculate the published rate that day. Each of the other seven submissions in the middle eight was 4.29%. As a result, the published rate was 4.29063%, instead of 4.29% as it would have been if the bank's submission had been 4.29 rather than 4.295. The difference, small as it was, benefited Deutsche Bank's trading in derivatives, at the expense of the counterparties to the trades.

28. It might at first sight appear that the policy of excluding the figures in the top and bottom quartiles provided a substantial protection against such attempts to manipulate the rate. But traders would realise that, even if an artificially inflated or reduced rate fell in the top or bottom quartile, it could still affect the calculation by causing a figure submitted by another bank to be used in the calculation which would otherwise have been too high, or low, to be included. If employees at two or more banks colluded with each other to attempt to move a rate in one direction, the prospects of doing so were correspondingly increased. Another means of trying to influence the rates submitted by other banks was via brokers. Submitters frequently relied on brokers for market intelligence, information about rates available in the market and even sometimes for direct suggestions about the

appropriate rates to submit as representing the cost of borrowing in the inter-bank market on a given day. Brokers who received big commissions from trading conducted by a particular derivatives trader were in some cases willing to help the trader try to influence the published LIBOR rate in a way that would increase the trader's profits (or reduce his losses) from a large transaction or series of transactions.

(5) Criminal prosecutions

29. In 2012, the Serious Fraud Office ("SFO") began criminal investigations of individuals suspected of participating in such attempts to manipulate LIBOR. The scope of these investigations was later broadened to include EURIBOR. Between 2013 and 2019, prosecutions were brought against 20 individuals. Seven of them were convicted at a trial; two pleaded guilty; and 11 were acquitted.

30. The first person to be prosecuted by the SFO was Tom Hayes, whose appeal is before this court. Mr Hayes is a British citizen, born in 1979. Between August 2006 and September 2010 (aged 26 to 31) he worked in Tokyo as a trader in interest rate derivatives, employed first by UBS Securities Japan Ltd ("UBS") and then by Citigroup Global Markets Japan Inc ("Citigroup"). In December 2012 a criminal complaint was filed against him by authorities in the United States and he was separately arrested by the SFO on charges of conspiracy to defraud. The allegations concerned Mr Hayes' conduct between 2006 and 2010 in relation to setting LIBOR for the Japanese yen.

31. Faced with a potential request for his extradition to the United States, Mr Hayes entered into an agreement with the SFO under section 73 of the Serious Organised Crime and Police Act 2005 ("SOCPA"), by which he agreed to cooperate fully with the SFO's investigation and to plead guilty to any charges arising from it in return for the expectation of a reduced sentence. As a result, Mr Hayes was not extradited to the United States. Between January and June 2013, he was interviewed at length as part of the SOCPA process. In June 2013 he was charged with eight counts of conspiracy to defraud.

32. In October 2013 Mr Hayes withdrew from the SOCPA agreement and in November 2013 entered not guilty pleas to each count. He was tried (alone) at Southwark Crown Court before Cooke J and a jury in 2015. On 3 August 2015, after a trial lasting 47 days, he was convicted on all eight counts. In December 2015 his appeal against these convictions was dismissed by the Court of Appeal: *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr App R 10.

33. A total of 25 individuals were named in the charges against Mr Hayes as having allegedly conspired with him. Six of those individuals (all brokers) were prosecuted at a separate trial, which ended in January 2016. All six were acquitted.

34. The SFO brought three further prosecutions. In the first of these, six former employees of Barclays Bank plc ("Barclays") were charged with conspiracy to defraud in attempting to manipulate the US dollar LIBOR. One pleaded guilty; three were convicted at a trial ending in June 2016; and two were acquitted at a retrial. Two of those convicted, Jay Merchant and Jonathan Mathew, appealed against their convictions. In February 2017, their appeals were dismissed by the Court of Appeal: *R v Merchant and Mathew* [2017] EWCA Crim 60; [2018] 1 Cr App R 11.

35. The next prosecution was of six individuals charged on a single count of conspiracy to defraud in relation to EURIBOR. One of those accused was Carlo Palombo, the second appellant to this court. Mr Palombo is of dual Italian and British nationality, born in 1978. Throughout the period covered by the indictment, from 1 January 2005 to 31 December 2009 (aged 26 to 30), Mr Palombo was employed by Barclays in London, trading interest rate derivatives linked to EURIBOR.

36. In these proceedings one defendant pleaded guilty. At a trial before Judge Gledhill QC and a jury at Southwark Crown Court which ended in July 2018 one defendant was acquitted and another was convicted; the jury failed to reach verdicts in relation to the other three defendants, who included Mr Palombo. At a re-trial Mr Palombo was convicted (by a majority of 10 to 2). So was one of his co-defendants, Colin Bermingham; the other was acquitted. Mr Bermingham and Mr Palombo appealed against their convictions. In December 2020 their appeals were dismissed by the Court of Appeal: *R v Bermingham and Palombo* [2020] EWCA Crim 1662; [2021] 4 WLR 113.

37. The last prosecution in the United Kingdom was of a single individual accused of attempting to manipulate EURIBOR. He was acquitted at a trial in 2019.

(6) The references to the Court of Appeal

38. Several prosecutions were brought in the United States. They included the case already mentioned in which two individuals, Matthew Connolly and Gavin Black, were charged with conspiracy to commit wire fraud and bank fraud, and with wire fraud, by inducing fellow employees to submit false statements intended to influence US dollar LIBOR. They were convicted at a trial in 2018. In January 2022 their convictions were reversed on appeal. In the light of that decision, the outstanding criminal proceedings against Mr Hayes in the United States, for which his extradition had been sought, were dismissed.

39. Mr Hayes first applied to the Criminal Cases Review Commission for a review of his conviction in January 2017. Several further grounds of appeal were later added. Eventually, in December 2021, the Commission reached a provisional decision that there

were no grounds on which to refer his conviction to the Court of Appeal. In response, further submissions were made to the Commission on behalf of Mr Hayes including, at its invitation, submissions relating to the decision of the US Court of Appeals in *United States v Connolly and Black*. In July 2023 the Commission referred Mr Hayes' conviction to the Court of Appeal. The grounds for the reference were:

> "There is a real possibility that the Court of Appeal will prefer the findings of the US appeal court in *Connolly and Black* regarding the definition and proper operation of LIBOR to those which were reached in Mr Hayes' own case, and will conclude that this renders his conviction unsafe."

In October 2023 the Commission referred Mr Palombo's conviction to the Court of Appeal on essentially the same grounds.

40. The appeals of Mr Hayes and Mr Palombo were heard together by the Court of Appeal (Bean LJ, Popplewell LJ and Bryan J) in March 2024. The appeals were dismissed for reasons given in a judgment of the court: [2024] EWCA Crim 304; [2024] 2 Cr App R 6. The Supreme Court granted permission to appeal after the Court of Appeal certified the question of law set out at para 5 above.

(7) The scope of these appeals

41. When granting permission to appeal, the Supreme Court observed that the court would need to be addressed on the scope of the appeals in the light of the certified question. Two points about the scope of the appeals were raised at the hearing. The first concerns the general extent of the Supreme Court's jurisdiction in dealing with appeals from the Court of Appeal Criminal Division. The second arises from the particular feature of these cases that the appellants' convictions were referred to the Court of Appeal by the Commission.

42. Section 33(2) of the Criminal Appeal Act 1968 makes it a condition of granting permission to appeal to the Supreme Court that the Court of Appeal has certified that a point of law of general public importance is involved in the decision and that it appears to the Court of Appeal or the Supreme Court that the point is one which the Supreme Court ought to consider. But neither section 33 nor any other statutory provision confines the Supreme Court, if permission to appeal is granted, to considering only the certified point of law. The appeal is from the decision of the Court of Appeal, not just from its conclusion on the certified point; and if it is necessary to consider other points as well to dispose of the appeal and decide whether the Court of Appeal's decision is correct, the Supreme Court can do so.

43. This is confirmed by the decision of the House of Lords in *Attorney General for Northern Ireland v Gallagher* [1963] AC 349. It was not necessary to decide in that case whether it is open to an appellant to raise matters wholly unrelated to the question certified (see Lord Reid at p 368). Lord Tucker expressed the view (at p 370) that this will always be a matter for the exercise of the court's discretion; see also Lord Denning at p 383 and Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 69. Once it is recognised that, if permission to appeal is given, the certified question does not fetter the court's jurisdiction, this must be correct. But on this appeal too the issue does not arise, as the grounds of appeal are all related to the certified question.

44. The second question about the scope of these appeals raised at the hearing arises from the fact that the appellants' convictions were referred to the Court of Appeal by the Commission under section 9 of the Criminal Appeal Act 1995. Section 9(2) provides that such a reference shall be treated for all purposes as an appeal against the conviction under section 1 of the Criminal Appeal Act 1968. Section 14(4A) and (4B) of the 1995 Act (inserted by section 315 of the Criminal Justice Act 2003) provide that, in such a case, the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference, unless the Court of Appeal gives leave for the appeal to be on such a ground.

45. Here the Court of Appeal decided that both grounds of appeal which Mr Hayes sought to advance and two of the three grounds of appeal which Mr Palombo sought to advance were not related to the reason given by the Commission for making the references, and they refused to grant leave for the appeals to be on those grounds. It is not, however, suggested that this precludes the Supreme Court from entertaining these grounds of appeal if this court thinks it right to do so. Section 35(3) of the Criminal Appeal Act 1968 provides that, for the purpose of disposing of an appeal, the Supreme Court may exercise any powers of the Court of Appeal or may remit the case to that court. It is common ground that the powers which the Supreme Court may exercise in accordance with this provision include the power of the Court of Appeal under section 14(4B) of the Criminal Appeal Act 1995 to give leave for the appeal to be on a ground relating to the conviction which is not related to any reason given by the Commission for making the reference to the Court of Appeal.

46. Whether or not the grounds of appeal are related to the reason given by the Commission for making the references to the Court of Appeal is not, in my view, a question which should detain this court. Now that the appeals are before the Supreme Court, in so far as the grounds advanced have merit, this court should consider them – particularly as they all arise directly out of or are related to the certified question. Nor, whatever view this court has taken of the arguments, could there be any reason to remit the case to the Court of Appeal. As the Court of Appeal itself emphasised, that court has considered most of the issues raised several times already, including in the decision now under appeal. In that decision the Court of Appeal addressed all the grounds argued on

this appeal even when they thought that they were not bound to do so as the ground was not one which they should properly entertain. There is no question, therefore, of the Supreme Court being asked to decide points which have not already been considered by the Court of Appeal.

III. THE HAYES APPEAL

(1) Conspiracy to defraud

47. Section 91 of the Financial Services Act 2012 created a new criminal offence of making misleading statements in relation to benchmarks. Section 91(1) provides that 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".

48. No such offence existed when the conduct for which Mr Hayes and Mr Palombo were prosecuted took place. In their cases, as in all the prosecutions brought by the SFO relating to attempts to influence LIBOR or EURIBOR, the offence charged was conspiracy to defraud. Conspiracy is an offence developed by the courts as part of the common law. When a statutory offence of conspiracy was created by section 1 of the Criminal Law Act 1977, the common law offence was for the most part abolished by section 5(1) of that Act. But conspiracy to defraud was preserved: see section 5(2). The offence is controversial and has been criticised as excessively broad and vague and incompatible with the principle that the law should be sufficiently certain to enable a person to know what conduct will amount to a crime: see eg *Smith, Hogan and Ormerod's Criminal Law*, 17th ed (2024), pp 493, 501-503. The Law Commission recommended the abolition of the offence as part of a draft Bill which became the Fraud Act 2006, describing conspiracy to defraud as an "indefensible anomaly": see Law Commission, *Fraud* (2002), Law Com No 276, paras 1.4, 3.2-3.5, 9.6. But the government decided to retain the offence "for the present" (see *Fraud Law Reform - Government Response to Consultations*, November 2004, para 45), and it remains available to prosecutors subject to guidelines on its use published by the Attorney General.

49. As appears from the leading case of *Scott v Metropolitan Police Commissioner* [1975] AC 819, the three elements of the offence are: (1) an agreement made between two or more people, (2) with an intention of causing prejudice (usually in the form of financial loss) to one or more victims, (3) by means which are dishonest. The infliction of financial loss need not be, and seldom is, the primary object of the conspirators. That is usually to make a profit for themselves. But it is sufficient that the parties to the agreement realise that their profit will be someone else's loss: see *R v Allsop* (1976) 64

Cr App R 29, 32; *Wai Yu-tsang v The Queen* [1992] 1 AC 269, 280. Although fraud frequently involves deceit, the House of Lords held in *Scott* that a conspiracy to defraud need not do so and that other dishonest means will suffice. In that case the intended means was bribery. The agreement must, however, include an element of unlawfulness in its object or means. It cannot comprise an agreement to achieve a lawful object by lawful means: see *R v Evans (Eric)* [2014] 1 WLR 2817, paras 138-160; *R v Barton* [2020] EWCA Crim 575; [2021] QB 685, para 121.

50. The uncertain ambit of the offence and wide range of intended conduct that can be the subject of a charge of conspiracy to defraud make it all the more essential, when the offence is charged, to specify the content of the alleged agreement with particularity. Both the defendant and the court need to know with reasonable certainty and clarity what the prosecution must prove, and the jury must find, to convict. This has been recognised in the case law. For example, in *R v Landy* [1981] 1WLR 355, 362, the Court of Appeal said:

> "In our judgment particulars should have been given and for these reasons: first, to enable the defendants and the trial judge to know precisely and on the face of the indictment itself the nature of the prosecution's case, and secondly, to stop the prosecution shifting their ground during the course of the case without the leave of the trial judge and the making of an amendment."

51. There is a line of cases, beginning with *R v Hancock* [1996] 2 Cr App R 554 and continuing with the recent decision of the Court of Appeal in *R v Skeene* [2025] EWCA Crim 17, that draw a distinction between particulars of the agreement which the prosecution seeks to prove and particulars of overt acts on which the prosecution rely to invite the jury to infer the existence of that agreement. This distinction has given rise to difficult issues such as those discussed by the Hong Kong Court of Final Appeal in *HKSAR v Chen Keen (alias Jack Chen)* [2019] HKCFA 32; (2019) 22 HKCFAR 248. No such issues are raised, however, on these appeals. The only particulars with which we are concerned relate to the content of the agreements alleged in the indictment and especially to the dishonest means which the conspirators allegedly agreed to use. The SFO did not give particulars of overt acts relied on to support the inference that the alleged agreements were made.

(2) The indictment

52. Against this background, I turn to the indictment which set out the charges against Mr Hayes. The same general form of indictment was used for all the later prosecutions including that of Mr Palombo.

53. Each of the eight counts of the indictment charged Mr Hayes with conspiracy to defraud, contrary to common law. The particulars of each offence were:

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

54. Regrettably the indictment did not give sufficient particulars to enable the defence and the trial judge to know clearly and precisely the nature of the prosecution's case. Had it done so, the problems which have beset this case might have been avoided.

55. Considering first the object of the conspiracy, the words "intending to prejudice the economic interests of others" are hopelessly vague. What interests, of what others, and how were those interests intended to be prejudiced? The defendant and the court were entitled to know. This defect was, however, remedied by further and better particulars provided by the SFO in response to a request from the defence. These specified that the "others" whose "economic interests" the conspirators allegedly "intended to prejudice" were the counterparties to trades conducted by Mr Hayes and others at UBS or Citigroup. Spelt out more fully, the prosecution case was that the object of the conspiracy was to influence LIBOR, and thus the price of instruments linked to LIBOR which Mr Hayes and others at UBS or Citigroup were trading, in a way that would generate profits for Mr Hayes and the bank and corresponding losses for the counterparties to the trades. The

indictment should have said this. But on this point the prosecution case was soon made clear enough.

56. The indictment described the dishonest means by which this object was intended to be achieved as procuring or making submissions of rates by UBS or Citigroup into the LIBOR setting process "which were false or misleading". This allegation also required further explanation. The submission of an interest rate – which is simply a number – can only be false or misleading if the number submitted is represented to be something other than it in fact is. The prosecution therefore needed to specify what representation was on their case made when a rate was submitted, the basis for alleging that such a representation was made and the basis for alleging that it was false or misleading.

57. The indictment contained two particulars of this allegation. Yet rather than clarifying the prosecution case, they provided no real further particularity at all and instead sowed the seeds of subsequent confusion.

58. The first was that the rate submissions "were intended to create an advantage to the trading of Tom Hayes and others". This statement confused facts which, if proved, would make a representation false with a potential *motive* for making a false representation. The existence of an intention to create a trading advantage might well explain why a person shown to have agreed to procure or make rate submissions which were false or misleading did so. But a representation is not rendered true or false by the motivation of the person who makes it.

59. The second particular given of the falsity allegation was also unilluminating. It referred to "the proper basis" for the submission of rates. But that phrase is vague and begs the questions of what "the proper basis" for the submission of rates allegedly was, what made it proper, and indeed what was meant by the word "proper". Was it, for example, contended that there was a legal requirement to make submissions on a particular basis? If so, what was that requirement and what was its source? If not, what force was the word "proper" supposed to have? Until these questions were answered, it was impossible for the defendant or the court to know what the conspirators were said to have intended should be deliberately disregarded when making rate submissions and how such deliberate disregard would allegedly make the submissions false or misleading.

60. When asked for further and better particulars of "the proper basis", the SFO responded:

> "The proper basis for the submission of rates was in accordance with the duties of Panel Banks in compliance with the British Bankers' Association definition of LIBOR, which was *'The*

> *rate at which an individual Contributor Panel Bank could borrow funds were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 11.00 London Time'*."

The defence also asked: "In what way was it intended that the submitted rates would 'deliberately disregard' that 'proper basis'?" The answer given was:

> "The submitted rates purported to be a genuine attempt to comply with the duties of the Panel Banks as set out … above, uninfluenced by any trading activity or personal consideration, when in fact the submitted rates were influenced by and were intended to benefit Hayes' and others' trading positions in Yen derivatives …"

61. Another question asked was: "In what way were [the submitted rates] intended to be 'false'?". The SFO answered:

> "They were intended to be false in that they told a lie about themselves, by representing that they purported to comply with the duties of the Panel Banks when, in fact, they represented rates which were influenced by and took into account Hayes' and others' trading positions in Yen derivatives …"

Leaving aside the puzzle of how an interest rate can tell a lie about itself, this answer – like the others I have quoted – invoked "the duties of the Panel Banks" but without specifying the nature, source or content of these alleged duties.

62. The references to duties of the panel banks might be read as suggesting that the LIBOR document published by the BBA had legal effect and imposed legally enforceable duties on the contributor panel banks. When the defence objected, however, that the further and better particulars failed to specify to whom any duty was allegedly owed or the basis for it, counsel for the SFO explained that they were not making such a case. In written submissions for a case management hearing on 27 and 28 November 2014, they stated:

> "The word 'duty' has not been used as a term of art, nor should it be read to import any legal duty. It simply reflects the unarguable requirement to follow the BBA LIBOR definition ('the definition') itself. It is the Prosecution case that the

‘proper basis’ for the submission of rates by a Panel Bank was in accordance with the definition: *‘The rate at which an individual Contributor Panel Bank could borrow funds were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 11.00 London Time’*.”

63. To make it clear that the prosecution case was not based on any legal duties allegedly owed by panel banks, the SFO served amended further and better particulars of the indictment which deleted the previous references to “the duties of Panel Banks”. I show below how the particulars of “the proper basis” were amended:

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

The previous explanation of how it was intended that the submitted rates would “deliberately disregard” the “proper basis” for the submission of rates was replaced by the following:

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

64. The nature of the prosecution case was still not as clear as it should have been. But some progress had been made. The SFO had explained that they were not, after all, alleging that the LIBOR document was a source of legal duties and thus were also not alleging that Mr Hayes agreed to procure or make rate submissions which (as he knew) did not comply with those duties. In that respect it was clear what the prosecution case was *not*. It was less clear what the prosecution case *was*. The particulars of “deliberate disregard” still contained the same confusion as the indictment itself between a fact that would make a submission false and a motive for making a false submission. But the reliance on the wording of the definition of LIBOR suggested that the prosecution case should be understood as follows. In submitting a rate, a panel bank impliedly represented that the rate was as described in the LIBOR document, ie that it was “the rate at which [that bank] could borrow funds were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 11.00 London Time”. The conspirators

intended that rates should be submitted which were intended to create a trading advantage regardless of whether they complied with this description.

(3) The defence case

65. As well as denying that he had been dishonest, Mr Hayes denied that he had agreed to procure submissions of rates which were false or misleading. His case was that the question posed by the LIBOR document (which, for short, I will call "the LIBOR question") did not admit of a single correct answer. Rather, there was a range of numbers that could properly and legitimately be submitted in answer to the LIBOR question. Provided the rate submitted was within this range, the submission was not false or misleading.

66. This case was articulated in the defence statement. It reflected answers that Mr Hayes had given in his SOCPA interviews. The following extract from one of those interviews gives a flavour of how Mr Hayes sought to defend his attempts to influence the figures submitted for use in setting LIBOR:

> "So, in the course of a morning, prior to a LIBOR submission, there are a range of values where, legitimately, you can borrow cash. I mean, and none of them are untruthful, because they all traded and you're asked to submit a LIBOR submission at 11 am, based on, you know, based on everything that you've seen or heard that morning. So, when I was trying to influence the guys who set LIBOR, be it internally or externally, you'll notice that I never, I very, very, very rarely refer to specific rates. I always, always just go low or high.
>
> And, the goal there is to, basically, because I know that cash is trading within a specific range and you might, your rate that you may be able to borrow at might be 121, it might be 122, it might be 123, it might be 124, it might be 125 and all of those things may trade during the morning at different times and in different volumes, etc, etc. But all of them, really, are valid submissions, because they're all, actually, where you can borrow. So, within that range, if I say I want it higher or I want it low, what I'm saying to my guys, I'm saying, 'Well, if you've got a choice between 23 and 24, set 23,' you know, if I want it low. And what I'm saying to my brokers is if I want it high or I want it low, I'm saying, you know, 'If people come to you and they're saying, "Well, where do you reckon LIBOR should be today," and you're going to say 123 or 124, say 123.' I'm not

> saying, 'Go and say 4% or go and say half a percent,' because that's wrong …"

67. Mr Hayes maintained this defence of his conduct in his oral evidence at the trial.

(4) The cheapest rate theory

68. It is convenient to address now the second limb of the question certified for this appeal. This asks whether, as a matter of law upon the proper construction of the LIBOR and EURIBOR definitions, "the submission must be an assessment of the single cheapest rate at which the panel bank, or a prime bank, respectively, could borrow at the time of submission, rather than a selection from within a range of borrowing rates". Whether and, if so, how the proper construction of the LIBOR and EURIBOR definitions is relevant to the legal analysis of these cases is a major issue which I will consider soon. But putting that to one side for the moment, the second limb of the certified question discloses what I believe to be a misunderstanding by the Court of Appeal of the sense in which there was a range of borrowing rates and therefore of the significance of that concept.

69. If a bank's treasury wanted to borrow money in the inter-bank market just before 11 am one day and was committed to borrowing a particular amount in a particular currency and tenor, and if the bank received several offers from other banks of equal credit standing to lend that sum, it would be rational for the bank to accept the cheapest offer. I therefore agree with the following statement at para 89 of the Court of Appeal's judgment:

> "If in a stable and liquid market a submitting bank seeks and receives offers for a reasonable market size at the very time it is to make its submission, and receives offers ranging from 2.50% to 2.53%, it would accept the offer at 2.50%. It would be absurd to suggest that the LIBOR question could then properly be answered by a submission of 2.53%."

70. Nobody, however, so far as I am aware, has ever suggested that, in the situation postulated by the Court of Appeal, it would be a valid answer to the LIBOR question to submit a rate of 2.53%. The Court of Appeal appear to have thought that pointing out that, in their theoretical example, there could only be one correct answer to the LIBOR question shows that there could only ever be one correct answer to the LIBOR question and that there could never be a situation in which there was a range of different rates any of which could properly be submitted.

71. The example given by the Court of Appeal, however, does not correspond to the market reality (which I do not understand to have been in dispute in Mr Hayes' case or any of the other LIBOR and EURIBOR prosecutions). It is doubtless possible that, just before 11 am on the day in question, a panel bank had actually borrowed funds in the particular currency and tenor for which it was making its submission – in which case the answer to the LIBOR question could be regarded as a matter of fact. But in practice that was not the situation. There had normally been no offer actually accepted or made. The submitter was estimating the rate at which the bank *could* hypothetically have borrowed funds *if* the bank had asked for and then accepted inter-bank offers for the currency and tenor in question at the relevant time (which in fact it had not). Particularly when the market was illiquid, as it was during the financial crisis between 2007 and 2009, there was seldom, if ever, a precise, empirically verifiable or falsifiable answer to the hypothetical question posed – certainly not to five decimal places. A submitter might well, properly and in good faith, take the view: "I do not know at exactly what rate my bank could (most cheaply) have borrowed funds if it had asked for and then accepted inter-bank offers for the relevant currency and tenor just prior to 11 am. The most I can say with reasonable confidence is that the rate obtained would have been somewhere between 2.50% and 2.53%".

72. If that was the submitter's state of mind, no logic points to submitting a rate of 2.50%. To adopt a practice of submitting the lowest figure would amount to saying: "Although the rate my bank would have had to pay might have been anywhere within a range, I am going to assume that it would have been at the very bottom end of the range and therefore the cheapest rate that it could possibly have been". A banker who adopted such a Panglossian attitude would be unlikely to have a successful career in finance. Once the hypothetical nature of the exercise is appreciated, it is apparent that submitting the cheapest rate in the range is not, as the Court of Appeal supposed, a rational (let alone the only rational) choice. It would be an expression of irrational optimism.

73. In the same part of the judgment the Court of Appeal also reasoned that there could not be a range of rates which were equally valid because the LIBOR and EURIBOR definitions required a single figure to be submitted. For example, the court said, at para 93, that "from the point of view of an individual panel bank there could only be one genuinely assessed rate, because the assessment required was of a single rate". Again, this seems to me false logic. It does not follow from the fact that a panel bank had to submit a single figure (expressed to two or five decimal places) that the submitter could not genuinely have believed that another figure was just as likely to be accurate. Setting a rule that a single figure has to be submitted, and that a range will not be accepted as an answer to the LIBOR question, does not make it true that the figure submitted is the only one that would be a "genuine" answer.

74. I therefore consider that the Court of Appeal was wrong to reject on these grounds the previously uncontroversial proposition that a LIBOR or EURIBOR submission

typically involved a selection from within a range of borrowing rates. The "cheapest rate" theory was introduced in the Court of Appeal's judgment in 2024. It had not featured in the litigation until then. It was a blind alley.

(5) *Connolly and Black*

75. In *United States v Connolly and Black* the prosecution advanced a case, described as the "one true interest rate" or "one true number" theory, that there was only one correct answer to the LIBOR question. That theory had some affinity with the cheapest rate theory adopted here by the Court of Appeal. The judgment of the US Court of Appeals quotes, at p 836, from the closing argument made by the prosecutor at the trial:

> "You borrow at the lowest rate. There's no range."

The US Court of Appeals rejected the "one true interest rate" theory as inconsistent with the evidence given at the trial. They referred to evidence which showed that there was a range of rates that could be submitted on a given day without it being possible to prove that the rate submitted was false.

76. The court considered that, provided the rate submitted by a panel bank was within the range of available rates, the submission would not be false or misleading. As put at p 835 of the judgment:

> "The precise hypothetical question to which the LIBOR submitters were responding was at what interest rate 'could' [the bank] borrow a typical amount of cash if it were to seek inter-bank offers and were to accept. If the rate submitted is one that the bank could request, be offered, and accept, the submission, irrespective of its motivation, would not be false."

Because the burden of proof was on the prosecution to prove that the defendants had made or conspired to make false or fraudulent statements, this meant that, to establish falsity, the prosecution had to show that the panel bank making the submission *could not* have borrowed funds at the rate submitted.

77. Taken literally, this requirement would mean that, where it was alleged that the rate submitted had been deliberately inflated, it could never be shown that a false submission had been made. That is because it is reasonable to suppose that a bank could always borrow funds, if it chose, at an interest rate higher than the market rate. An inflated

rate would therefore always be one that the bank could request, be offered and accept. So submitting such a rate would never, on the court's test, involve making a false statement.

78. Even where the allegation was that a deliberately low rate had been submitted, the test was practically impossible to satisfy. If there was no actual trading in the tenor and currency concerned at the relevant point in time, it would be a tall order to prove to the criminal standard of proof that the rate submitted was not one which the bank could have requested, been offered, and accepted, at that time.

79. There was copious evidence that Connolly and Black had agreed with other employees of Deutsche Bank to alter the numbers that would otherwise have been submitted by the bank with the aim of benefiting its derivatives trading. I have quoted one example at para 27 above. On the view taken by the US appeal court, however, this did not show that they had caused or conspired to cause Deutsche Bank to make LIBOR submissions that were false or deceptive. That was because, as summarised at p 843 of the judgment:

> "The government failed to produce any evidence that any DB [Deutsche Bank] LIBOR submissions that were influenced by the bank's derivatives traders were not rates at which DB could request, receive offers, and accept loans in DB's typical loan amounts; hence the government failed to show that any of the trader-influenced submissions were false, fraudulent, or misleading."

On this basis the court concluded that there was insufficient evidence to support the defendants' convictions, which were reversed and replaced by judgments of acquittal.

(6) Misrepresentations of opinion

80. As I will mention in a moment, a position similar to the approach of the US appeal court in *Connolly and Black* was at one stage contended for by the defence in these proceedings. But it is not now maintained. Counsel for Mr Hayes have not sought to argue on this appeal that the approach taken in *Connolly and Black* accords with English law. They accept that in English law a submission can be false and fraudulent even though the rate at which the bank could have borrowed funds at the relevant time is a matter of opinion and not verifiable fact. That is because, in submitting a rate, the person making the submission represents that the figure submitted is his or her opinion of the rate at which the bank could have borrowed funds at the relevant time. If that is not in fact the submitter's opinion, the submission is false and known by the submitter to be so.

(7) Preliminary rulings

81. In advance of Mr Hayes' trial, Cooke J ruled on three legal issues raised by the defence. The defence argued that there was no legal duty on a panel bank to make a submission that accorded with the LIBOR definition and that making a submission which did not accord with the definition therefore could not be an unlawful act. They also sought a ruling akin to the approach subsequently taken by the US appeal court in *Connolly and Black* that:

> "If a range of figures is available to a submitter, then any submission within that range accords with the definition, even if prompted by a request from another party, and cannot therefore be false."

The third ruling sought was that there was nothing in the LIBOR definition which prohibited a submitter from taking into account the bank's own commercial interests.

82. In a ruling given on 5 December 2014, the judge rejected all these contentions. On the first issue about whether there was a legal duty to submit in accordance with the definition of LIBOR, he said:

> "4. The prosecution's case is that there is a legal duty when making a submission not to put forward a rate which is not a genuine assessment of the rate at which an individual contributor panel bank could borrow funds in accordance with the definition. It is said that there is a duty not to make dishonest fraudulent misrepresentations in putting forward a rate which is known not to be a genuine assessment of borrowing rate but is in fact a rate designed to advantage the bank's trading.
>
> 5. In my judgment the prosecution is right in that submission. In putting forward a rate which is not believed to be the single figure which represents a genuine assessment of borrowing rate, the submitter or those responsible for the submission would be attempting to defraud."

83. As for the second contention, that a figure within an available range could not be false, the judge said that "much the same point in truth applies" (para 6). In particular (para 7):

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

84. On the third issue the judge thought it obvious that "a party is not to put forward a rate which is intended to benefit its trading position as opposed to its genuine assessment of the borrowing rate". He said (para 8):

> "If it be a matter of law - and I am inclined to think that it is - the meaning of the definition is perfectly straightforward; it is an assessment of borrowing rate which is required and nothing else."

In hindsight there can be seen in this reference to "a matter of law" the genesis of legal directions which, as I will describe, the judge gave at Mr Hayes' trial.

(8) Interlocutory appeal: *R v H*

85. Mr Hayes applied for leave to appeal against the judge's rulings. The application was referred to a full Court of Appeal by the Registrar. The Court of Appeal refused leave to appeal, essentially on the basis that the judge's rulings were correct for the reasons which the judge had given: see *R v H* [2015] EWCA Crim 46, para 24.

86. In rejecting the contention that there was no legal duty on a panel bank to make a submission that accorded with the LIBOR definition, Davis LJ (who gave the judgment) said, at para 43, that:

> "if a panel bank makes a submission then it is under an obligation to do so genuinely and honestly as representing its own assessment. Not to do so is potentially dishonest. The judge regarded that as self-evident. So do we. It serves no purpose at all to play around with the word 'duty'. The point is

> that there was an obligation ('duty', if you like) to give a genuine, to give an honest, opinion as to what the rate was."

87. In rejecting the second argument, based on the range of rates, Davis LJ said, at para 44:

> "It is of course the case that various submissions by panel banks can legitimately differ. They can legitimately differ because views as to the appropriate rate can legitimately differ. But that does not displace the requirement that the submission actually made must represent the genuine opinion of the submitter. Accordingly, that the figure could be within a range provides no answer if the figure actually submitted does not represent the genuine opinion of the person submitting that figure."

88. The third contention, that the LIBOR definition did not prohibit a submitter from taking the bank's own commercial interests into consideration, was also dismissed as untenable. Davis LJ said, at para 49:

> "It seems to us that all the elaborate arguments advanced under this head come to nothing. It is self-evident, as the judge found, that a bank, in making its submission to Thomson Reuters, is not free to let its submission be coloured by considerations of how the bank may be advantaged in its own trading exposure. That simply is contrary to the definition set by the BBA and to the whole object of the exercise."

89. I pause to take stock. In rejecting the first two propositions contended for by the defence, Cooke J and the Court of Appeal robustly affirmed the validity in law of what, as had been clarified, was the prosecution case. That case was simple enough. In submitting a rate for use in setting LIBOR, the person doing so represented that the figure submitted was his or her opinion of the relevant borrowing rate. If it was not, the representation was false. As the submitter would know that the figure submitted did not represent his or her genuine opinion, the representation would also be fraudulent. The prosecution case was that Mr Hayes had dishonestly agreed to procure the making of such fraudulent misrepresentations with the aim of benefiting his derivatives trading.

90. When Davis LJ said that "there was an obligation ('duty', if you like) to give a genuine, to give an honest, opinion as to what the rate was", he was not suggesting that the LIBOR document published by the BBA gave rise to legal duties owed by the panel banks to the BBA. As described at paras 62-64 above, the prosecution had expressly

disavowed such a case. The only "duty" on which the prosecution relied or needed to rely was the duty of every citizen under the criminal law not dishonestly to make a false representation, intending by doing so to make a gain for himself or another: see section 2(1) of the Fraud Act 2006.

91. What was not thought through at this stage was the significance of the ruling on the third issue. This issue was treated as a question of construction of the LIBOR document. Viewed as such, the ruling that the LIBOR document does not permit the bank's own commercial advantage to be taken into account in deciding on the rate to submit seems to me unimpeachable. No attention was paid, however, to whether, and if so how, the court's view of what the LIBOR document meant was relevant to the issues which the jury would have to decide.

92. The Court of Appeal could not be expected to address that question on an application for leave to appeal from the judge's rulings. All the Court of Appeal had to decide was whether the rulings were correct. The significance of the rulings for how the jury should be directed was a matter for the judge to consider when the case came to trial.

(9) The judge's legal directions

93. It was when at the end of Mr Hayes' trial the judge came to direct the jury on the law that, in my opinion, the case took a wrong turn. Cooke J decided that he should give directions about what the LIBOR document meant as a matter of law. His legal directions to the jury were extensive. As well as giving them orally, he provided them in writing so that the jury had copies when they were considering their verdicts. The entire document runs to 35 pages. The passages relevant for present purposes (paras 7-15 and 21-23) extend over 11 pages. To assess whether the judge materially misdirected the jury, it is necessary to consider these passages in the round. To make them available for reference, I have quoted them in full in an appendix to this judgment. Here I will just highlight key aspects.

94. First, as already mentioned, the judge gave detailed directions about what he said the definition of LIBOR required as a matter of law. After identifying the LIBOR question ("At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11.00 am?"), the written directions stated, at para 7:

> "It is clear, and courts have so decided as a matter of law, that this means that the panel bank, when making a submission to Reuters, must make a genuine, honest assessment of the rate at which it could borrow funds on the day in question, without

> reference to its own perceived commercial advantage. In making its LIBOR submission, a panel bank is not free to let its submission be influenced at all by consideration of how the bank may be advantaged in its own trading."

95. In expanding on this point, the judge emphasised that the panel bank had to make "an honest assessment" of the rate at which it could borrow funds and that, although the bank could use various sources of information in making the assessment, "[i]t must however be an honest assessment of its borrowing rate, *and not one* which takes into account its trading advantage …" (emphasis added).

96. The judge set out, in para 8, six specific points which, he said, the courts had decided and which the jury must take from him to be the law. They are all significant, but para 8(v) deserves particular note:

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

The point made here was repeated twice in the following paragraphs. The judge stressed, in paras 9 and 10(ii), that if, in answering the LIBOR question, the bank's trading advantage had been taken into account, then the figure submitted "would not be an assessment of the bank's borrowing rate in accordance with the LIBOR definition" even if without regard to trading advantage the same figure would have been submitted.

97. At para 11, the judge summarised the question for the jury as being "whether Mr Hayes dishonestly agreed with others to seek to procure that UBS, Citi or other banks should make submissions which were not, in accordance with the LIBOR definition, their honest true assessment of their borrowing rate or rates but a rate or rates designed to secure a trading advantage for himself or his bank". He reminded the jury, in para 12, that it was "clear and undisputed that Mr Hayes asked submitters at UBS, and the trader submitter of Deutsche to put forward rates intended to advantage his trading" and that he asked traders at other banks and brokers to do the same.

98. The judge then directed the jury, at paras 13 and 14, on the question of "dishonesty", which he described as "the central issue in the trial". His directions on this element of the offence followed the then leading case of *R v Ghosh* [1982] QB 1053. It is not suggested that these directions were materially incorrect. The core of them, in para 13(i), was:

> "In order for you to be sure of Mr Hayes' guilt, you need to be sure that he was acting dishonestly, that means that you have two questions to resolve:
>
> (a) First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? …
>
> (b) Second, must Mr Hayes have realised that what he agreed to do would be regarded as dishonest by those standards? …"

99. After summarising the eight counts of the indictment, the judge, at para 21, reproduced count 1 as an example. He explained the allegation of agreeing to procure false or misleading submissions, at para 22, as follows:

> "This is saying that:
>
> (i) They agreed that UBS (or the Panel Bank in question in the other counts) should make submissions of rates to Thomson Reuters (ie into the LIBOR setting process) which were intended and designed to benefit Mr Hayes' trading and did not represent a genuine assessment of the true rate at which UBS could borrow funds at 11 am on the day in question, contrary to the LIBOR definition requirements.
>
> (ii) They did so dishonestly knowing that the rate that they agreed should be put forward was not a genuine proper assessment of the borrowing rate, but a rate which was designed to help Mr Hayes' trading position and profits.
>
> (i) …"

100. Along with his written legal directions, the judge provided the jury with a separate "route to verdict" – that is, a document setting out the questions they should ask and answer to arrive at a verdict. This document instructed the jury that the following three questions should be answered in relation to each count, in the same sequence:

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

(10) The role of construction

101. The wording of the question certified for this appeal assumes that it was appropriate to direct the jury – as the judge did at length – about what, as a matter of law upon its proper construction, the LIBOR definition required. In my view, that assumption is mistaken. To see why, it is necessary to reflect on when and why the construction of a document is treated as a question of law for a judge to decide rather than a question of fact which, in a trial with a jury, is for the jury to decide.

102. When a judge rules on the construction of a document, what the judge is doing is deciding its legal effect: that is to say, what legal relations the document records or

creates. It is easy to lose sight of this point, which can be obscured by the fact that construing a legal document involves the linguistic task of understanding the meaning of the words.

103. That is of course the necessary starting point. To construe a statute or a contract or any other document that has legal effect, the judge must first understand the language in which it is expressed. That requires knowledge of the English language (assuming English to be the language of the document). But except where words have a technical legal meaning, no legal expertise is involved in this. Judges are not expected to have, and do not profess to have, any special or different understanding of the meaning of ordinary words from that of any other competent speaker or reader. They are not experts in philology or linguistics. What requires legal expertise is identifying and applying legal rules to derive from the meaning of the words, considered in their relevant context, legal propositions.

104. To take the example of a contractual document, English lawyers often describe the aim in construing a contract as being to ascertain the meaning of the language used. Such statements are particularly prevalent following the immense influence which Lord Hoffmann has exerted on this area of the law and his claim that the law has developed so as "to assimilate the way in which [contractual] documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life": see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912. Such statements are capable of misleading. They risk giving the impression that lawyers are interested in the document for its linguistic content when their true concern is with its legal content. (See on this subject a helpful article by Frederick Wilmot-Smith, "Term Limits: What is a Term?" (2019) 39 OJLS 705, 707-708 and 717.)

105. To derive that legal content, legal rules governing the construction of contracts are applied. The primary rule requires the court to ascertain what a reasonable person aware of all relevant background facts known or reasonably available to both parties would have understood the words of the contract to mean. An underlying presupposition which frames the inquiry is that the words have a single "true" or "correct" meaning which defines the parties' contractual rights and obligations. In the process of construction, many further rules potentially come into play. For example, the subjective understanding and intentions of the parties about the meaning and effect of the document must be ignored. So too must any communications between them before, or after, the contract was concluded. The commercial consequences and reasonableness of different constructions are relevant. This is before one comes to a plethora of rules that apply in particular contexts or to particular types of contract or to the use of particular words. The ultimate object of the exercise is not simply to understand what the words mean but is always to answer a question about the parties' legal relationship – typically, what legal obligation one party to the contract owes to the other on the facts of a particular case.

106. Sometimes a question about what legal obligation a contract or other document records or creates arises in a criminal case. When it does and there is a jury, it is for the judge to construe the document in order to answer this question and to direct the jury accordingly. This reflects the basic division of responsibility between judge and jury, whereby the role of the jury is to find the facts and apply the law as explained by the judge to those facts to arrive at a verdict. Questions of law are for the judge to decide. They include questions about what legal effect a document has.

107. The distinction I have described is one that has long been recognised. In *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, 85, Lindley LJ said:

> "The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect … The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."

In *Cozens v Brutus* [1973] AC 854, 861, Lord Reid made the point succinctly when he said: "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law."

(11) Documents with legal effect

108. Self-evidently, a court can only determine the legal effect of a document if the document has legal effect: that is, it is a document which creates or records legal relations (typically legal rights and obligations but including other legal relations such as privileges or powers). Some documents, such as Acts of Parliament and other legislative instruments, and various documents made by private parties to record contracts or dispose of property, plainly have legal effect. But there is a grey area. In *R v Spens* [1991] 1 WLR 624 a question arose about whether Lord Spens, who faced criminal charges arising from his involvement as a banker in a corporate takeover, had acted in breach of the City Code on Takeovers and Mergers. The prosecution did not have to establish a breach of this Code for Lord Spens to be convicted. But the judge thought that, in considering whether Lord Spens had acted dishonestly, the jury would wish to consider whether the Takeover Code had been complied with and, if not, whether that might be due to some factor not pointing to dishonesty, such as a belief, however mistaken, that the Code had been complied with. At a preparatory hearing the judge ruled that the construction of the Takeover Code was a matter of law for him to decide rather than a matter for the jury. The correctness of this ruling was challenged on an appeal to the Court of Appeal.

109. The Takeover Code has an unusual status. It does not create rights and obligations directly enforceable by a court. But it is a detailed and carefully drafted document designed to regulate the conduct of those involved in takeovers and mergers of companies in the United Kingdom. It is issued and administered by the Takeover Panel, a body chaired by an eminent lawyer which, when asked, determines whether conduct would constitute or has constituted a breach of the Code. When a breach is found, the Panel has available a variety of remedies – including private censure, public censure, the suspension, withdrawal or imposition of conditions on the terms of any exemption, approval or other special status granted by the Panel, or reporting the offender's conduct to another regulatory authority or professional body. The Panel can also implement "cold-shouldering" procedures such that persons authorised by the Financial Conduct Authority or certain other professional bodies will not be permitted to act for an individual in a transaction subject to the Takeover Code for a specified period.

110. In *R v Panel on Takeovers and Mergers, Ex p Datafin plc* [1987] QB 815, the Court of Appeal held that decisions of the Takeover Panel were susceptible to judicial review. The basis for that conclusion was that, although the Panel purported to be part of a system of self-regulation, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties and was exercising what amounted to public powers. In these circumstances it is easy to see why in *R v Spens* the Court of Appeal concluded that the Takeover Code "sufficiently resembles legislation as to be likewise regarded as demanding construction of its provisions by a judge" (see p 632F). Even if we choose to define "legal" obligations narrowly as obligations directly enforceable by a court, the obligations created by the Takeover Code are sufficiently akin to legal obligations to make it appropriate in a trial with a jury to allocate responsibility for ascertaining those obligations to the judge.

(12) Is the legal effect relevant?

111. It does not follow from the fact that a document lends itself to construction by a court that the court should construe it. That depends on whether the legal effect of the document is relevant to an issue in the case. Questions often arise about the meaning of documents which are not questions about what legal relations the document records or creates but are simply questions about its linguistic meaning or how that meaning was in fact understood (or intended to be understood). Such questions are questions of fact which, in a trial with a jury, are for the jury to decide.

112. In *R v Adams* [1994] RTR 220 the defendant appealed against his convictions for obtaining services by deception and obtaining a pecuniary advantage by deception. The charges were based on an answer given in an application form for car hire and insurance to the following question:

> "Have you (a) Been convicted during the past 5 years in connection with any motor vehicle. (b) Ever been disqualified from driving. (c) Any prosecution or police enquiry pending?"

Opposite these questions on the form were two boxes: one marked "Yes" and the other marked "No". The defendant ticked the box marked "No". This was true in answer to (a) but was untrue in answer to (b) because he had previously been disqualified from driving. His case was that he had answered the overall question truthfully. The judge ruled that the construction of the form was a matter of law for the court to decide and that the question was to be read disjunctively, so that the defendant should have ticked the "Yes" box if the answer to any of (a), (b) and (c) was "Yes".

113. On the defendant's appeal against conviction, the Court of Appeal had no doubt that, if the judge was right that the construction of the form was a question for him to decide, the judge's construction was correct. But they held that the judge had been wrong to regard the relevant question as a question of law. Lloyd LJ, who gave the judgment, said, at p 224:

> "Where the central question is whether the defendant has made a representation or not, and, if so, whether it is false, then both aspects of that question are questions of fact for the jury. This is clearly so where the alleged representation is oral. It must be equally so in our judgment where the representation is contained in writing."

114. The ratio of the decision was lucidly expressed by Sir John Smith in a note in the Criminal Law Review report of *R v Adams* [1993] Crim LR 525, 526:

> "A distinction must be made according to whether the issue is as to:
>
> (i) the legal effect of the document or
>
> (ii) the meaning of the document as (a) understood or intended by the person making it and (b) understood by the person reading it.
>
> Where the issue is as to the legal effect of the document, it is submitted that it is a matter for the judge. Where the issue is as

> to meaning intended or understood by the parties it is a matter for the jury."

The Court of Appeal adopted this statement of the law in *R v Page, Holden, Dunning and Bradshaw* [1996] Crim LR 821; [1996] Lexis Citation 1816, saying that it "precisely encapsulates the position". The statement has been approved by this court in *R v Perry* [2025] UKSC 17; [2025] 1 WLR 2055, para 24, which was argued immediately before the present appeals.

115. In *Perry* the Court of Appeal of Northern Ireland certified as a question of law of general public importance whether, in a jury trial, the construction of a defence statement is a question of law for the trial judge. It was common ground on the appeal to the Supreme Court that the certified question of law could not be answered in abstract terms. The answer would depend on the nature of the statement made in the defence statement and the purpose for which that statement was being relied upon: see para 22 of the judgment. On the facts of *Perry*, the relevance of the defence statement was that it contained statements which, depending on how they were understood, conflicted with oral evidence given by the appellant at her trial. Before the Supreme Court it was common ground that, in this situation, the court was not concerned with the legal effect of the defence statement but with the meaning of the document as understood or intended by the appellant when she approved it. That was a question of fact: see paras 23 and 25.

116. In their judgment on these appeals the Court of Appeal sought to explain the decision in *Adams* as turning on the nature of the document containing the representation made in that case. They said, at para 136:

> "*Adams*, unlike the present case, was concerned with a representation whose truth or falsity depended upon construction of an instrument which was not, in accordance with the principles identified in *Spens*, a matter of law for the court rather than one of fact for the jury. The statement that whether a representation is false is a matter of fact for the jury was made by reference to the facts of that case, and is not to be treated as a statement of universal application. Where the truth or falsity of a statement depends upon the meaning of an instrument which, in accordance with *Spens*, it is for the court to determine as a matter of law, falsity is a matter for the court not the jury (although honesty will be a matter for the jury)."

117. This passage is perplexing because to say that falsity is a matter for the court not the jury is on any view an obvious mistake. Unless a statement is a statement about the law, its truth or falsity is always a matter of fact for the jury. It is no part of the court's

role at a trial with a jury to determine whether a statement of fact (including a statement that a person genuinely holds an opinion) is true or false.

118. It seems likely that what the Court of Appeal meant to say is that, where an instrument falls within one of the classes identified in *Spens* of documents which have legal effect, the *meaning* of the instrument (rather than its falsity) is for the court to determine as a matter of law. But that is still inconsistent with the decision in *Adams* which treated the meaning of a document, where the issue is whether a fraudulent representation was made, as a question of fact for the jury. The distinction suggested by the Court of Appeal is that that approach was justified in *Adams* only because the application form for car hire and insurance completed by the defendant was not a document which had legal effect. Had the document been one with legal effect – for example, a contract – its meaning, and thus the meaning of a representation made in answer to a question posed in the document, would have been a matter of law for the court.

119. I do not consider this a tenable explanation of *Adams* for two reasons. First, the application form completed by the defendant in that case plainly was a document which had legal effect. The legal validity of the defendant's contract of car hire and associated policy of insurance turned on the truth of statements made by him in that form. Had the issue been, for example, whether the insurer had a legal right to avoid the insurance policy for (innocent) misrepresentation, it would have been a matter of law for the court to decide how the question in the form to which the defendant answered "No" should be construed: see eg *R & R Developments Ltd v Axa Insurance UK plc* [2009] EWHC 2429 (Ch); [2010] Lloyd's Rep IR 521, paras 14-26; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289, para 193. Second and more fundamentally, the explanation of *Adams* proposed by the Court of Appeal misses the key point illustrated by that case. This is that whether the meaning of a document is a question of law or fact depends not just on the nature of the document but on the issue to which it is relevant. The relevant issue in *Adams* was not whether the defendant had entered into a valid contract but whether he had made a fraudulent misrepresentation giving rise to criminal liability. For that purpose what mattered was not the legal effect of the document but how the defendant understood the question about past convictions and disqualification from driving and believed that his answer would be understood. (This would also be the test in civil proceedings where fraudulent misrepresentation is alleged: see eg *Akerhielm v De Mare* [1959] AC 789, 805; John Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 7th ed (2025), para 5-19.)

(13) Relevance of the LIBOR document

120. The question whether the LIBOR document had legal effect has been debated on this appeal. As mentioned, the Court of Appeal thought it did (see paras 130-131 of the judgment). They gave two reasons: first, that the LIBOR document is similar in nature to

the EURIBOR Code which, as discussed below, was held in the later proceedings involving Mr Palombo to have contractual effect; and second, that the LIBOR document is akin to legislation in the same way as the Takeover Code.

121. Neither of those contentions, however, was advanced at Mr Hayes' trial. The SFO did not assert, and adduced no evidence, that a contract was concluded between any panel bank and the BBA. Nor was it suggested that the LIBOR document published by the BBA was akin to legislation. As noted earlier, when asked to give particulars of "the duties of the panel banks" on which they relied, the SFO made it clear that they were not advancing any case that the LIBOR document imported any legal duty, and that the only legal duty on which they relied was the duty not to make dishonest fraudulent misrepresentations. Having amended the further and better particulars given of the indictment to delete references to "the duties of the panel banks", the SFO never afterwards sought to reinstate those references or to change their case.

122. I agree with the submission made by Mr Tom Doble, who addressed this point for Mr Hayes, that there is no cause in these circumstances to seek to explore the nature of the LIBOR document now. The prosecution case did not involve any allegation that it had legal effect. Their case was that Mr Hayes had agreed to procure the making of fraudulent misrepresentations through the submission of rates which did not represent the submitter's genuine opinion of the answer to the LIBOR question. As in *Adams*, therefore, the issue turned on how the person answering the question understood it and believed that the answer given would be understood. That was a matter of fact for the jury to consider. It was not a matter of law for the court.

123. For this reason, I consider that the premise on which Cooke J directed the jury about what, as a matter of law, was "in accordance with" or "contrary to" the LIBOR definition – and which is reflected in the certified question – was misconceived. What was material was not how the court construed the LIBOR definition but how Mr Hayes (and other relevant individuals) had understood it. That was a matter of fact, and not law.

(14) Conflating law and fact

124. Cooke J not only gave directions about what, as a matter of law, the LIBOR definition required, but in doing so he conflated the question whether the submission of a rate complied with the LIBOR definition with the question whether it represented the genuine opinion of the submitter. The conflation of these two matters pervades his legal directions. The judge treated them as interchangeable. In some places he referred to a "genuine assessment", or "honest assessment", of the bank's borrowing rate. In others he referred to an assessment of the bank's borrowing rate "in accordance with the LIBOR definition". Often, he combined the two formulations. An example of such hybrid phrasing can be seen in the passage quoted at para 96 above (from para 8(v) of the written

directions), where the judge referred to a "genuine assessment of the bank's borrowing rate in accordance with the LIBOR definition". There are other examples in the passages quoted at paras 97 and 99 above. Question 1 in the route to verdict document (quoted at para 100 above) provides a further illustration.

(15) Directions on trading advantage

125. Significant prejudice was caused by the addition of a further element to the mix. This was the judge's earlier ruling, endorsed by the Court of Appeal in *R v H*, that the LIBOR document upon its proper construction did not permit any consideration of trading advantage to be taken into account in making a LIBOR submission. When this proposition was combined with the fallacy that whether a submission was a genuine or honest assessment of the bank's borrowing rate turned on whether it accorded with the LIBOR definition, it produced the following flawed conclusion: if trading advantage was taken into account, the submission could not, as a matter of law, be a genuine or honest answer to the LIBOR question.

126. The genesis of this flawed approach can be seen in a ruling that Cooke J gave during the trial on 5 July 2015. He began this ruling by saying:

> "1. The Court of Appeal has decided that to take into account a trader's or bank's trading advantage when making a LIBOR submission is not permissible at all. … If … the submitter puts in a … figure influenced by the perception of trading advantage, the submission is not a genuine answer to the LIBOR question and does not accord with the LIBOR definition.
>
> 2. If therefore Mr Hayes agrees with another to procure the making of a submission which is perceived to be to his trading advantage …, then Mr Hayes has agreed to procure a submission which does not accord with the LIBOR definition.
>
> 3. On this basis if the evidence shows that this is what Mr Hayes did, which in my judgment it does, though of course this [is] a matter for the jury, the sole remaining question is whether Mr Hayes was dishonest in making such agreements."

127. This flawed approach runs through the whole of the judge's legal directions reproduced in the appendix to this judgment. Examples are the directions given at para

8(iv) and (v), where the judge said that, if account had been taken of the commercial interests of the bank (or of any other bank or person), the submission "would not accord with the LIBOR definition *nor be a genuine nor proper answer* to the LIBOR question"; and that "even if the submitted figure did not differ from the figure which would have been submitted without taking such commercial interests into account, the submitter *would not have made [a] genuine assessment of the bank's borrowing rate* in accordance with the LIBOR definition" (emphasis added). The message conveyed here and repeated many times was that a submission which took any account of commercial interests would not only be contrary to the LIBOR definition as a matter of law, it would also not be the bank's genuine opinion of its borrowing rate.

128. This flawed approach was also embodied in Question 1 of the route to verdict provided to the jury. That question asked the jury to decide whether Mr Hayes had agreed to procure "the making of a submission by a bank of a rate which was not that bank's *genuine perception* of its borrowing rate for the tenor in question (in accordance with the LIBOR definition) *but was* a rate which was intended to advantage Mr Hayes' trading" (emphasis added). The implication of this phrasing is that a rate intended to advantage Mr Hayes' trading was not, necessarily and for that reason, the bank's genuine perception of its borrowing rate.

129. The false logic involved mirrors the confusion noted earlier in the wording of the indictment. To establish that Mr Hayes had agreed with others to procure submissions of rates which were false or misleading, the prosecution had to show that he intended submitters to input figures to be used in setting LIBOR which did not represent their genuine opinion of the relevant borrowing rate. Showing that Mr Hayes intended submitters to input rates that would advantage his trading was proof of a motive for encouraging submitters to misrepresent their opinion of the borrowing rate. But it was not proof that he had intended them to do so. Mr Hayes had put forward a defence, summarised at paras 65-66 above, that he had not intended or agreed to procure submitters to input figures which were not genuine assessments: he had intended only that, where there was a range of rates which the submitter regarded as equally valid estimates of the rate at which the bank would have borrowed funds, a figure at the high (or low) end of the range should be submitted. Mr Hayes was entitled to have that defence considered by the jury.

130. Instead, the effect of the judge's directions was to remove that defence from the jury's consideration. The jury was told, in substance, that the fact that Mr Hayes had intended trading advantage to be taken into account necessarily meant, as a matter of law, that he intended figures which were not genuine assessments of the bank's borrowing rate to be submitted. As the judge pointed out at para 12 of his written legal directions, it was undisputed that Mr Hayes had asked submitters at UBS to put forward rates intended to advantage his trading and that he had asked traders at other banks and brokers to ask submitters at other banks to do the same. Given this undisputed fact, the judge was in

effect directing the jury, as a matter of law, that Mr Hayes had agreed to procure the submission of rates which, as a matter of fact, were not genuine assessments of the bank's borrowing rate and were therefore false or misleading. That usurped the jury's function and undermined the fairness of the trial. It had the consequence – expressly stated by the judge in para 3 of the ruling quoted at para 126 above – that the only question left for the jury to decide was whether Mr Hayes was dishonest.

131. The extreme to which the judge took this point is also striking. I have mentioned his direction, repeated several times, that it was irrelevant whether consideration of trading advantage made any difference to the figure submitted. Even if the figure submitted did not differ from the figure which would have been submitted if the bank's trading advantage had not been considered, the very fact that it had been considered "polluted" the submission (a description used by Cooke J in argument) so as to make it not a genuine assessment of the bank's borrowing rate. On any view of the matter, this strikes me as tendentious. Suppose that the submitter's best estimate of the bank's borrowing rate reached without regard to the bank's commercial interests was 2.53%, but the submitter considered what would be to the bank's trading advantage and, having done so, still submitted a rate of 2.53%. I find it hard to see why the submission of 2.53% should be regarded as false or misleading. That, however, should have been a matter for the jury to assess. The fundamental error was to treat what would be a genuine answer to the LIBOR question as a proper subject at all for legal directions from the judge.

(16) Implications for the issue of dishonesty

132. The judge's directions on the "definition of LIBOR" are open to criticism in another respect. He used language liable to prejudice the jury's consideration of the issue of dishonesty. That was all the more unfortunate when the practical result of his directions was that dishonesty was the only real issue left to the jury.

133. The prejudice lay in the use of the word "honest" in directing the jury about what, as a matter of law, the LIBOR definition required. The judge repeatedly stated that the bank and its submitter had to give an "honest assessment" of the bank's borrowing rate. The phrase "honest assessment" (or "honest estimate" or "honest opinion") was used no fewer than nine times in this context. In four of those instances, the word "honest" was combined with the word "genuine" (as in the phrase "genuine honest assessment"). On four further occasions the judge used the word "genuine" alone, clearly treating it as synonymous with the word "honest".

134. Although the judge directed the jury to consider separately whether Mr Hayes acted in a way that was, and was appreciated by him to be, dishonest by the ordinary standards of reasonable and honest people, it may not have been clear to the jury that the judge was using the word "honest" in two senses. Using the same word in both contexts

risked giving the impression that, if Mr Hayes had agreed to procure a submission which was not an "honest assessment" of the bank's borrowing rate, then he had not acted honestly. Since taking any account at all of commercial interests had been equated with making a LIBOR submission that was not an "honest assessment", this would imply that if (as was undisputed) Mr Hayes had asked submitters or traders at other banks or brokers to take account of commercial interests in making LIBOR submissions, then he must have been dishonest.

135. This was an additional reason why the legal directions given to the jury at Mr Hayes' trial were unfair.

(17) Objecting to the directions

136. Before providing his legal directions and route to verdict in writing to the jury, Cooke J circulated these documents to counsel in draft, to afford them an opportunity to make any objection or comment. Counsel then representing Mr Hayes took that opportunity. They requested very substantial amendments to both documents. In oral submissions made on 20 July 2015 (Day 37 of the trial), Mr Neil Hawes QC on behalf of Mr Hayes pointed out clearly the basic error in the directions, that they treated matters of fact which should have been for the jury to resolve as points of law, and thus wrongly removed them from the jury's consideration.

137. Defence counsel marked up with tracked changes proposed alterations to the draft directions and route to verdict. These proposed alterations included the deletion of much of what became paras 7 to 11 in the final version of the directions under the heading "The Definition of LIBOR". Among other changes, defence counsel asked the judge to delete the references to what "as a matter of law, the courts have decided"; to delete most of paras 8 to 10 including the point made in para 8(v) (see para 96 above); and to delete statements suggesting that, if a submission took account of commercial considerations or trading advantage, it could not represent the bank's genuine perception of its borrowing rate. In the route to verdict, they asked the judge to delete Question 1 and replace it with two questions which asked: (1) whether Mr Hayes had agreed with any of the individuals named on the count to submit a rate which (i) was intended to create a trading advantage to Mr Hayes and (ii) deliberately disregarded the proper basis for the submission of rates; and (2) if so, whether the submissions were therefore false and misleading.

138. Had the judge accepted the amendments requested by Mr Hayes' counsel, the criticisms of the legal directions and route to verdict made on this appeal would have been adequately addressed. The question whether Mr Hayes agreed to procure submissions which were false and misleading would have been posed as a question of fact, not law, and in a way that avoided conflating a rate which was not a genuine assessment of the bank's borrowing rate with a rate which was intended to advantage Mr Hayes' trading.

As it was, with one trivial exception, the judge rejected all the alterations requested by the defence and provided his directions and route to verdict to the jury in a form unchanged from the drafts shown to counsel.

(18) The first appeal: *R v Hayes*

139. The criticisms of the judge's legal directions which Mr Hayes' counsel had raised unsuccessfully at the trial were raised again in his grounds of appeal against conviction. Ground 2 was that the judge "was wrong to direct the jury in the terms of para 8 of his written directions that the LIBOR question gave rise to five propositions of *law* which the courts had already decided". In support of that ground, counsel for Mr Hayes submitted that the judge should have confined his legal directions on the LIBOR definition to telling the jury that it required a genuine assessment of the borrowing rate. Any further direction on the interpretation of the LIBOR question was unnecessary and wrong. Instead, the judge had given extensive directions on the LIBOR definition which subsumed matters of fact which should have been for the jury to consider and resolve into directions of law which the jury were required to follow. In doing so, the judge had "usurped the function of the jury" and "removed from the jury's consideration important issues of fact". Particular complaint was made about the direction that a rate submitted could not be a genuine or honest assessment of the bank's borrowing rate if it took into account the commercial position of the bank.

140. I think it fair to say that this ground of appeal received cursory treatment from the Court of Appeal, which did not do justice to the argument made: see *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr App R 10, paras 34-37. Taking as an example the proposition in para 8(v) of the judge's legal directions which I have quoted at para 96 above, the court said, at para 36:

> "In our judgment, however, taking this as an example, the judge was doing no more than spelling out helpfully for the jury the decision of this court [in *R v H*] that it was impermissible as [a] matter of the legal definition of LIBOR for the submitting bank's assessment to be coloured by taking into its consideration its commercial interests. As a matter of law, the submitter was not entitled to take those interests in any way into consideration."

They continued, at para 37:

> "On examination, it is clear that the other criticised propositions are all explanations to the jury in line with [the] decision of this

> court on the legal definition of LIBOR and the obligations to which it gave rise. In the circumstances, there is no arguable merit in this ground of appeal; leave to appeal is refused."

141. The Court of Appeal did not explain why it was helpful to spell out to the jury what the court had decided about the construction of the LIBOR definition as a matter of law. They did not engage with the argument made by counsel for Mr Hayes that whether a submission was a genuine or honest assessment was a matter of fact which should have been for the jury to decide and should not have been the subject of legal directions from the judge at all. Nor, in my view, was their benign characterisation of what the judge was doing in giving the criticised directions realistic. The judge did much more than tell the jury what the Court of Appeal had held in *R v H* was the legal effect of the definition of LIBOR. Cooke J repeatedly equated the question whether a submission would "accord with the LIBOR definition" as a matter of law with the question whether it would represent a "genuine assessment" or "honest assessment" of the bank's borrowing rate, which was a question of fact. And he repeatedly conveyed the erroneous message that, if the submitting bank's commercial interests had been taken into consideration in any way, then it followed as a matter of law that the submission could not be a genuine or honest opinion of the bank's borrowing rate.

(19) The decision in *Merchant*

142. Unsurprisingly, after receiving the imprimatur of the Court of Appeal the approach of Cooke J in directing the jury at Mr Hayes' trial was followed at subsequent LIBOR trials. Another attempt to challenge the legal validity of that approach was made by counsel for Jay Merchant on his appeal against conviction in 2017: see *R v Merchant and Mathew* [2017] EWCA Crim 60; [2018] 1 Cr App R 11. That appeal was also dismissed. Although Mr Hayes was not a party to the appeal and was not represented, the Court of Appeal expressed views about the adequacy and correctness of the jury directions given at Mr Hayes' trial.

143. The judgment of the court, given by Lord Thomas CJ, recognised that whether a LIBOR submission was a genuine assessment depended on the state of mind of the submitter and that this is a question of fact. As Lord Thomas said, at para 33: "A false statement about a person's belief or intention can be a false statement of fact". He also said, at para 39:

> "We consider that it is better to use the term 'genuine' when assisting the jury rather than 'honest' in relation to the LIBOR submission. This is because the use of the word 'honest' might be confused with the separate and distinct issue of "dishonesty"

> as an essential ingredient of the offence of conspiracy to defraud."

I agree. The Court of Appeal nevertheless defended the legal directions given by Cooke J at Mr Hayes' trial on two bases.

144. First, the court repeated the assertion made previously in refusing Mr Hayes leave to appeal against his convictions that what Cooke J had done was "no more than" to give "guidance to the jury on the legal effect … of the definition of LIBOR", "crafted in such a way as to be relevant to the facts of that case". I have examined the directions given by Cooke J in detail to show that this is not an accurate or tenable description of what was done. It ignores the way in which the directions consistently conflated the legal effect of the definition of LIBOR, as construed by the court, with the factual question whether the submitter's opinion was falsely represented.

145. Second, the Court of Appeal suggested that Cooke J had dealt with this factual question under the issue of dishonesty. Lord Thomas said, at para 46:

> "We accept that the issue can be addressed under dishonesty and because of the focus of the issues in that case, it was right to do so."

The court considered that, by contrast, in Mr Merchant's case a separate question should have been posed to the jury because "properly analysed, deliberately disregarding the proper basis was, as drafted in the particulars of the offence of this indictment, part of the element of the particulars of this offence of defrauding" (para 46).

146. I do not understand the suggested distinction between the two cases as there was no material difference between the form of the indictment in Mr Merchant's case and in that of Mr Hayes. In each case deliberately disregarding the proper basis for the submission of rates was part of the particulars of the offence as drafted in the indictment, distinct from the element of dishonesty. The Court of Appeal had the impression that "the central issue before Cooke J had been identified as one of dishonesty" (para 46). The basis for this understanding (see para 24 of the judgment) was that Cooke J had referred in a ruling on questions of disclosure given on 3 July 2014 to a document prepared by the defence which identified "the issue for the jury" as being whether Mr Hayes acted dishonestly. That ruling was given, however, at a very early stage of the proceedings. As the ruling itself records, the document referred to by the Court of Appeal in *Merchant* was described as "preliminary only" and "specifically not a defence statement". It was superseded by the defence statement served on 28 October 2014. The defence statement, at paras 6.1 to 6.8, set out the case based on the range of rates that I have summarised at

paras 65-66 above. That remained Mr Hayes' case at the trial. It was relied on as a defence to the allegation that Mr Hayes agreed to procure false and misleading submissions. The impression formed by the Court of Appeal in *Merchant* that the existence of such an agreement was not, or was not seriously, in issue was therefore mistaken.

147. On the present appeal Mr James Hines KC for the SFO sought to support the suggestion that dishonesty was the only real issue at Mr Hayes' trial by referring to transcripts of the defence closing speech to the jury at the trial to make the point that almost the entire focus of that speech was on the issue of dishonesty. The reliance on this speech is circular, however, as it was made after defence counsel had tried, and failed, to persuade Cooke J to give directions which would have left the issue whether Mr Hayes agreed to procure false submissions to the jury as a question of fact for them to decide without telling them how, "as a matter of law", they should answer that question. The fact that those attempts were made confirms that, so far as the defence was concerned, the existence of such agreements was very much in issue. The rejection of those attempts by the judge and effective withdrawal of that factual question from the jury's consideration left Mr Hayes' trial counsel, Mr Hawes QC, with no option but to focus his closing speech on the issue of dishonesty. Thus, the point made by Mr Hines illustrates the very complaint made on this appeal.

148. The errors in the directions given at Mr Hayes' trial cannot therefore be excused on the basis that they do not matter because dishonesty was the only real issue in the case. The suggestion that whether Mr Hayes had agreed to procure false submissions could be or was addressed under the issue of dishonesty also does not withstand scrutiny. The two matters were distinct elements of the offence charged. The idea that one could somehow be decided by deciding the other makes no sense. To try to deal with the issues in that way, the judge would have had to direct the jury that, when answering the question whether Mr Hayes appreciated that what he was doing was dishonest, they must consider whether Mr Hayes had intended LIBOR submissions to be made which were false because they did not represent the submitter's genuine opinion of the bank's borrowing rate; and if they were not sure of this, to find Mr Hayes not guilty. Unsurprisingly, Cooke J gave no such direction. It would have been illogical for him to do so as, by the time he addressed the issue of dishonesty, he had already in substance told the jury that, as a matter of law, they must find that Mr Hayes had agreed to procure the making of false submissions if he had sought to influence submitters (as he admitted that he had) to put forward rates which were intended to advantage his trading.

149. It is instructive to consider how the directions on the issue of dishonesty dealt with Mr Hayes' evidence that he believed there to be a range of proper answers to the LIBOR question. At para 13(iii) of the written directions, the judge referred to Mr Hayes' contention that he did not realise that what he was doing would be considered by honest and reasonable people as dishonest, for various reasons. One of those reasons (as summarised by the judge) was:

> "There was a range of potential answers to the LIBOR question which could be justified as a subjective judgment of the panel bank's borrowing rate and Mr Hayes did not personally realise that the selection of any figure within that range by reference to a trader's or bank's trading advantage, even though it did not accord with the LIBOR definition nor properly answer the LIBOR question, was dishonest by the standards of ordinary reasonable and honest people."

The judge then said this (at para 14):

> "It is a matter for you whether or not any of [the] facts or matters put forward in these contentions are true (or any which underlie them) and whether or not you consider such issues *are of any relevance to, or help you with, the question whether Mr Hayes must have realised that what he was doing was dishonest* by the ordinary standards of reasonable honest people, if he did what the Prosecution say he did. It is for you to apply the two tests for dishonesty that I have set out." (emphasis added)

150. It can be seen that, far from directing the jury to decide whether Mr Hayes had agreed to procure statements that were not genuine answers to the LIBOR question as part of the issue of dishonesty, the judge left it entirely up to the jury whether or not they considered this matter to be "of any relevance" to the question of dishonesty. In these circumstances the suggestion that the jury could not have found that Mr Hayes must have realised that what he was doing was dishonest unless they were sure that he had agreed to procure submissions which he did not believe to be genuine assessments of the panel bank's borrowing rate is unsustainable. To the contrary, Cooke J expressly told the jury that it was open to them to find dishonesty regardless of whether Mr Hayes thought, or might have thought, that what he was seeking to achieve was permitted by the LIBOR process.

(20) Mr Hayes' second appeal to the Court of Appeal

151. The third time the Court of Appeal considered the legal directions given at Mr Hayes' trial was in the decision now under appeal on the reference from the Commission. The two grounds of appeal which (new) counsel for Mr Hayes put forward made the same basic criticisms of the judge's directions to the jury which his previous counsel had attempted to raise at the trial itself and in Ground 2 of the original grounds of appeal against conviction in 2015. In summary, Ground 1 argued that the judge wrongly directed the jury that, if the submitter took any account of commercial considerations, the submission could not as a matter of law be a genuine or honest opinion of the borrowing

rate, when (properly analysed) the question whether a submission was a genuine or honest opinion of the rate was a question of fact, dependent on the state of mind of the submitter. Ground 2 argued that the effect of the judge's legal directions was, wrongly, to remove the factual question whether Mr Hayes agreed to the deliberate disregard of the proper basis for the submission of LIBOR rates and as a result to the submission of rates which were false or misleading from the jury's consideration.

152. The judgment of the Court of Appeal shows no appetite for giving Mr Hayes' case fresh consideration. The court's approach placed him in something of a dilemma. In so far as the arguments advanced had been made previously and rejected by the Court of Appeal, the court considered that it should not depart from its previous decisions. In so far as the arguments advanced were new, the Court of Appeal considered that it should not entertain them when, although available, they had not been made before.

153. The Court of Appeal felt able to decide that it should not entertain Ground 1 for both these reasons. That is, the court appears to have held that it should not entertain this ground of appeal *both* because it was available but was not taken at Mr Hayes' previous appeal *and* because the Court of Appeal had rejected the argument on previous occasions (including on that previous appeal).

154. Section 14(4A) of the Criminal Appeal Act 1995 prohibits an appellant from raising grounds of appeal which are unrelated to the reasons given by the Commission for making the reference, unless the court gives leave to do so (see para 44 above). The Court of Appeal considered that it would be contrary to the purpose of this provision to allow points to be argued "which were available at a previous appeal but were not taken". Mr Hayes' Ground 1, as they saw it, was available at Mr Hayes' first appeal and it would be contrary to the purpose of section 14(4A) to allow him to "piggyback" this unrelated ground upon the reference concerned with *Connolly and Black* (para 123). In the next paragraph, however, the court said that they would not be justified in entertaining this ground when "there have been five decisions of this court, not just one, treating the point as a bad one" (para 124).

155. The latter reason reflected the position taken by the SFO. Counsel for the SFO submitted in a respondent's notice that Mr Hayes' two grounds of appeal should be dismissed because the arguments raised had already been considered and rejected by the Court of Appeal when dismissing Mr Hayes' first appeal against conviction in 2015. This was said to apply to Ground 2 as well as Ground 1. Thus, counsel for the SFO described Ground 2 as "a repeat of an old argument" that "has already been determined" and quoted passages from the written submissions made in support of the first appeal against conviction to show that Mr Hayes had "advanced the same argument now advanced".

156. The Court of Appeal took the opposite view of Mr Hayes' Ground 2. They thought that this criticism of Cooke J's legal directions had not been raised before. The court clearly attached significance to this view as they stated on five occasions in the judgment that the argument, though available, was not advanced on Mr Hayes' first appeal against conviction: see paras 144, 145, 150, 151 and 153 of the judgment. For example, the court said at para 150:

> "Mr Hayes had the opportunity to appeal against conviction and did so, represented by experienced trial counsel. This point could have been taken on the appeal if it had any merit, but it was not."

157. Why did the Court of Appeal believe that the point had not been argued on Mr Hayes' first appeal, when the SFO (and Mr Hayes' new counsel) had maintained otherwise? As best I can tell, the answer lies in an ambiguity in what exactly the point was understood to be. The Court of Appeal evidently understood deliberate disregard of the proper basis for the submission of LIBOR rates to mean knowing non-compliance with what the LIBOR document required as a matter of law. They interpreted Ground 2 of the grounds of appeal in this light as a complaint that the judge did not direct the jury to decide whether Mr Hayes agreed to submissions which he knew to be against the LIBOR rules because the submitter had taken account of trading advantage (see paras 138 and 142 of the judgment). That was not an argument advanced on Mr Hayes' first appeal against conviction. It was one way of reading Ground 2 of the grounds of his second appeal. The other way was as a complaint that the judge did not direct the jury to decide whether Mr Hayes agreed to submissions which he knew to be false (because they did not represent the submitter's genuine opinion of the borrowing rate). That was a point which had been raised before and is raised again, in unequivocal terms, on the appeal to this court.

158. In so far as the Court of Appeal addressed the merits of Mr Hayes' grounds of appeal, they rejected Ground 1 on the footing that the meaning and falsity of the representations which Mr Hayes agreed to procure were questions of law for the court and not questions of fact for the jury (see para 116 above). Their response to Ground 2 was that, as suggested in *R v Merchant*, whether Mr Hayes had agreed to procure false representations was a matter that could be, and had been, addressed under the issue of dishonesty (see para 153 of the Court of Appeal's judgment). I have already explained why, in my opinion, those reasons for rejecting Mr Hayes' grounds of appeal are flawed.

(21) The first part of the certified question

159. The main flaws in the legal directions given at Mr Hayes' trial and in the Court of Appeal's approval of them are reflected in the question certified for this appeal. I repeat the first part of this question:

> "Whether as a matter of law upon the proper construction of the LIBOR and EURIBOR definitions:
>
> (a) If a LIBOR or EURIBOR submission is influenced by trading advantage, it is for that reason not a genuine or honest answer to the question posed by the definitions; …"

160. This wording assumes that whether an answer to a question posed by a document is genuine or honest turns on the "proper construction" of the document as a matter of law. As discussed above, that is a mistake. Whether an answer to a question is a genuine or honest answer is never a matter of law. It depends on what the person who answers the question understands the question to mean, how he or she believes that the answer given will be understood and whether that accords with what that person actually believes. These are matters of fact.

161. The certified question also embodies the notion that, if the person making a submission has taken account of trading advantage, that makes it (as a matter of law) "for that reason" not a genuine or honest answer to the question posed. As discussed above, that is also a mistake, for the same basic reason that it treats a question of fact about a person's state of mind as governed by the proper construction of a document as a matter of law.

(22) Conclusion on Mr Hayes' appeal

162. As mentioned at the start of this judgment, there was ample evidence adduced at Mr Hayes' trial from which a jury could have concluded that he agreed with others to make or procure LIBOR submissions which were not genuine assessments of the bank's borrowing rate but were deliberately distorted in pursuit of financial gain. Much of that evidence came from Mr Hayes himself in the course of many hours of interviews conducted by the SFO under the SOCPA process. But Mr Hayes was entitled to have his defence to the allegation that he agreed to procure false submissions as well as his denial that he had acted dishonestly left fairly to the jury. He was deprived of that opportunity by directions which were legally inaccurate and unfair. It is not possible to say that, if the

jury had been properly directed, they would have been bound to return verdicts of guilty. The convictions are therefore unsafe and cannot stand.

IV. THE PALOMBO APPEAL

163. By the time of Mr Palombo's indictment in 2017, the notion that the truth or falsity of a rate submission depended upon the proper construction of the LIBOR document, as decided by a court, had taken firm root. The same approach was applied to EURIBOR. But a notable difference in the proceedings relating to EURIBOR was the acceptance by both the prosecution and defence that the process for setting rates was governed by a legally binding contract.

164. It was common ground that, when a bank joined the panel of banks which contributed rates for setting EURIBOR, the bank entered into a contract with EURIBOR-FBE and EURIBOR-ACI, the two entities that administered EURIBOR, on the terms of the EURIBOR "Code of Conduct". It was also common ground that this contract was governed by and to be interpreted in accordance with the law of Belgium.

(1) The EURIBOR Code

165. Because of their relevance to arguments made on Mr Palombo's appeal, I will outline the salient terms of the EURIBOR Code.

166. Article 1 specified the criteria for qualifying as, and remaining, a panel bank. These criteria required, among other things, that panel banks "must be banks of first class credit standing, high ethical standards and enjoying an excellent reputation".

167. Article 6 of the Code stated:

> "**ARTICLE 6: OBLIGATIONS OF PANEL BANKS**
>
> 1. Panel banks must quote the required euro rates:
>
> – to the best of their knowledge, these rates being defined as the rates at which euro inter-bank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 am Brussels time ('the best price between the best banks');

– for the complete range of maturities as indicated by the Steering Committee;

– on time as indicated by the screen service provider;

– daily except on Saturdays, Sundays and Target holidays;

– accurately with two digits behind the comma.

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

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

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

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

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

168. Article 7 of the Code provided:

> "EURIBOR-FBE and EURIBOR-ACI, two international associations under Belgian law, will create a Steering Committee as referred to in this Code."

Article 7 then specified the composition of the Steering Committee and how its decisions were to be taken.

169. Articles 9 and 11 of the Code were also relied on in argument:

> "**ARTICLE 9: SANCTIONS**
>
> The Steering Committee may take the following sanctions if panel banks do not comply with the obligations under this Code:
>
> – issuance of a warning to remedy the situation quickly;
>
> – if such warning is ignored, exclusion of a panel bank from the panel.
>
> …
>
> **ARTICLE 11: AMENDMENTS**
>
> EURIBOR-FBE and EURIBOR-ACI can decide jointly to amend this Code, whenever such a request is brought before them by at least one half of the members of the Steering Committee.
>
> Amendments to this Code are not subject to the approval of the panel banks. Panel banks are, of course, free to leave the panel if they do not wish to abide by the amended Code."

(2) The indictment in Mr Palombo's case

170. The indictment in the EURIBOR proceedings was drafted in similar terms to the indictment charging Mr Hayes. There was a single count charging the defendants with conspiracy to defraud between 1 January 2005 and 31 December 2009. The central allegation was that:

> "They dishonestly agreed to procure or make submissions of rates into the EURIBOR setting process by one or more EURIBOR Panel Banks which were false or misleading in that they:
>
> a. were intended to create an advantage to the trading positions of employees of one or more of the abovementioned banks and
>
> b. deliberately disregarded the proper basis for the submission of those rates
>
> thereby intending that the economic interests of others may be prejudiced."

(3) Mr Palombo's defence

171. Throughout the period covered by the indictment Mr Palombo was employed by Barclays (which was a panel bank) in London, trading interest rate derivatives referenced to EURIBOR. He did not deny that he had attempted to influence Barclays' EURIBOR submissions. His defence was that he had not sought or conspired with others to procure or make submissions that were false or misleading and had not acted dishonestly.

172. Mr Palombo and his co-defendants all relied on the argument that there was a range of rates which satisfied the definition in article 6.1 of the Code. They maintained – and it was not disputed by the SFO – that the submission of a rate was not a mathematical or scientific exercise and involved subjective judgment. When rate submissions were made, there might be various rates at which borrowing was taking place, between different banks, in different sizes and at different times. Sometimes, particularly during the financial crisis, there were no actual inter-bank transactions taking place which fell within the definition of EURIBOR, and it was necessary to base the assessment entirely on other sources of data and general market conditions. The defence case was that it was common to have a range of equally valid and justifiable numbers that could be submitted for a particular maturity; and that, where the submitter formed that view, it was and was believed to be legitimate to submit any figure within that range and, in choosing which figure to submit, to have regard to the bank's commercial interests.

173. To support this case, the defence obtained witness statements from several individuals who were centrally involved in establishing EURIBOR and drafting the Code. They included Mr Nikolaus Bömcke, who was chairman of the working group which oversaw the creation of EURIBOR and was the primary author of the Code, as well as

other key members of the EURIBOR working group. The gist of their evidence was that it was expected that panel banks would take into account their commercial interests when submitting rates and that this was allowed by the Code so long as the rate submitted was one which the submitter believed to be *an* appropriate rate. Mr Bömcke, for example, said in his witness statement:

> "[I]t is wrong to say that each day only one single rate existed which was correct. In fact on many days one would expect a number of equally correct rates. By way of example, if two rates were equally appropriate on any given day, it mattered not whether a panel bank picked the higher or lower rate of the equally appropriate rates as long as the submission was a rate at which one prime bank could lend to another prime bank. Submitting either the lower or the higher rate for reasons of commercial interest did not render that rate false as long as the submission was a rate at which one prime bank could lend to another prime bank. The belief of the EURIBOR Working Group was that the subjective views of 64 quoting banks would finally lead to a balanced, objective reference rate."

(4) The Belgian law question

174. The defendants wished to rely on this evidence not only to support their case that in seeking to influence rate submissions they did not act dishonestly, but also to argue that submitting a rate which suited the commercial interests of a panel bank, provided it was within a range of rates believed to be equally valid and appropriate, was consistent with the bank's contractual obligations under the Code. If English law had governed the contract, evidence of what individuals involved in drafting the Code subjectively intended or understood its legal effect to be would, indisputably, have been inadmissible. The defence argued, however, that under Belgian law the position is different. They contended that under Belgian law extrinsic evidence – that is, evidence from sources other than the contractual document itself – including evidence of the intentions or understanding of its authors, can be relied on to interpret the contract.

175. At an early stage of the proceedings the court was asked to decide an issue which was referred to as "the Belgian law question". This issue was whether panel banks, in submitting rates under article 6 of the Code as interpreted in accordance with Belgian law, were permitted to make submissions which were intended to create an advantage to the trading positions of employees of the bank (or another bank).

176. Under section 15 of the Administration of Justice Act 1920, where a question of foreign law arises in any action which is being tried by a judge with a jury, the question

of foreign law is to be decided by the judge. A preliminary hearing was held to decide the Belgian law question. The prosecution and the defence each adduced written and oral evidence from experts in Belgian law about the rules of Belgian law that govern the construction of contracts. Counsel for Mr Bittar, one of Mr Palombo's co-defendants, took the lead in making submissions for the defence. These were supported by the other defendants.

177. The expert witnesses agreed that the applicable rules of Belgian law require the court to identify the common intention of the contracting parties. They disagreed about when extrinsic evidence can be relied on for this purpose. It was in issue between the prosecution and defence whether the judge should consider extrinsic evidence in construing the Code. The defence argued that the terms of the Code did not, or did not clearly, prohibit a panel bank from submitting a rate which was intended to advantage the bank's own trading position; that in construing the Code the court was bound to have regard to the evidence of the witnesses who were closely involved in drafting it; and that, in the light of their evidence, the Code should be construed as permitting a panel bank to take into account its commercial interests when submitting a rate as long as the rate submitted was within the range of rates that could be justified as a rate at which one prime bank could lend to another prime bank.

(5) The judge's ruling on Belgian law

178. In a written ruling given on 22 September 2017, Judge Gledhill QC rejected both the construction of the Code contended for by the defence and the argument that, in deciding on the proper construction of the Code in accordance with Belgian law, he should take into account the witness evidence on which the defence sought to rely.

179. On the question of when extrinsic evidence is admissible, the judge found the applicable Belgian law to be that, if the common intention of the parties is clear from the contract itself, the court need go no further. If, however, having considered the terms of the contract, the court finds the common intention of the parties to be unclear, then the court may go on to consider extrinsic matters, such as pre-contract negotiations, post-contract conduct and extra-contractual declarations of subjective intent. Whether to consider such extrinsic matters is in the discretion of the court. The judge also found that, throughout the exercise of determining the common intention of the parties, the court has to follow the Belgian law principle of good faith, which "enables the court to interpret, supplement, moderate or restrict the contract".

180. Applying these principles, the judge found that the common intention of the parties to the Code was clear from the definition of EURIBOR and other terms of the Code itself. The common intention was that each panel bank would make an independent and genuine assessment of the rate at which, to the best of its knowledge, euro inter-bank

term deposits were being offered by one prime bank to another at the relevant time. When making this assessment and submitting rates, the panel banks were not permitted to take into account their own (or anyone else's) trading advantage. To do so would distort the EURIBOR rate. There was no common intention that, so long as the rates submitted were within a range of justifiable rates, panel banks were permitted to take their own commercial interests into account and to manipulate the rate for their own advantage or the advantage of others. The judge also held that this conclusion was supported by the principle of good faith in Belgian law.

181. As the judge found the common intention of the parties to be clear from the Code itself, he concluded that Belgian law did not require him to consider extrinsic matters and that there was no reason to do so.

(6) Interlocutory appeal: *R v B*

182. An appeal against this ruling was brought by Mr Palombo's co-defendant, Mr Bittar. The appeal was dismissed: see *R v B* [2018] EWCA Crim 73. In summary, the Court of Appeal was in no doubt that Judge Gledhill was entitled to appraise the expert evidence of Belgian law as he did; to draw the conclusions that he did applying the principles derived from that expert evidence; and, having properly concluded that the meaning and effect of the Code was clear, to refuse to admit extrinsic evidence on the question of construction.

(7) Trial, conviction and appeal

183. After the appeal was dismissed, Mr Bittar pleaded guilty. The case proceeded to trial against the other defendants. As described at para 36 above, Mr Palombo and another Barclays' employee, Colin Bermingham, were convicted at a re-trial. Judge Gledhill's directions to the jury at that trial included legal directions on the "proper basis for the submission of EURIBOR rates" which reflected his ruling, upheld by the Court of Appeal in *R v B*, on the Belgian law question. I will return to these directions when I consider the criticisms of them made on this appeal.

184. Mr Bermingham and Mr Palombo appealed against their convictions to the Court of Appeal: *R v Bermingham and Palombo* [2020] EWCA Crim 1662; [2021] 4 WLR 113. One of their grounds of appeal involved another attempt to challenge the judge's findings on the Belgian law question. Two of the witnesses whose evidence the judge had declined to take into account in construing the Code had testified at the trial, as their evidence was agreed to be relevant to the question whether the defendants had acted dishonestly. The appellants argued that the evidence of these witnesses showed that the judge's

interpretation of the Code, and therefore his directions to the jury on its legal effect, were wrong.

185. The Court of Appeal refused to grant leave to appeal on this ground, regarding it as "unarguable". They considered that the decision in *R v B* was "unassailable" in upholding the judge's decision that the common intention of the parties to the Code was clear that panel banks could not have regard to their own trading advantage in submitting rates, and that evidence from witnesses was therefore irrelevant on this issue: see paras 77-82 of the judgment.

(8) Mr Palombo's case on this appeal

186. When Mr Palombo's case was referred to the Court of Appeal by the Commission in 2023, three grounds of appeal were put forward. Ground 2 (which overlapped with the first ground) is the only one of those grounds still pursued. It is similar to the case made on Mr Hayes' appeal.

187. In argument before the Court of Appeal two more points were raised. First, counsel for Mr Palombo suggested for the first time that the Code was not, after all, binding as a contract between a panel bank and the entities which administered the Code. It was now submitted that this relationship was entirely informal and that the Code had no legal force. Second, it was argued that, even if the Code did have legal force, Judge Gledhill was wrong to construe it as prohibiting a panel bank from taking commercial interests into account in deciding what rate to submit. These contentions form two of three "core submissions" made on Mr Palombo's appeal to this court.

188. Had it not been for the elegance with which they were advanced by Mr Jonathan Crow KC, I would not have thought these two submissions arguable. I am not persuaded that either has merit.

(9) Contractual effect of the Code

189. I have mentioned that when Judge Gledhill decided the Belgian law question and when the Court of Appeal upheld his ruling in 2018, it was common ground that the Code bound the panel banks as a contract. This remained common ground at Mr Palombo's trial and re-trial and on his appeal against conviction. Even when the Commission referred his conviction to the Court of Appeal in late 2023, Mr Palombo's grounds of appeal expressly asserted that the Code was a contract. The judgment of the Court of Appeal in 2024, at para 129, records that it was not until a speaking note was served shortly before the hearing that Mr Palombo sought to resile from that position.

190. I see no reason why, having adopted the position throughout the proceedings that the Code was contractually binding, Mr Palombo should now be heard to argue the opposite. It is not suggested that, in taking that stance, Mr Palombo and his co-defendants were inadequately advised, or that some relevant feature of the Code or applicable law was not apparent to their legal advisers or was overlooked. All that has changed is that the construction of the Code contended for by the defence and the attempt to introduce evidence of subjective intention in support of that construction were rejected by the courts. There would be no finality in criminal proceedings if a person whose conviction has been upheld on appeal could bring another challenge on the footing that he now wishes to disown the basis on which he previously argued the case and try his luck on a different and inconsistent basis when there has been no material change in the applicable law or other circumstances.

191. The necessary foundation for the proposed new argument is in any case missing. In accordance with article 10 of the Rome I Regulation (EC) No 593/2008 (and the common law), the existence and validity of a contract are to be determined by the law which would govern the contract if it were valid. Mr Palombo has not sought to resile from the position that, if there were a contract, it would be governed by the law of Belgium. The starting point for any argument that the Code did not have effect as a contract would therefore need to be evidence of the rules of Belgian law which a Belgian court would apply to decide whether the Code had contractual force. No evidence of those rules has been adduced, and no argument has been made by reference to those rules, on this appeal. In these circumstances the submission that the Code was not contractually binding does not even get off the ground.

192. Mr Palombo's new case has been advanced as if the English law of contract applies. Essential elements of a binding contract in English law are said to be absent. It is submitted that there was no consideration moving from either party and no basis on which a court could infer an intention to create legal relations. In support of the latter contention, it is submitted that none of the provisions of the Code was expressed in terms of imposing legal duties. It is also said that, had the Code been intended to impose legal duties, it would have been likely, given the international reach of EURIBOR across many different jurisdictions, to include a clause specifying the governing law. Reliance is also placed on the consequence of non-compliance with the Code. Under article 9 a bank could be issued with a warning and ultimately could be excluded from the panel; there was no other form of liability or sanction. That is said to be antithetical to the existence of a legally binding contract. So is the power under article 11 to amend the Code unilaterally and the freedom of a bank under that provision simply to leave the panel without any requirement for notice or stipulated formality. It is further submitted that, for EURIBOR to operate effectively, there was no need to establish any contractual relationship between panel banks and the associations which administered the Code and no clear rationale for doing so.

193. In some contexts – for example, where the two systems have a shared legal heritage – it can be presumed in the absence of evidence that the relevant foreign law is similar to English law: see *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45; [2022] AC 995, paras 119-126, 143-149. But Belgium has a civil law, and not a common law, system and there is no justification for presuming that the concepts of consideration and intention to create legal relations which govern the formation of contracts in English law are part of Belgian law. In any case, even if English law were applied, I would reject the arguments advanced. The intention to impose legal obligations could hardly be clearer than it is from article 6, which is expressly headed "Obligations of Panel Banks". The language used throughout that clause is the language of obligation ("Panel banks must …"). Articles 8 and 9 also refer to the "obligations" of panel banks "under this Code". There is no reason to take this wording other than at face value. A provision such as article 6.5 ("Panel banks must subject themselves unconditionally to this Code and its enclosures, in their present or future form") would be both pointless and illusory if it was not intended to record a legal obligation.

194. I agree with the Court of Appeal (see para 130 of their judgment) that the essential nature of the arrangement is that, in return for its admission as a panel bank with the prestige thereby accorded, the panel bank will make daily rate submissions in accordance with the obligations set out in the Code. There is therefore no lack of consideration.

195. The absence of a clause expressly stipulating the governing law is of little moment, as such a clause need not be, and sometimes is not, included in contracts even when they have international reach. In any case the fact that the entities responsible for administering the Code were (as stated in article 7) associations constituted under Belgian law and that EURIBOR was set by reference to Brussels time demonstrate a choice of Belgian law as the system of law applicable or, at the very least, that Belgium is the country with which the contract is manifestly most closely connected (see articles 3(1) and 4 of the Rome I Regulation (EC) No 593/2008, which has been retained in UK law).

196. The provisions of the Code governing the composition and decision-making of the Steering Committee and the procedures for admitting a bank to the panel or excluding a bank from the panel if it does not comply with "the obligations under this Code" are set out with a degree of detail and formality that convey an intention to create legal relations. The provision in article 11 of a formal mechanism for amending the Code also demonstrates such an intention. The fact that, if a bank does not wish to abide by the Code, it is free to leave the panel does not imply that, while it remains a panel bank, obedience to the Code is optional; rather, it carries the opposite implication.

197. I therefore see no reason to doubt that Mr Palombo was right to assert (until recently) that the Code had legal effect as a contract binding on the panel banks.

(10) Interpretation of the Code

198. I see no greater merit in Mr Palombo's second "core submission", which seeks to challenge Judge Gledhill's ruling on the proper construction of the Code and his finding that the Code did not permit a panel bank to take into account commercial interests when deciding what rate to submit for use in setting EURIBOR.

199. The nub of the argument advanced is that the Code contained no express prohibition to this effect and that it was an error of law to imply one. It was therefore wrong to direct the jury, as the judge did, that a EURIBOR submission which took the bank's trading advantage into account was contrary to the Code.

200. Like the contention that the Code did not have effect as a contract, this argument was also presented as if English law applies and without heed to the agreed position (from which Mr Palombo has not resiled) that the law applicable is that of Belgium. No challenge was, or could realistically have been, made to the findings of Belgian law made by Judge Gledhill and affirmed by the Court of Appeal in *R v B* (see para 182 above). As foreign law – although for the judge to determine – is a question of fact, the construction of a document governed by foreign law is also a question of fact. There are some cases in which the similarity of foreign law to English law and consequent ability to bring the court's own legal expertise to bear may make an appellate court readier to intervene on a point of foreign law than in relation to ordinary findings of fact: see *Perry v Lopag Trust Reg* [2023] UKPC 16; [2023] 1 WLR 3494. But this is not such a case. Belgium has a civil law and not a common law legal system. It is not a system with which UK lawyers are familiar. This court has not in any case been provided with any of the expert evidence, relevant provisions of the Belgian Civil Code or other underlying materials which would enable us to make any attempt to evaluate the judge's findings of Belgian law even if so minded. The proper approach in these circumstances is to adopt the well-established practice on a second appeal of not disturbing concurrent findings of fact made by two courts below save for certain exceptional reasons set out in the Privy Council case of *Devi v Roy* [1946] AC 508. This practice applies on appeals to the Supreme Court as it does on appeals to the Privy Council: see *R v Perry* [2025] UKSC 17; [2025] 1 WLR 2055, paras 33-35. No such reason has been shown here.

201. Again, even if English law had applied, the argument made would still lack merit. The reasons for this were cogently stated by Sir James Eadie KC, who dealt with this point in oral argument on behalf of the SFO. There are two central reasons. First, the obligation on a panel bank under article 6.1 of the Code was to submit the rate at which euro inter-bank term deposits were being offered by one prime bank to another at 11 am Brussels time ("the best price between the best banks"). What that rate was and whether it was a rate commercially advantageous to the panel bank were two quite different and entirely unrelated questions. To take account, when deciding what rate to submit, of what rate would assist the bank to make a profit would therefore be to take account of an

irrelevant consideration. A rate influenced by such a consideration would not comply with the bank's obligation imposed by article 6.1 of the Code. This conclusion follows from a straightforward interpretation of article 6.1 and does not require the implication of any further term.

202. Second, to give an answer influenced by what rate would benefit the bank's trading would conflict with the purpose of EURIBOR as a rate intended to be used and promoted (see eg article 6.6) as a benchmark or reference rate of interest in financial transactions. To be trusted for use as a benchmark, such a rate needs to be recognised as a fair and accurate measure of the average cost of borrowing in the relevant market. Any perception that panel banks are deciding what rate to submit by reference to their own financial gain rather than purely on their view of the cost of funds is bound to undermine the credibility of the published rate. That rate will be discredited and seen as unfit for use as a benchmark as soon as it becomes known that its calculation is affected by covert commercial interests.

203. Under English law, if it did not already follow from the express terms of the Code that a panel bank may not take into account commercial gain in deciding what rate to submit, such a term would be implied. The implication would be necessary to give effect to the purpose of the contract and make it function in the way the parties must reasonably have intended and expected: see eg *The Moorcock* (1889) 14 PD 64, 68; *Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd* [2024] UKSC 28; [2025] ICR 107, paras 104-106.

204. The analysis is not affected by pointing out that assessing the rate at which euro inter-bank term deposits were being offered involved subjective judgment and that there was a range of rates which submitters exercising their best judgment might quote. There are many situations in which an exercise of judgment is required without it being possible to demonstrate that there is a single correct answer. That feature does not license the pursuit of personal (or institutional) financial interest in making the relevant judgment. To take an example, when a teacher marks a student's essay, unless some purely mechanical system of marking is used, there is no method of demonstrating that one mark is uniquely correct; and different teachers, equally expert and experienced, may reasonably assign different marks to the same essay. The same applies when, to give another example, restaurant critics (or members of the public) give ratings to a restaurant. Countless further examples could be given. In such situations the subjectivity of the assessment does not make it legitimate for assessors to take into account their own financial interest. No one would consider it acceptable for a teacher who was promised a financial reward by parents if their child got a high mark to give a higher mark to a student for that reason. It would be no answer for the teacher to say: "I genuinely believed that the appropriate mark was anywhere between 75 and 80 out of 100 and that the marks in that range were equally correct. In those circumstances there was nothing to prohibit me from taking account of my own financial interest in awarding a mark of 80."

205. In the same way, the integrity and credibility of a rating given to a restaurant will be undermined if it is revealed that the person giving the rating has a financial interest in the success of the restaurant. Credibility would not be restored if the assessor explained that he or she only took account of their own financial interest when deciding what rating to give within a range of ratings none of which was demonstrably incorrect.

206. As a matter of construction of the Code, therefore, I agree with the view taken by the judge, and on three occasions by the Court of Appeal, that it is manifestly inconsistent with the obligation of a panel bank under article 6 for the bank to submit a rate influenced by what would benefit that bank (or anyone else) financially. The same would be true of the LIBOR document if that were found to be a document creating or recording legal obligations (a matter on which I express no view). Davis LJ expressed the nub of the matter in *R v H*, para 49 (see para 88 above), when he said that the arguments advanced under this head come to nothing; that it is self-evident that a bank is not free to let its submission of a rate be coloured by considerations of how the bank may be advantaged in its own trading; and that to do so is simply contrary to the whole object of the exercise.

(11) Directions on falsity and deliberate disregard

207. It is the third "core submission" made on behalf of Mr Palombo that gives rise to the real issue in the appeal. This submission is similar to the case made by Mr Hayes. Mr Tim Owen KC, who addressed this issue for Mr Palombo, submitted that the judge misdirected the jury by conflating what, as a matter of law, was a breach of the Code with what, as a matter of fact, was a false representation. The effect of the judge's directions was, wrongly, to direct the jury that, if a submitter had taken into account a bank's or trader's commercial interests, it necessarily followed that a false submission had been made.

208. Although these criticisms of the judge's legal directions are similar to those made of the directions given at Mr Hayes' trial, there were material differences between the two sets of directions. For a start the legal directions given by Judge Gledhill at Mr Palombo's trial were much shorter. They also tracked more closely the language of the indictment and concentrated, in a way that Cooke J's directions did not, on the allegation that the defendants had agreed to procure or make submissions of rates which "deliberately disregarded the proper basis for the submission of those rates".

209. The chief difference of approach lay in the way that this ambiguous allegation was interpreted. As discussed in Part III, in prosecuting Mr Hayes the SFO did not maintain its initial assertion that the LIBOR document imposed legal duties on panel banks, whether as terms of a contract or otherwise; the only legal duty on which the SFO relied was the duty under the criminal law not to make dishonest fraudulent misrepresentations. Thus, the nature of the prosecution case was that submissions of rates "deliberately

disregarded the proper basis for the submission of those rates" when the figure submitted did not represent the submitter's true opinion. By contrast, the proceedings against Mr Palombo and his co-defendants were conducted on the agreed footing that the EURIBOR Code imposed contractual duties on panel banks. As a result of Judge Gledhill's ruling on the Belgian law question, affirmed by the Court of Appeal, it was also established that those duties included a duty not to take commercial interests into account in making EURIBOR submissions. The prosecution contended that submissions of rates "deliberately disregarded the proper basis for the submission of those rates" when the submission deliberately disregarded the obligations imposed by the Code.

210. As at Mr Hayes' trial, the judge provided his directions on the law to the jury in writing as well as orally (though there was no separate route to verdict document). Judge Gledhill directed the jury, following the wording of the indictment, that one of the matters of which they must be sure before convicting a defendant was that:

> "he/she agreed with one or more employees of a Panel Bank to make or procure submissions of EURIBOR rates which were false or misleading in that they:
>
> a. were intended to create an advantage to the trading positions of employees of one or more of the Panel Banks, and
>
> b. deliberately disregarded the proper basis for the submission of those rates..."

211. I will quote the judge's written directions explaining the latter requirement in full:

> "**PROPER BASIS FOR THE SUBMISSION OF EURIBOR RATES**
>
> The proper basis for the submission of EURIBOR rates includes:
>
> i. A submitter at a Panel Bank, when submitting a EURIBOR rate, must put forward his/her assessment, to the best of his/her knowledge, of the rate at which Euro inter-bank term deposits in the relevant tenor are being offered within the EMU zone by one prime bank to another at 11 am Brussels time.

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

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

iv. A submitter is not entitled to take into account that which would or might advance his/her own or another Bank's commercial interests or those of a trader in putting forward his/her EURIBOR submission. To take such commercial matters into account would be to act in a way that was contrary to the EURIBOR Code of Conduct, as it plays no part in an assessment to the best of his/her knowledge of the borrowing rate.

v. You must bear in mind that although this was the law of England and Wales during the period covered by the Indictment, and indeed has always been so, it was set out by the Court of Appeal for the first time in January 2018. This was therefore not available to the Defendants beforehand. …

Deliberate Disregard

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

For a defendant to 'deliberately disregard' the proper basis, he/she must know what the proper basis for submissions is at

> that time. He/she must know that the submissions deliberately disregarded that proper basis for the submissions."

(12) The need for a misrepresentation

212. I have noted that the form of the indictment in the EURIBOR prosecution was materially identical to the indictment charging Mr Hayes. It required the prosecution to establish that the defendant agreed to procure or make submissions of rates which were false or misleading. As discussed earlier (see para 56 above), the submission of a rate can only be false if it involves a misrepresentation. The only potentially false representation which the SFO has ever identified is the representation implicit in the submission of a rate that the rate is believed to be a true answer to the LIBOR or EURIBOR question. That representation is false (and fraudulent) if the person submitting the rate does not in fact hold that belief.

213. The presentation of the prosecution case and the legal directions given by Judge Gledhill would have led the jury to believe that, if they were sure that a EURIBOR submission "deliberately disregarded the proper basis" for submissions (and was intended to create a trading advantage), then it automatically followed that the submission had been shown to be false or misleading. This was implicit in the judge's directions. The question whether a false representation had been made was not posed separately or additionally. Rather, it was presented as if it was answered by deciding whether a submission (a) was intended to create a trading advantage and (b) deliberately disregarded the proper basis for the submission of rates. The equation of these matters was explicit in the prosecution closing speech. Counsel for the SFO told the jury (Day 31, p 21):

> "The rates submitted were false or misleading if they were entered in deliberate disregard of the proper basis, of course you know that."

214. It follows that the directions which I have quoted at para 211 above were only justified if it could safely be assumed without the need for separate consideration that a submission which deliberately disregarded the proper basis for the submission of rates as explained by the judge did not represent the submitter's genuine opinion of the relevant borrowing rate.

(13) Could the offence have been charged differently?

215. Although it is not necessary to decide this point, I have considered whether the prosecution had to frame the case as they did in the indictment, which required them to

prove an agreement to procure or make false representations of what the submitter believed the relevant borrowing rate to be. Could that allegation have been cut out? Could the case have been framed instead as alleging conspiracy to defraud simply on the basis that the defendants dishonestly agreed to make or procure rate submissions which deliberately disregarded the obligations imposed by the EURIBOR Code of Conduct, intending thereby to cause loss to counterparties to trades in derivatives linked to EURIBOR?

216. I am inclined to think that, if the indictment had been worded in such a way, it would have been bad in law. As noted earlier (see para 49 above), a conspiracy to defraud cannot comprise an agreement to achieve a lawful object by lawful means. The object of the conspiracy alleged here – to make a profit from trading in derivatives that would (as the defendant knew) inevitably result in a corresponding loss to the counterparty to the trade – was not unlawful. It was the basic purpose for which traders such as Mr Palombo were employed. The element of unlawfulness required for the offence must therefore be found in the means intended to be used to achieve that object. We were not addressed on whether a breach of the civil law would suffice for this purpose. I find it hard to see in principle why it should. Unless the intended means involves criminal conduct, I see no reason why an agreement to use that means to achieve a lawful object should be a crime. For example, given that refusing to pay a debt, even if known to be due, is not a criminal offence, it would make no sense for the common law to treat agreeing with someone else not to pay a debt (knowing that this will cause loss to the creditor) as a criminal offence.

217. If this is right, then it was essential to allege – as the indictment in substance did – that the defendants had conspired to cause loss by criminal means. The criminal means alleged amounted to fraud by false representation (see paras 89-90 above), which would be an offence under section 2 of the Fraud Act 2006.

218. Be this as it may, Mr Palombo was entitled to be tried on the indictment and to be acquitted unless the jury found him guilty of the offence as charged. The offence as charged required proof of an agreement to procure or make false representations of the submitter's opinion (and which the submitter therefore knew misrepresented his or her opinion) of the relevant borrowing rate. The critical question is therefore whether a jury which followed the directions quoted at para 211 above must have found that Mr Palombo was a party to such an agreement.

(14) Taking account of commercial interests

219. As discussed earlier in this judgment, whether submitters put forward rates which did not represent their true opinion of the relevant borrowing rate and whether any of the defendants was a (knowing) party to an agreement to procure or make such submissions were questions of fact which could have been put very simply to the jury and required

little elaboration. Still, of the five directions given by Judge Gledhill about what "the proper basis for the submission of EURIBOR rates" included, there was nothing wrong with points (i) and (ii). They did no more than state the question which a person submitting a rate for use in setting EURIBOR had to answer and the duty to give an answer which the submitter believed to be true.

220. Although it is criticised by counsel for Mr Palombo, I also would not find fault with point (iii). It is said that the judge was contrasting "an assessment to the best of [the submitter's] knowledge" with "a rate intended to advantage the submitter or trader or the bank at which he/she worked" and implying that they must be mutually exclusive. But particularly when read with points (i) and (ii), I think this direction would reasonably be understood to mean that, even when there is a range of figures, the submission must still be a genuine assessment and not a rate which is intended to create a trading advantage *rather than* representing a genuine assessment.

221. Point (iv), however, was in my view a clear misdirection. Its effect, when combined with the approach described at para 213 above, was to treat proof that a submitter had taken commercial interests into account as proof that the submission made was false. As discussed, whether a submission was false depended on whether or not the rate submitted represented the submitter's genuinely held opinion of the rate at which Euro inter-bank deposits were being offered by one prime bank to another. The direction given therefore involved treating the answer to that question as constrained by the court's ruling that a panel bank was prohibited (as a matter of the Belgian law of contract) from taking into account commercial interests. At its root, although less patent than in the directions given at Mr Hayes' trial, was the same error of treating a question of fact about the submitter's state of mind as turning on the legal effect, as decided by the courts, of the document posing the question answered by the submitter. I will consider later how the direction at point (v) compounded this error.

(15) Directions on "Deliberate Disregard"

222. The question then is whether this misdirection was remedied by the directions given under the heading "Deliberate Disregard". Although tortuously worded, the gist of these directions was that the prosecution had to prove that a defendant knew at the time when he or she agreed to procure or make a EURIBOR submission what the proper basis for submissions was and that the submission would not comply with that proper basis for submissions. The inclusion of these directions is a point of distinction from Mr Hayes' case, as no equivalent direction was given at his trial.

223. A problem here is to know how these directions are to be understood when read together with the prior explanation of what "the proper basis for the submission of EURIBOR rates" includes. I will return to this problem. But for the moment I will assume

that "the proper basis for the submission of EURIBOR rates" was defined by the EURIBOR Code of Conduct. The Code was the foundation for the direction that a submitter was not entitled to take commercial interests into account in putting forward a EURIBOR submission. We have seen that this proposition was derived by construing the Code in accordance with Belgian law. Understood in this way, for a defendant to "deliberately disregard" the proper basis, he or she would have to be aware of the Code and to know that the Code prohibited taking into account commercial interests in putting forward a EURIBOR submission.

224. If this was what the jury understood, then it may be thought that it is a short step from what the jury must have decided to convict Mr Palombo and what they would have had to decide to convict him if they had been properly directed on the law. If the jury had been properly directed, they would have been told that they must be sure that Mr Palombo intended submitters to submit rates which did not represent the submitter's true opinion of the inter-bank borrowing rate. If a submitter understood that the rules governing EURIBOR submissions set out in the Code did not permit commercial interests to be taken into account in assessing the borrowing rate, it is hard to see how the submitter could have believed that an assessment which was influenced by what would advantage the bank or a trader was a truthful answer to the EURIBOR question. Even so, the fact that a judge might draw such an inference is not a substitute for asking the jury to decide the right question.

225. There is a similarity between the approach taken in this case and the approach taken in *R v Spens* (see para 108 above), where the judge directed the jury that certain conduct was a breach of the Takeover Code. That direction was justified because whether the conduct of Lord Spens complied with the Takeover Code was considered relevant to whether he had acted dishonestly. The jury was also told to consider whether his breach of the Takeover Code might be due to some factor not pointing to dishonesty, such as a belief, however mistaken, that the Takeover Code had been complied with. The Takeover Code has been developed to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and how fairness to shareholders of a target company and an orderly framework for takeovers can be achieved. Although at a criminal trial the standard of honesty is for the jury to determine, jurors are unlikely to be familiar with the field of corporate takeovers; and, in assessing the honesty of conduct in that field, it would be reasonable for a jury, if they thought fit, to have regard to what the Takeover Code requires. That was also potentially relevant to the likelihood that an individual in the position of Lord Spens (who was managing director of a merchant bank) appreciated that the conduct alleged by the prosecution in that case was dishonest (being part of the legal test of dishonesty as understood at the time).

226. If directions about the effect of the EURIBOR Code of Conduct had been given in connection with the issue of dishonesty at Mr Palombo's trial, they would arguably have been relevant for similar reasons (though the status of Mr Palombo as a junior trader at

Barclays was in no way comparable to that of Lord Spens). But we are not here concerned with the judge's directions on the issue of dishonesty, of which no criticism is made. In *Adams* the Court of Appeal distinguished *Spens* on the basis that the effect of the Takeover Code as interpreted by the court would not have been relevant if the issue had been whether the defendant had made a particular representation and whether it was false. In my view, it was right to do so.

(16) Further faults in the directions

227. Whether this defect in the legal directions would be sufficient reason to interfere with Mr Palombo's conviction may be open to doubt. But it does not stand alone. In considering the adequacy and accuracy of the directions, two further points – each in my view significant – also need to be borne in mind. I have already alluded to the first. This is the unclarity of the directions on "deliberate disregard". It was important to spell out clearly to the jury exactly what knowledge they had to be sure that a defendant possessed to satisfy this requirement. The judge did not do that.

228. I have so far assumed that a defendant had to be aware of the Code and to know that the Code prohibited taking into account commercial interests in putting forward a EURIBOR submission. I have made this assumption because, on the theory that treated the construction of the Code as relevant to the question whether a false representation was made, it is what would need to be shown. But if this is what the jury had understood that the prosecution needed to prove, it is hard to see how they could have convicted Mr Palombo. That is because the prosecution did not suggest that Mr Palombo had any knowledge of the Code. For example, counsel for the SFO said in his closing speech to the jury (Day 31, pp 21-22):

> "As to their knowledge of the proper basis for making submissions, of course it's not suggested that any defendant had any legal learning about it or in the case, necessarily of Palombo or Ms Bohart, they even examined the Code of Conduct. But we do very much say that the knowledge and experience that each of these defendants had in the banking world, and in their knowledge of EURIBOR in particular, was on any view sufficient for them to know full well that trying to get a bit of extra profit on their derivatives trade was not the proper basis for setting EURIBOR."

Judge Gledhill said much the same in summing up the case (Day 35, p 26):

> "Mr Palombo … was on the derivatives desk and doesn't appear to have had any reason to go to the Code of Conduct for submitting EURIBOR, that's not his job."

229. As can be seen from the passage I have quoted above from the prosecution closing speech, the prosecution did not allege that Mr Palombo knew what obligations the Code imposed on panel banks. Their case on knowledge as presented to the jury was much more nebulous. Elsewhere in his closing speech, counsel for the SFO used terms such as "inappropriate", "an improper practice", "contrary to the point of an independent benchmark" and "wrong". The impression given was that it was enough that Mr Palombo and his co-defendants knew that it was improper to take into account a bank's or trader's commercial interests when deciding what rate to submit, in a general sense of contrary to accepted or acceptable standards in the banking industry. No attempt was made to identify the source of those standards beyond "knowledge and experience … in the banking world, and … of EURIBOR in particular". The judge did not elaborate on the nature or source of "the proper basis for the submission of rates" beyond what was said in his directions quoted at para 211 above. Those directions included a reference to the Code in point (iv) and to the law of England and Wales in point (v). But the source of what the jury was told that a submitter "must" do or "is not entitled" to do was otherwise left undefined.

230. Given the broad and vague way in which "the proper basis for submissions" was explained to the jury, there was little difference between the allegation that a defendant had deliberately disregarded the proper basis for submissions and the allegation that a defendant acted dishonestly. That was indeed what counsel for the SFO submitted. For example, near the start of his closing speech (Day 30, p 72), he identified the issues for the jury in this way:

> "What are these two issues which are fundamental to the outcome of your deliberation? (1) whether a defendant decided to deliberately disregard the proper basis for making submissions and (2) if so, whether that was done dishonestly. You have the message loud and clear. We all know that those two issues are right at the heart of things for you in this case.
>
> We further suggest to you that if you find a defendant was in a conspiracy to deliberately disregard the proper basis, it's a short step from there to find that person acted dishonestly. So they are two separate issues for you. But how could there be a deliberate yet honest disregard of the proper basis?"

231. Nothing in the judge's directions was calculated to dispel the impression that these two issues were little different from each other and that in each case the jury was being

asked to identify an unwritten standard of conduct (what was proper or honest) and decide whether the defendant had agreed to something which to their knowledge violated that standard. This was a significant flaw in how the jury was directed. It came close to removing from them the question whether the defendant was a party to a fraudulent misrepresentation as a separate issue to be decided and collapsing it into the issue of dishonesty.

232. Another significant flaw lay in the final direction given about what "the proper basis for the submission of EURIBOR rates" involved. I have referred to the direction at point (iv) that, for a submitter to take commercial interests into account in putting forward a EURIBOR submission, "would be to act in a way that was contrary to the EURIBOR Code of Conduct". The jury was then told at point (v) that "this was the law of England and Wales during the period covered by the Indictment, and indeed has always been so", although it was "set out by the Court of Appeal for the first time in January 2018". (January 2018 was when the Court of Appeal decided *R v B*, affirming Judge Gledhill's ruling on the Belgian law question.) A direction that conduct was against the law of England and Wales would naturally be understood to refer to the criminal law. Thus, the jury was given the impression that a submitter who took into account commercial interests in putting forward a EURIBOR submission was breaking the criminal law of England and Wales, albeit that the courts had not yet given a ruling to that effect at the time. That was a false impression. The true position was that such conduct amounted only to a breach by the panel bank which submitted the rate of the Belgian law of contract.

233. This inaccurate direction was prejudicial to Mr Palombo because it exaggerated the gravity of his alleged actions in trying to advance his own or Barclays' commercial interests in his communications with the individuals responsible for putting forward the bank's EURIBOR submissions. The jury was given the impression that such conduct of itself involved trying to influence submitters to break the criminal law, when in truth all that the Court of Appeal had decided in January 2018 was that taking into account commercial interests would be a breach of Barclays' contractual obligations under its contract with the Belgian entities that administered EURIBOR.

(16) Conclusion on Mr Palombo's appeal

234. When the flaws in the directions given at Mr Palombo's trial are considered in combination, it cannot safely be assumed that, without them, the jury would still have been bound to convict Mr Palombo. Thus, his conviction also cannot stand.

V. CONCLUSION

235. For the reasons given in this judgment, I would answer both limbs of the certified question in the negative, allow both appeals, and quash the appellants' convictions.

ANNEX

Extracts from the judge's legal directions to the jury at Mr Hayes' trial

"<u>The Definition of LIBOR</u>

7. You know the definition which appears in RB/C/1 as *The rate at which an Individual Contributor Panel Bank could borrow funds were it to do so by asking for and then accepting inter-bank offers in reasonable market size just prior to 11.00 London Time*. The question to be answered was: *At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11.00 am?* It is clear, and courts have so decided as a matter of law, that this means that the Panel Bank, when making a submission to Reuters, must make a genuine honest assessment of the rate at which it could borrow funds on the day in question, without reference to its own perceived commercial advantage. In making its LIBOR submission, a Panel Bank is not free to let its submission be influenced at all by consideration of how the bank may be advantaged in its own trading. Obviously, if the bank is not actually borrowing funds at about that time in the tenor in question - whether for 1, 3 or 6 months, it will have to use information available to it to make an honest assessment of the rate at which it could borrow such funds. It is undisputed that such information may include the rates at which the bank borrowed for other lengths of time or in other currencies from banks in the London market or elsewhere, similar rates at which it borrowed from customers which were not banks, rates at which it borrowed the day before or when it last borrowed, its own credit rating, the rate at which it lends to other banks, currency exchange and currency swaps, the rates at which derivatives trade and the like. It must however be an honest assessment of its borrowing rate, and not one which takes into account its trading advantage or is simply a figure designed to look as though it is such an honest estimate when it is in fact a figure designed to secure a trading advantage for a derivative trader.

8. As a matter of law, the courts have decided, and I direct you that:

   (i) First, a bank, when submitting a LIBOR rate, must put forward its own genuine honest assessment of the rate at which it could borrow in the currency and tenor in question.

The submission made must be the bank's genuine opinion as to that rate, whether the conclusion is reached by the submitter after discussion and collective assessment or not.

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

(iii) Third, a bank is not entitled to take into account that which would or might advance its own commercial interests at all in putting forward its LIBOR submission. It is the borrowing rate which is to be the subject of the submission and not any perceived trading advantage of the submitting bank or any other bank or person. To take such commercial matters into account would be to act in a way that was contrary to the LIBOR definition. To answer the LIBOR question by taking into account such commercial interests of a bank would be to bring in factors which should play no part when assessing the rate at which it could borrow.

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

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

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

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

10. Therefore,

(i) an agreement between individuals to seek to move a bank's submission to such a different figure for that reason would be an agreement to make or procure a submission contrary to the LIBOR definition;

(ii) an agreement between individuals to put in a submission or procure a submission which took into account a perceived trading advantage, even if the figure did not differ from the figure which would otherwise have been submitted, would also be an agreement to make or procure a submission contrary to the LIBOR definition, because that factor should not be taken into account at all.

11. The question for you therefore is whether Mr Hayes dishonestly agreed with others to seek to procure that UBS, Citi or other banks should make submissions which were not, in accordance with the LIBOR definition, their honest true assessment of their borrowing rate or rates but a rate or rates designed to secure a trading advantage for himself or his bank. … There are two elements to consider. First there must be an agreement or, as the Prosecution allege here, several such agreements. Secondly there must be dishonesty in making such an agreement or agreements.

12. As to the need for an agreement, I have already given you some directions about conspiracy generally and the absence of any need for any formality in any such agreement which can be made orally, face to face, on the phone or by messaging of any kind. It is clear and undisputed that Mr Hayes asked submitters at UBS, and the trader submitter at Deutsche to put forward rates intended to advantage his trading and that he asked traders at other banks such as JP Morgan Chase, RBS and HSBC, as well as at UBS and Citi, to ask their submitters to do the same, whilst asking brokers to make similar requests of other bank representatives (traders, submitters or trader/submitters) or to influence their opinions in other ways with broker run-throughs, recommendations, suggestions or spoof offers or bids. He asked them to take account of his and his employers' commercial interests by putting in rates which would advantage his trading. …

13. "*Dishonesty*" is a key element in the commission of fraud and it is the element on which much attention has been focussed throughout and in Counsels' closing speeches. It is the central issue in the trial.

    (i) In order for you to be sure of Mr Hayes' guilt you need to be sure that he was acting dishonestly and that means that you have two questions to resolve:

        (a) First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated if different; not by the standards of his employers or colleagues if different; not by the standards of bankers or brokers in that market if different, even if many or even all regarded it as acceptable; nor by the standards of the BBA or the FXMMC; but by the standards of reasonable, honest members of society. There are no different standards which apply to any particular group of society - whether as a result of market ethos or practice. You must form your own judgment as to what those standards are, in the light of all the arguments that have been put before you about such standards. If what he agreed to do was not dishonest by those standards, the prosecution fails.

(b) Second, must Mr Hayes have realised that what he agreed to do would be regarded as dishonest by those standards? It is dishonest for a person to act in a way which he knows ordinary reasonable and honest people consider to be dishonest even if he thinks he is justified 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.

(c) In deciding this you must consider Mr Hayes' state of mind at the time of the events in question. If after taking into account all the evidence you are sure that the answer to both of these questions is Yes, then the element of dishonesty is proved. If you are not sure of that, the element of dishonesty is not proved and Mr Hayes is not guilty of the offences charged.

(ii) Mr Hayes maintains that what he did was not dishonest by the ordinary standards of reasonable and honest people. That is a matter for you to judge by the standards of reasonable and honest people, as I have already said.

(iii) Mr Hayes also contends that he did not realise that what he was doing would be considered by honest and reasonable people as dishonest because he says that:

(a) He was never trained in the LIBOR process and in particular what was and was not a legitimate consideration for a submitter to take into account in making a LIBOR submission.

(b) He had no regulatory or compliance obligations imposed on him by either UBS or Citi when he was employed by them.

(c) He saw that other banks answered the LIBOR question in a manner favourable to their own commercial trading interests.

(d) He perceived that the activity of Panel Banks in making LIBOR submissions gave rise to an inherent conflict of interest as the banks would always have a commercial incentive to make submissions which inured to their commercial advantage.

(e) He considered that what he was doing was common practice in the banking industry at the time and it was regarded as legitimate by a significant number of submitters, traders and brokers, understanding that banks as a matter of practice based submissions on their own commercial interests.

(f) He was aware that banks were involved in the practice of 'lowballing'.

(g) What he was doing was not only condoned but encouraged by his employers and he was instructed to act in the way he did.

(h) There was a range of potential answers to the LIBOR question which could be justified as a subjective judgment of the Panel Bank's borrowing rate and Mr Hayes did not personally realise that the selection of any figure within that range by reference to a trader's or bank's trading advantage, even though it did not accord with the LIBOR definition nor properly answer the LIBOR question, was dishonest by the standards of ordinary reasonable and honest people.

14. It is a matter for you whether or not any of [the] facts or matters put forward in these contentions are true (or any which underlie

them) and whether or not you consider such issues are of any relevance to, or help you with, the question whether Mr Hayes must have realised that what he was doing was dishonest by the ordinary standards of reasonable honest people, if he did what the Prosecution say he did. It is for you to apply the two tests for dishonesty that I have set out.

15. So, before you can convict Mr Hayes on any Count you must be sure:

    (i) First, that there was in fact an agreement between Mr Hayes and one or more of the people referred to in that Count to procure the making of such false or misleading submissions by the Panel Banks, as referred to in that particular Count. You do not need to be sure that there was an agreement with all of the people referred to in that Count, but there must be an agreement between Mr Hayes and at least one such other person referred to in that Count, to that effect.

    (ii) Second, that at the time of the agreement he and that other intended that the Panel Bank in question should put forward a false or misleading submission of a rate which did not truly reflect its view of the rate at which it could borrow but took account of Mr Hayes' commercial interests and was a rate designed to help Mr Hayes' trading.

…

21. Let us now look at the Particulars of the Counts and we need only look at Count 1 since the others follow the same form. The Prosecution allege that Mr Hayes conspired with, that is reached an agreement with other people to defraud, inasmuch as [they]:

    (i) Knowing or believing that UBS, through the trading activity of Tom Hayes and others, was a party to trading referenced to ... Yen LIBOR

        (a) This speaks for itself.

(b) It is undisputed that Mr Hayes and all those named knew or believed that Mr Hayes was trading, in the name of UBS, in transactions which depended on the rate at which LIBOR was published and that his trading profit depended on the way in which LIBOR moved - up or down.

(ii) They dishonestly agreed to procure or make submissions of rates by UBS, a Panel Bank, into the Yen LIBOR setting process which were false or misleading in that they:

(a) were intended to create an advantage to the trading of Tom Hayes and others; and

(b) deliberately disregarded the proper basis for the submission of those rates,

thereby intending to prejudice the economic interests of others

(iii) This requires a little more explanation.

22. This is saying that:

(i) They agreed that UBS (or the Panel Bank in question in the other counts) should make submissions of rates to Thomson Reuters (ie into the LIBOR setting process) which were intended and designed to benefit Mr Hayes' trading and did not represent a genuine assessment of the true rate at which UBS could borrow funds at 11 am on the day in question, contrary to the LIBOR definition requirements.

(ii) They did so dishonestly knowing that the rate that they agreed should be put forward was not a genuine proper assessment of the borrowing rate, but a rate which was designed to help Mr Hayes' trading position and profits.

(iii) They did so intending that the other parties to Mr Hayes' trading would lose as Mr Hayes gained, which was an inevitable result if the overall published LIBOR rate moved in such a way as to increase his profits, or diminish his losses on any one transaction or series of transactions. If he profited and made gains on individual transactions or lost less than he otherwise would have, because of a different LIBOR rate, the other parties to those trades would inevitably lose money on them that they would otherwise have made, or more money than they would otherwise have lost, as the expert evidence, which was undisputed, made clear.

23. The other Counts follow the same format but involve different people in the agreement in question to procure the making of false or misleading submissions by different Panel Banks."