Neutral Citation Number: [2020] EWCA Crim 1662

Case No: 201901564 B3, 201901565 B3,
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT SOUTHWARK
HHJ Gledhill QC
T20167024 & T20167025

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE CUTTS DBE
and
SIR NICHOLAS BLAKE

- -

Between:

Colin BERMINGHAM	**1st Appellant**
Carlo PALOMBO	**2nd Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Andrew Thomas Q.C. (instructed by **Adkirk Law**) for the **1st Appellant**
Mr Tim Owen Q.C. & Ms Katherine Hardcastle (instructed by **Hodge, Jones & Allen Solicitors**) for the **2nd Appellant**
Mr James Waddington Q.C. & Ms Emma Deacon Q.C. (instructed by the **Serious Fraud Office**) for the **Respondent**

Hearing dates: 28th & 29th October 2020

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Approved Judgment

Lord Justice Fulford:

This is the judgment of the court to which all members have contributed.

Introduction

1. On 26 and 28 March 2019, respectively, in the Crown Court at Southwark (Judge Gledhill Q.C.), the applicants Palombo and Bermingham were convicted following a re-trial (by a majority of 10 to 2) of a single count of conspiracy to defraud.

2. On 1 April 2019, Bermingham was sentenced to 5 years' imprisonment and Palombo was sentenced to 4 years' imprisonment.

3. On 3 March 2020, Bermingham was ordered to pay a contribution within two years towards the prosecution's costs in the sum of £300,000, pursuant to section 18 Prosecution of Offences Act 1985.

4. Philippe Moryoussef (an interest rates trader at Barclays Bank) was convicted in his absence at the conclusion of the first trial in June 2018 and sentenced to 8 years' imprisonment.

5. Christian Bittar (an interest rates trader at Deutsche Bank) changed his plea to guilty on 2 March 2018 following a ruling by this court (31 January 2018) on an interlocutory appeal against a ruling made in a preparatory hearing (*R v B (Bittar)* [2018] EWCA Crim 73). We return substantively to that decision later in this judgment. He was sentenced to 5 years and 4 months' imprisonment and ordered to pay a confiscation order in the sum of £2.5 million.

6. Bermingham applies for leave to appeal against conviction and sentence, these applications having been referred by this court at a directions hearing on 25 July 2019. Bermingham also applies for leave to appeal against an order to pay prosecution costs in the sum of £300,000, the application having subsequently been referred by the Registrar to be considered with the conviction and sentence applications.

7. Palombo applies for an extension of time (50 days) to apply for leave to appeal against conviction only, the applications having been referred at the same directions hearing. The application for an extension of time is essentially founded on the proposition that it was considered desirable to synchronise Palombo's grounds of appeal with those submitted by Bermingham and there was a delay in Palombo's representatives being furnished with a copy of Bermingham's grounds. There was an additional delay while instructions were taken from Palombo in prison. We have considerable reservations – if advanced as a general proposition – that a breach of the time limits can be justified, as here, in order to "synchronise" the grounds of appeal between applicants. However, in the markedly complex circumstances of the present case we are persuaded that this explanation provides a sufficient basis for extending time and we grant the application. It has been necessary to ensure coherence in the presentation of the highly detailed submissions on the various and complicated issues arising in this case which otherwise may have been missing. We stress,

however, the exceptional nature of the present case and in less complex circumstances this explanation may well be insufficient to justify a failure to lodge an application for leave to appeal in time.

Overview of the case

8. This trial concerned the alleged manipulation of the 'Euribor' ('Euro Interbank Offered Rate') benchmark interest rate between 1 January 2005 and 31 December 2009, in order to benefit the trading positions of interest rate derivate ("swaps") traders, in deliberate disregard of the proper basis for setting the daily Euribor rate. Euribor was devised at the time of the creation of the Euro in 1999. Euribor was principally devised by the European Banking Federation ('EBF'), representing national banks and the Financial Markets Association ('ACI'), on behalf of European banks. Euribor – EBF and Euribor – ACI were established under Belgian law to supervise the operation of the Euribor. Its purpose was to provide participants in euro denominated transactions with a new benchmark interest rate for interbank lending in that currency comparable to those found in many money markets. Euribor is defined as the rate at which euro interbank term deposits are being offered within the eurozone by one prime bank to another. Interbank lending rates vary according to the period of the loan (known as the tenor) and it is therefore quoted at a range of rates varying from one week to one year. It is commonly designated as the reference rate for interest rate swaps or other derivative transactions. Euro interest rate derivatives contracts contain payment terms which are referenced to the Euribor benchmark rate. The traders regularly hold trades with notional amounts worth billions of euros, such that a very small movement in the Euribor rate can yield large profits on their deals. In such trades, a gain to one party to the trade will result in a corresponding loss to the other party.

9. The Euribor rate was based on trimmed and averaged estimates. Each business day, just prior to 11 a.m. Central European Time ("CET"), submitters at each panel bank (up to 48 banks) would submit their assessment, to the best of their knowledge, of the rate at which Euro interbank term deposits were being offered within the EMU zone by one prime bank to another at 11 a.m. CET ("the best price between the best banks"). The highest and lowest 15% of the submissions were eliminated and trimmed from the calculation of the rate. The remaining submissions were averaged and rounded to three decimal places, producing the daily rate which was then published by Thomson Reuters. No panel bank was permitted to see any other panel bank's submission during the relevant window before 11 a.m.

10. Until June 2008 the Euribor setting process was governed by the 1999 Euribor Code of Conduct, and thereafter it was governed by the 2008 Code of Conduct. The Euribor Code was a contract governed by Belgian Law and made between Euribor-EBF and the participating banks.

11. The investigation in this case was principally focussed on individuals employed by Barclays Bank, Deutsche Bank and Société Générale. The prosecution's case of fraud was, in essence, that the submissions into the Euribor setting process were procured and made dishonestly, with the intention of creating an advantage to the trading positions of the derivatives traders,

and in deliberate disregard of the proper basis for setting the daily Euribor rate according to the Euribor Code of Conduct. It was alleged, therefore, that these submissions were false or misleading, and as a result the economic interests of the counterparties were prejudiced. In addition, any manipulation of the Euribor rate had the potential to have an impact on other financial products throughout the world that were referenced to it, including interest rate swaps taken out by large corporations, insurance or pension companies and others. In 2014, the estimated value in US dollars of financial products referenced to Euribor was in excess of $150 trillion.

12. The conspiracy was said to have three essential aspects, which came under the following headings:

    - **Interbank**
      The first central allegation was that traders in different banks liaised with each other to arrange for their cash desks to make submissions on a concerted basis with a view to achieving a rate that benefitted the various banks' economic positions. The prosecution accepted that, unlike Palombo, there was no evidence that Bermingham or Bohart had any knowledge of the Interbank aspect of the conspiracy.

    - **Intrabank**
      The second critical assertion was that traders at Barclays Bank including Palombo made requests of their cash desk for a higher or lower submission to benefit the bank's economic position. This criminality was said to have involved Bermingham and Bohart.

    - **Cash-pushing**
      The third limb was the prosecution's allegation that Bermingham and Bohart (but not Palombo) agreed to make bids and/or transactions in the market in order to manipulate the actual market price.

13. The prosecution case against Bermingham, therefore, was that he was involved in the Intrabank conspiracy, in that he received and acted upon a number of requests from traders on the Barclays swaps desk. It was alleged he accommodated those requests by adjusting the submissions higher or lower, knowing that this was designed to give a trading advantage to the swaps traders. In his case, there were 15 occasions during the indictment period when communications showed requests being made to, and acknowledged by, Bermingham. He was employed by Barclays at the relevant time as the senior manager on the Euro money markets desk (the "cash desk"), and he was a senior, long-standing, influential figure at the bank. He supervised Bohart, a junior employee, throughout her period on the money markets desk. He accepted that he would sometimes be aware that Bohart received similar requests and that she would have followed his lead in accommodating them. The allegations of cash-pushing against him were that on three occasions he discussed bids to manipulate the market.

14. The prosecution case against Palombo was that he was mainly involved in the Intrabank aspect of the conspiracy, making requests of the Barclays cash desk for a higher or lower

submission to benefit the bank's economic position. In addition, the prosecution alleged that on two occasions, Palombo was involved in the Interbank aspect of the conspiracy when he asked traders at other banks to request a particular rate.

15. As to the central evidence relied on by the prosecution, Christian Bittar's guilty plea to the indictment and Philippe Moryoussef's conviction proved the existence of the conspiracy. The Crown introduced the archived communications recovered from Barclays Bank and other panel banks relating to Euribor submissions during the indictment period to establish the criminal activities of the applicants. These included the audio and written electronic communications which had been recorded for compliance purposes, including emails, Bloomberg electronic messages, transcripts of telephone and intercom calls, the individual submissions and the published Euribor rates. Expert evidence was called to deal with the history, definition and setting of the daily Euribor rate and an explanation of the products on which it was used. Additionally, the jury were provided with an explanation of the basic workings of an investment bank, including derivatives trading and the trading strategies that featured in this case. Similarly, expert evidence addressed the Euribor Code of Conduct which was directed at the conduct of panel banks.

16. Bermingham denied being party to any dishonest agreement with the Barclays' derivatives desk (or any trader working on it) to manipulate the Euribor rate. He maintained he was unaware of any agreements between Barclays' traders and traders at other panel banks to co-ordinate the Euribor submissions. He accepted he had received the 15 requests from the swaps traders relied on by the prosecution and that he might have taken them into account in choosing which figure to submit, whether higher or lower, but he said he had never submitted a figure which was outside the range of valid figures. He considered his figures (and those of Bohart) to be honest and true to the Euribor definition and justified by the rates on offer in the market. His case was that there was no guidance or published methodology. He suggested no one could remember when the practice of making requests of the kind relied on in this case began. He maintained it was not considered an issue at the time, and the activity took place openly and with the knowledge of senior management.

17. It was emphasised that Bermingham did not stand to gain anything directly or indirectly from accommodating the traders' requests, albeit he accepted that he knew it would give a commercial advantage to Barclays Bank. He agreed to accommodate these requests because he believed that it was appropriate to assist colleagues within the bank when he was able to do so. He denied the cash-pushing allegations and suggested there was no evidence that any suspicious transactions occurred on the relevant occasions or that any inappropriate bids had in fact been made.

18. Palombo accepted a degree of involvement in seeking to influence Barclays' Euribor submissions on particular dates. He denied, first, that he had been part of any conspiracy; second, that he had attempted to procure submissions that were false or misleading; or, third, that there was any element of dishonesty in his actions. He had not worked in banking prior to joining Barclays as a graduate trainee. He suggested he received no specific training on applying the Euribor Code. He was told instead to learn on the job, particularly from

Moryoussef when he was assigned to work with him. It transpired that the cash desk might arrive at more than one figure which could be the 'proper basis' for a submission. If there was a range of figures, it was considered honest for the cash desk to submit any of the figures that fell within the definition. It was suggested the entire Euro swaps desk worked on this basis and if a member of the desk wanted a higher or lower submission, a request would be made of the cash desk on the basis that the figure was within the legitimate range. The practice was openly discussed and conducted without subterfuge. Whilst he accepted his role in the requests made to the cash desk, he was unaware of the interbank nature of Moryoussef's dealings, and if he (Palombo) was said to be involved to any extent, it was as a proxy for Moryoussef. He accepted that on two occasions he had asked traders at other banks to request a particular rate. This was done at the specific direction of Moryoussef on days when the latter was not present, and when he had to deal with considerable responsibilities which caused him significant anxiety. Consequently, he gave no thought to the directions but simply carried them out as instructed, along with many other tasks.

19. Against that background, the central issues for the jury were, looking at each defendant separately: a) was he or she knowingly involved in a conspiracy deliberately to disregard the proper basis for making Euribor submissions, and b) if so, was he or she dishonest?

The Grounds of Appeal

Ground 1: the various jury issues (both applicants)

Submissions

20. The jury retired on the morning of Friday 15 March 2019, and continued their deliberations on 18 and 19 March 2019, but not 20, 21 or 22 March 2019 for reasons which included juror illness.

21. On Monday 25 March 2019, having resumed their discussions, at 12.30 pm the jury sent the judge a note:

> "Your Honour, we are at a unanimous decision on one defendant, we have a majority for another defendant + are at an impasse for the remaining defendant. Could you please advise how you would like us to proceed?"

22. Verdicts were not taken at that stage, but a majority direction was given at 12.57 pm, after which deliberations continued during the afternoon.

23. On Tuesday 26 March 2019, the jury went back into retirement. The judge decided he would take any verdicts that had been reached at 4.10 pm before adjourning for the evening. Palombo was convicted by a majority of 10 to 2 and Bohart acquitted. The jury indicated that they had not reached a verdict in respect of Bermingham.

24. The jury were then sent home. They did not deliberate on Wednesday 27 March 2019 because a juror was unwell.

25. On Thursday 28 March 2019 the jury went back into retirement. At 11.00 am they sent a note to the judge as follows:

    > "Your Honour, we are currently at an impasse whilst deliberating Mr Bermingham. This situation has not changed since of [sic] first note to you on Monday. We feel that this is unlikely to change. Please advise how you would like to continue."

26. The judge discussed the note with counsel. The judge raised whether a *Watson* direction was appropriate but agreed not to follow this course. In due course he directed the jury as follows:

    > "Members of the jury, thank you very much for your note which I have read with care. I'm not going to read it out, you will all be aware of what the note says. It asks for advice as to how you should continue. I'm going to ask you to retire again and continue to try and reach a verdict firstly on which you are all agreed and, if you can't do that, on which at least ten of you are agreed. However, if the time comes when you can't do that, please send me another note. Thank you very much."

27. The jury continued their deliberations at 11.14 am. They returned at 13.07 and convicted Bermingham by a majority of 10:2.

28. The following day, Friday 29 March 2019, one of the jurors ('M1') returned to the court building and asked to speak with the judge to raise certain concerns. He was asked to express these in a letter. M1 prepared and provided two documents.

    The first:

    > "Dear [Judge],
    > I was a juror on the trial of Messrs Palombo and Bermingham and Miss Bohart. I would like to speak to you to discuss a potential breach of the rules by another juror ["Juror A"].
    > I deeply regret not bringing it to your attention whilst the trial was still in progress, and so have come in today to try and make amends. I sincerely apologise and ask for your understanding. Please see the attached note for the details.
    > Yours sincerely
    > [M1]"

    The second:

    > "Details
    > On the morning of Thursday 28th March, after we had delivered the verdicts on Mr Palombo and Miss Bohart, we returned to the jury room to discuss the case of Mr Bermingham. At this point [Juror A], in open discussion, brought up the following facts:
    >
    > 1) The sentences handed out to Mr Bittar and Mr Moryoussef, and the fact that Mr Moryoussef was convicted in absentia, and remains at large.

> 2) That Barclays Bank received a considerable fine for 'rate rigging'.
> 3) That UBS Bank were alleged to have set up a spreadsheet specifically to expedite the process of submitting rates that suited their position.
>
> None of these facts were presented in evidence during the trial. It is possible that [Juror A] concerned knew these things before the trial started, however either way I do not believe that it was proper to introduce them into the discussion.
> [M1]"

29. The judge immediately replied via a member of staff:

> "The Judge has read your letter and its attachment and is considering what, if any, action is required. It may be that you will be contacted about the matter in the future. In the meantime, as the deliberations of a jury are absolutely confidential, it is very important that you do not discuss the content of the letter and attachment with anyone, including even with members of the jury in this case."

30. An investigation into the juror's conduct was undertaken by the Metropolitan Police at the request of the Registrar of Criminal Appeals. All the members of the jury were asked about what had occurred in the context of the suggested internet research during the trial.

31. In his statement to the Metropolitan Police, M1 alleged that on the morning of 28 March 2019, Juror A introduced the following three pieces of information during their discussions:

> "a) The sentences handed out to Mr Bitter and Mr Moryoussef and the fact Mr Moryoussef was convicted in his absence and remains at large.
> b) Barclay were given a considerable fine, for 'rate rigging'.
> c) That UBS bank were alleged to have set up a spreadsheet specifically to expedite the process of submitting rates that suited their position."

32. It would appear that b) in the preceding paragraph related to the findings of the Financial Services Authority in its combined report ("Final Notice") on Libor and Euribor which was published on 27 June 2012 and which resulted in a penalty of £59.5 million.

33. MI stated "*At the time it was not obvious to me these comments had any bearing on the decision of the jurors to change their mind and break the deadlock"* and contradicting part of what he had written to the judge as set out above [28] (*viz.* "*It is possible that the juror concerned knew these facts before the trial started …*"), he added "*In my opinion the only way* [Juror A] *would know these facts is if he researched the case while he was serving on the jury"*.

34. Juror A explained in his statement to the police that M1 had been very opinionated, irrational and, at times, aggressive throughout the trial (an assessment that was to a significant extent supported by other jurors), and M1 appeared to have taken a dislike to him (*viz.* Juror A). Juror A denied the allegations. He suggested:

> "At no point throughout my time on the Jury did I research the case, all the information I had was from what the court gave to us and my financial knowledge. The terminology and information I informed the rest of the jury of came from my background knowledge and not from any research. I am around this language and information in my day to day role."

35. Save for M1, the consistent indication from the jurors when they were interviewed by the police was that nothing was said, at any stage, that tended to indicate one of their number had carried out any independent research into the case. Furthermore, their accounts made it clear that activity of this kind would have been reported immediately to the judge if it had occurred. Against this background, the officer with oversight of the investigation concluded that there was no evidence that Juror A had conducted his own enquiries and given he worked in the financial sector, there was a reasonable explanation for his "enhanced knowledge".

36. The conclusion of the investigation, therefore, was that there was no evidence that any of the jurors, and particularly Juror A, had conducted their own research and the police were satisfied that reasonable lines of enquiry had been completed and there was no evidence of any offence having been committed.

37. As set out above, the focus of the investigation was into internet research. However, as part of the information provided to the Metropolitan Police, Juror A indicated he had asked to be excused at the beginning of the trial. He explained what occurred in his statement as follows:

> "At the beginning of the trial we were given a conflict of interest form, I ticked many of the boxes on this form and specifically asked the judge not to be on the trial. My reasons were, I had worked at UBS and with certain Brokers who I had an affiliation with. The judge did not dismiss me from the case, saying the dates I had worked in the industry did not correspond with the dates of the case."

38. Against that background, under this ground of appeal, both applicants suggest that the conviction are unsafe on the basis of two principal contentions.

39. The first contention relates to the suggested misconduct during the trial, namely the extraneous information allegedly researched by or known to Juror A and provided to the other jurors before Bermingham was convicted.

40. The second contention involves the suggestion that the verdict is vitiated on account of apparent bias on the part of Juror A. In this regard, it is argued there is an appearance of bias because the juror had worked for one of the banks implicated in the Euribor investigation (UBS) and – in part referring back to the first contention – he is said to have shared specialist knowledge of the relevant financial markets during the jury's deliberations. The judge is criticised for having not informed counsel about Juror A's previous employment and for failing either to reveal the dates of his employment at UBS and the role/roles in

which he worked or to investigate the extent of the juror's knowledge of the markets, the training he received and the extent of his knowledge of "Libor" and/or "Euribor".

41. It is emphasised that the judge would not necessarily have had in mind that in the preceding decade the questionable activities of traders at a number of banks had been put "under the spotlight". For instance, Jay Merchant, a former US dollar interest rate derivatives/swaps trader at Barclays Bank, who later worked at UBS, was convicted on 29 June 2016 in the Crown Court at Southwark of conspiracy to defraud in respect of fixing the Libor rate for the US dollar whilst at Barclays to advantage the bank's trades. Similarly, on 3 August 2015 in the Crown Court at Southwark, Tom Hayes, a Tokyo-based trader at UBS and Citigroup, was convicted of eight counts of conspiracy between 2006 – 2010 to defraud in relation to the manipulation of the Japanese Yen London Interbank Offered Rate (the Yen Libor). UBS had itself faced disciplinary proceedings and on 19 December 2012 it agreed to pay regulators in various countries $1.5 billion for its role in the Libor scandal. The investigations revealed that UBS traders had colluded with other panel banks and had made multiple written requests for movements in rates from at least January 2005 to at least June 2010 to benefit the bank's trading positions. It is suggested that Juror A may have had some detailed knowledge of, or have been involved in, these events which bore material similarities to the present allegations.

42. On this basis, it is suggested that Juror A's position on the jury created a real possibility of bias or a conflict of interest. We are reminded particularly that he is said to have shared specialist information on the morning that the jury overcame their apparent deadlock and Bermingham was convicted. On the basis that "appearance is everything" in this context, it is submitted that the test for bias is met, in that a fair-minded and informed observer would have concluded that there was a real possibility of unconscious bias. In this regard the applicants rely on the following observation of Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon and Others* [1969] 1 QB 577 at 599:

> "[…] The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. [...] Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough […]"

(The applicants rely also on *Porter v Magill* [2001] UKHL 67; 2002 AC 357 and *R v Abdroikov* ([2007] UKHL 37; [2008] 1 Cr App R 21, as summarised in the latter headnote, "[…] *justice was not seen to be done if, on the particular facts of a case, a fair-minded and informed observer would conclude that there was a real possibility of jury bias, whether conscious or unconscious* […]")

43. It is emphasised, finally, that the decision to convict Bermingham was "*exceptionally finely balanced*".

Discussion

44. Addressing the first contention, namely the suggested misconduct during the trial by way of internet research on the part of Juror A, the starting point in our view is the decision in *R. v Baybasin and others* [2013] EWCA Crim 2357; [2014] 1 Cr App R 19 in which Lord Thomas C.J. stated in the context of a case involving alleged juror impropriety and irregularity:

> "60. We would add that great care has to be exercised before this kind of appeal proceeds. In *R v Lewis* [2013] EWCA Crim 776, this Court observed at [25] that the inference that complaints after verdicts simply represent a protest by a juror at verdicts with which he or she disagrees are likely to be overwhelming.
>
> […]
>
> 62. […] the fact that complaint of irregularity was first made after the verdict should henceforth be a very firm indication against the initiation of any inquiry into the way the jury acted, absent other compelling evidence. Juries are now told in very clear terms to report irregularities during the trial. The evidence from this and other cases demonstrates that juries take their responsibilities with great seriousness and care, as one would expect of citizens called to perform such a high civic duty. The evidence is that they do report irregularities if they occur.
>
> 63. We therefore have little doubt that if one of the jurors during the trial falls below the standards expected of a juror, the other jurors will report that to the judge during the trial and before the verdict. That is the presumption upon which this court should act, if the complaint is first made after the taking of the verdict. Inquiries should therefore not be ordered in such cases and the finality of the verdict accepted, absent other strong and compelling evidence. To do otherwise is neither fair nor just. Jurors doing their public duty should not in such circumstances be put through an examination of their conduct some considerable time after the performance of their civic duties."

45. This complaint by M1 was only made after the final relevant verdict, that relating to Bermingham, had been delivered. There is evidence that M1 was markedly dissatisfied with the result, in that the police investigation tends to indicate he left the court after the jury had been discharged in a rage. On the basis of the police report, there is no strong or compelling evidence that there had been any irregularity of the kind alleged, in that it is M1 alone who suggests the possibility that this information was provided by Juror A, gathered, as M1 averred, from internet researches and shared with other members of the jury. As set out above (see [33]), MI contradicted himself as to the source of this suggested material when he conceded "*it is possible that [Juror A]* […] *knew these things before the trial started*". Aside from M1, the other members of the jury generally reported that they were keenly aware of their duty to report any untoward behaviour to the judge and that none occurred. Juror E, for instance, stated to the Metropolitan Police, "*During my time serving on the jury I* (heard) *nothing that suggested any of the other jury members had been conducting their own research during the trial. If I had suspected this to be the case or* (heard) *anything of this*

nature I would have immediately told the court". That, as it seems to us, is determinative of this aspect of the argument. There is no prima facie evidence that Juror A behaved inappropriately either by conducting internet searches or sharing information that went beyond his professional experience or general knowledge. There is, therefore, no strong or compelling evidence that Juror A behaved improperly. There is no evidence, apart from what is said by M1, that he introduced the three pieces of information set out at [31] above.

46. We add that, in any event, the three pieces of information allegedly provided by Juror A (see [31]) would have had no material impact on the issues the jury needed to resolve. The prosecution had introduced Christian Bittar's guilty plea and Philippe Moryoussef's conviction to prove the existence of the conspiracy. The £59.5 million fine imposed on Barclays by the Financial Services Authority for significant failings in relation to Libor and Euribor had been prominently in the press in 2012 and was not in any sense determinative of whether either applicant was knowingly involved in a conspiracy deliberately to disregard the proper basis for making Euribor submissions, and, if so, whether he had acted dishonestly. Finally, the defence of both applicants involved an acceptance that the Euribor rates were on occasion submitted to suit the bank, but it was averred this was considered an appropriate and honest step if the figure chosen was within "the range" of valid potential figures. Accordingly, a spreadsheet designed by UBS to expedite the process of submitting rates that suited the Bank's position was not necessarily inconsistent with the defence of either applicant.

47. We turn to the second contention, namely that there was an appearance of bias. The jury panel were asked, before the selection process began, to complete a questionnaire which included whether:

    a) they had booked and paid for a holiday during the relevant period (question 1).
    b) they were expected to be admitted to hospital as an inpatient during the next three months (question 2).
    c) they had caring responsibilities for dependant relatives or small children (question 3).
    d) any member of their immediate family for whom they would be expected to act as carer was to be admitted to hospital as an inpatient during the next three months (question 4).
    e) they were undergoing long term medical treatment (question 5).
    f) they or a member of their immediate families had ever worked for any of those named in a list of banks or interdealer brokers (including UBS) (question 6) and other organisations such as the Serious Fraud Office and Euribor-ACI and -EBF (question 8) (if the answer was "yes" to either question, they were asked to state in what capacity and when).
    g) they knew any of the people set out in a three-page list of named individuals (question 7).
    h) they or any of their immediate family had been professionally engaged on Euribor-related or Libor-related work (if the answer was "yes", they were asked to state in what capacity and when) (question 9).

i) they had recently taken an active interest in Euribor or Libor, such as by reading books or articles about it, or by looking it up on the internet (if the answer was yes, they were asked to state in what way and when) (question 10). and
j) they were a shareholder of Barclays Bank, Deutsche Bank or Société Générale during the period 2005-2009 (question 11).

48. As already set out (see [37]), in his witness statement to the Metropolitan Police, Juror A stated that he ticked many of the boxes on the questionnaire and asked the judge to excuse him from serving on the jury in this case. His reasons were that he had worked at UBS and with certain brokers with whom he had an affiliation. His account is that the judge did not accede to his request, simply stating that the dates he had worked in the industry did not correspond with the dates of the case.

49. The forms completed by the jury panel are usually not retained by the court service once the trial is completed and, as a consequence, at the hearing in this court there were no means of determining whether Juror A had raised additional concerns by answering "yes" to other questions on the form, as he indicated in his statement. The judge, furthermore, did not alert counsel to the fact a juror had stated he had been employed at a bank implicated in the criminality concerning the Euribor rate and that he knew "*certain brokers*". At the end of the hearing, we raised with the parties the question of whether it would be of assistance for further enquiries to be made of Juror A. The Crown supported this approach whilst the applicants primarily suggested the court should resolve the matter on the basis of the available material, highlighting that the trial concluded in March 2019 and that the juror may now be unable accurately to recollect how he answered all the questions.

50. We were of the view that in the exceptional circumstances of this case, there were persuasive reasons for approaching Juror A given he was highly likely to remember the detail of how he answered questions 6 to 11 on the questionnaire, as they related to important aspects of his professional life. Accordingly, at the conclusion of the hearing on 29 October 2020, we directed that the officer who had overseen the original questioning of the jury should contact Juror A and provide him with a copy of the questionnaire. He was to be asked how he answered the part of question 6 which requested, "*If yes, please state in what capacity and when*" (see [47]). This related to Juror A's employment at UBS. Similarly, he was asked whether he answered positively any of questions 7, 8, 9, 10 and 11 and if he did, the nature of his answers. We directed that the response was to be provided to the court if possible within 14 days, giving the parties the opportunity thereafter to file any written observations, including as to whether a further oral hearing was necessary.

51. Although ordinarily an investigation of this kind would be conducted by the Criminal Cases Review Commission, the matter having been referred by the court (see the Criminal Practice Directions 26M.57), given the earlier involvement of the Metropolitan Police and the fact that this query arose directly out of the statement the officer had taken from Juror A, it was in our view appropriate for the police to complete this exercise. These were supplemental questions arising out of a potentially important aspect of Juror A's statement to the officers. It would not have been in the interests of justice to ask another organisation to ask these follow up questions.

52. The answers to the questions were as follows:

i) **Question 6**: “Have you or any member of your immediate family (i.e. parents, siblings or children) ever worked for any of the following banks or interdealer brokers (a list was set out)?

Answer: “I would have answered that I worked at UBS AG.”

ii) **Question 6 (supplementary):** “If yes, please state in what capacity and when.”

Answer: “I would have answer that I completed a summer internship from July to August 2013. I would have said that I was in the rates and credit side of the bank as an intern. I do not believe I went into any massive detail on this form, however I was later called by the judge, where I think I explained a bit more detail.

Further information that may assist the court regarding my role and time spent at UBS.
I was a summer intern, which means you work on some small projects that people ask you to complete (nothing of any real value). I remember speaking to the judge about this and he mentioned that the dates did not cross, as well as some other points and allowed me to continue.

At UBS, I remember being tasked with a list of words, and I had to go around the business speaking to various people, in order to define each of them (I was not allowed to look them up). It was a task to try and build my knowledge as well as meet people. I later sat on the Hybrid Derivatives desk, and they tasked me with reading a textbook as well as building a cross currency credit default swap hedging model, to analyse the impacts of different hedging strategies.

As you can tell, these tasks are fairly meaningless and just to test/occupy the interns around the more ‘core’ structured training programmes run by UBS for all interns. Once the summer internship was complete, I went back to university, so it was just a couple of months at the banks.

iii) **Questions 7, 8, 9, 10 and 11:** (set out above)

Answer: (in each instance) “No”.

53. The applicants’ central submission, following receipt of Juror A’s answers, is that the “initial impression” created by the original information relating to the juror should not be discounted and that, for good reason, the relevant test focusses on the appearance of bias. The applicants rely on the dates of the juror’s employment, which coincided with Palombo’s time at Barclays Bank. Over this period, Tom Hayes was charged regarding events that occurred between 2006 – 2010; UBS traders attended interviews; and the bank received a £160 million regulatory fine. This was a period when UBS was, say the applicants, “in the eye of

the storm" in the national and the specialist press. It is suggested there was a procedural failure in that the judge did not discuss the contents of the questionnaire with counsel before Juror A was sworn. It is underscored that "rates and credit" involved the part of the bank in which the applicants worked. The suggested circumstances of the unfolding scandal consequential to the investigation into Libor and Euribor, together with the extent to which it affected UBS and various UBS employees, are set out in some considerable detail, including the contention that more than 40 individuals in UBS were involved. It is argued that there are significant inconsistencies between Juror A's original statement to the investigating officer and the answers he has now provided.

54. Following the further investigation by the Metropolitan Police, in our judgment this second contention is equally without foundation. We do not consider that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the juror was biased. He was an intern at UBS four years after the end of the indictment period and nearly 6 years before serving on the jury. He was there for only two months, and the scope of the internship was clearly superficial. He was not engaged in Euribor- or Libor-related work and he had not taken an active interest in either. He was involved in building a cross currency swap hedging model to analyse the impacts of different hedging strategies which has no bearing on the subject matter of this case. Credit default swaps in particular are not the same form of instrument as interest rate swaps, which the trial concerned. His tasks were fairly meaningless, as he described the position. He did not know any of the witnesses in the trial or anyone identified in the questionnaire, including Tom Hayes.

55. Jurors are not expected to be without any knowledge or experience of the criminal justice system or of the issues that arise in cases, as demonstrated by the opportunity since 2004 for police officers to sit as jurors (unless the credibility or reliability of police evidence is a central issue). Similarly, judges and lawyers, and others previously ineligible, now serve as jurors. As Lord Judge C.J. observed in *R v Thompson and others* [2010] EWCA (Crim) 1623; [2010] 2 Cr. App. R. 27, "5. […] *each juror brings to the decision-making process, his or her own experience of life and general knowledge of the way things work in the real world; that is part of the stock in trade of the jury process, and the combination of the experience of a randomly selected group of twelve individuals, exercising their civic responsibility as a collective body, provides an essential strength of the system*". Indeed, jurors with some understanding of banking practices and principles in a case of this kind will bring benefits to the deliberations of the jury. Instead, individuals should not sit on a jury if they have special knowledge either of the individuals involved or the facts of the case outwith the evidence presented during the trial. We emphasise that anyone working in the City of London or who followed the business media would have been aware of the Libor and Euribor scandal, and the ways in which the relevant offences were said to have been committed.

56. The applicants rely on *Ramin Pouladian-Kari* [2013] EWCA Crim 158, a case in which a conviction for an attempt to export prohibited or restricted goods contrary to section 68(2) Customs and Excise Management Act 1979 was quashed when a juror revealed that he had special knowledge and experience that was directly related to the issue which arose for decision in the trial. Globe J described the position thus:

> 84. […] The jury had to decide whether, in the circumstances, the defendant was entitled to act as he did or whether his actions were prohibited. In the juror's professional knowledge and experience, his unconscious prejudice was that there were "definite red signals" and there would be "automatic rejection" of the transaction such that the defendant's actions would have been prohibited. […]

57. On this basis, the court determined that "*a fair minded and informed observer would have concluded that there was a real possibility of unconscious jury bias such that a fair trial was not possible*" (see [85]). That is at significant remove from the present situation. As set out above, the issues here were whether the defendant under consideration was knowingly involved in a conspiracy deliberately to disregard the proper basis for making Euribor submissions, and, if so, whether he or she was dishonest. Nothing revealed by Juror A tended to indicate that he had any personal knowledge of whether such a conspiracy existed which involved the relevant individuals. Juror A disclosed he had worked at UBS, but not during the five-year indictment period and we emphasise there is no suggestion that he had any connection with any brokers who had any connection with this alleged criminality. UBS was not directly implicated in the Serious Fraud Office Euribor investigation and it did not feature in any significant way in the evidence. As the Crown observe, this particular investigation was principally focused on Barclays and Deutsche Bank and, to a lesser extent, the position of Société Générale was under consideration. Additionally, traders who had worked at Credit Agricole, HSBC France, JP Morgan, BNP Paribas and Citibank were said to be involved.

58. Accordingly, nothing revealed by Juror A prior to being sworn in, during the trial or in his statements to the Metropolitan Police revealed that he had special knowledge either of the individuals involved or the facts of the case. It follows we are unpersuaded that a fair minded and informed observer would have concluded that there was a real possibility of jury bias such that a fair trial was not possible (see *Porter v Magill*).

59. Juror A originally indicated that he had ticked many boxes on the questionnaire but when a copy was provided to him, he reconstructed the answers he gave during the jury selection process. It is unsurprising that he needed to see the form again to remember how he had filled it in. There is no basis for concluding that he has been unreliable or dishonest in his present statement.

60. This ground of appeal was arguable, given the matters raised by Juror A in his first statement to the police and by M1, and we grant leave to appeal on this limited basis. However, for the

reasons set out above, we do not consider the safety of the conviction of either applicant is undermined by the arguments analysed above. We dismiss this ground of appeal.

Postscript

61. By way of a postscript, we are of the view, first, that the matters raised by Juror A as to why he should not serve on this jury were paradigmatic of the circumstances when the judge should have discussed with counsel the significance of what had been revealed by a potential juror, in the absence of the panel and before the jury were sworn. This might add slightly to what is in any event something of a cumbersome exercise, but it will serve to ensure that the risk is avoided that the entire proceedings are vitiated because, for instance, unbeknown to the judge the prospective juror had special knowledge either of the individuals involved or the facts of the case. These remarks, we stress, do not apply to the answers to questions one to five which are strictly personal to the juror, and ordinarily the judge will be able to resolve them without seeking the assistance of counsel.

62. Second, whenever questionnaires are given to the jury panel, those completed by the individuals selected to serve (including any "shadow jurors") should be uploaded onto the relevant private section of DCS (they should not be shared with the parties without judicial approval) and retained at least until the completion of any appeal against conviction or the 28-day period for submitting grounds of appeal has expired. Otherwise, the handling of these forms should be governed by the applicable data retention policy.

Ground 2: the judge's direction on the "proper basis" for the Euribor submissions was wrong (both applicants)

Submissions

63. At a hearing on 22 September 2017 designated as a preparatory hearing before the commencement of the first trial, the judge ruled on the interpretation of Article 6 of the applicable Euribor Code. As set out above, his decision was the subject of an interlocutory appeal to the Court of Appeal (*R v Bittar* [2018] EWCA Crim 73) by Christian Bittar, one of Bermingham and Palombo's co-accused. The appeal was dismissed. Bermingham and Palombo were parties to the preparatory hearing. They agreed that the proper interpretation of Article 6 should be decided at that stage, and they did not seek to introduce any evidence in addition to that already before the judge. Neither applicant participated in the interlocutory appeal in *Bittar*, notwithstanding their entitlement to do so. The present arguments were raised for the first time in this appeal given the applicants did not suggest in either trial that the judge should revisit his original ruling.

64. It is argued before us that the judge's direction to the jury in the present trial, which applied the decision in *Bittar* as regards the "*proper basis*" for Euribor submissions, was wrong in law, and most particularly that the jury were incorrectly directed that a submitter is never entitled to take into account the commercial interests of the submitting bank. On this issue, the judge directed the jury that:

> "A submitter is not entitled to take into account that which would or might advance his or her own or another bank's commercial interests or those of a trader putting forward his or her Euribor submissions. 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 of his or her knowledge of the borrowing rate."

65. Furthermore, it is contended that the jury were left with a confused picture given the judge's directions were inconsistent with a part of the evidence of two witnesses called at trial, Guido Ravoet and Helmut Konrad (the jury, according to Mr Thomas Q.C. on behalf of Bermingham, were left in a "legal no man's land").

66. The hearing on the interlocutory appeal in *Bittar* lasted two days. This court upheld the judge's decision that under the provisions of Article 6 of the Euribor Code, as interpreted in accordance with the principles of Belgian law, the panel banks were prohibited from making submissions which were intended to create an advantage to the trading positions of one or more of the banks when setting the daily Euribor rate.

67. The Preface to the Code, in its 1999 version, sets out as follows:

> "The EURO Interbank Offered Rate – "EURIBOR" – is the new money market reference rate for the euro. This Code lays down the rules applicable to EURIBOR and the banks which will quote for the establishment of EURIBOR.
> EURIBOR is the rate at which euro interbank 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"). It is quoted for spot value (two Target days) and on actual/360 day basis."

68. By 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 interbank 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 (e.g. use EURIBOR as reference rate as much as possible) and refrain from any activity damageable to EURIBOR."

69. The judge decided that the common intention of the parties to the Code was clear from the Euribor definition, as set out in Article 6.1, and that the panel banks were not permitted to take into account their own trading advantage when submitting the daily rate. Each bank was to make an independent and genuine assessment of the rate submitted. Although there was a subjective element given this was the expression of an opinion, the rate was to be assessed objectively as the rate at which deposits were to be offered by one prime bank to another at the relevant time.

70. The judge determined that the common intention of the parties to the Code was apparent from the Euribor definition, as set out in Article 6.1. In those circumstances, the judge concluded that Belgian law did not require him to consider extraneous evidence on this issue. He accepted the evidence of Professor Nuyts that Belgian law established that if the common intention is clear from the contract itself, taking into account its wording and other intrinsic elements of the contract, the court need go no further. However, the judge added [39 VIII]:

> "[…] However, I am conscious that such (extraneous) evidence will be relevant, or at least some of it will be, at the trial. It is admissible if it goes to the issue of the defendant's state of mind, and in particular, to whether he or she was acting honestly. Indeed, it may very well be that the real issue in this case is whether the prosecution can prove that the defendant was dishonest, within the meaning as set out by the Court of Appeal (Criminal Division) in the case of *R v Ghosh 75 Cr. App. R. 154*."

71. Having declined to hear extrinsic evidence, the judge therefore did not consider the testimony of Helmut Konrad (one of the authors of the Code of Conduct and a member of the Euribor Steering Committee) and other suggested witnesses during the preparatory hearing on the issue of the common intention.

72. Davis LJ, in giving the judgment of the court on the interlocutory appeal, stated that it was hard to conceive of the system working if the trading advantage of the individual submitting banks could be influential (see [55]). Instead, it required a genuine assessment of the rate, to the best of the submitter's knowledge, not least because the justifiable range risked being skewed if all panel banks are serially entitled to submit rates to their own advantage (see [56]). Furthermore, the court agreed with the trial judge that since the common intent was clear from the intrinsic terms of the Code itself, it was a proper exercise of his discretion to decline to admit extrinsic evidence/extraneous materials on this issue (see [59]).

73. It is submitted by the applicants that the judge's interpretation of the Euribor Code of Conduct, as approved by the Court of Appeal, was unsustainable in light of evidence given at trial by the two witnesses mentioned already and summarised below, as to the operation of the euro interbank market and their understanding of the approach taken to the Euribor Code of Conduct.

74. Dr Guido Ravoet (the head of EBF and Euribor-EBF) was called by the prosecution during the present trial and he stated that that the bank's own position could be taken into account "as a parameter" for activity in the derivatives market done on the bank's own account but not as regards derivatives for customers. He was clear, however, that the submitter should not take into account a request from a derivatives trader and that the Euribor rate would not be an accurate benchmark if the submission was influenced by a particular bank's commercial interests.

75. Helmut Konrad, called by Bermingham, gave evidence that the institution's commercial interests could be an influence so long as the submissions remained within the range of the valid rates offered on the market. His evidence was challenged by the prosecution who suggested that although he had been a founder of Euribor, he had ceased involvement at an early stage following retirement and was distanced from the way the scheme had been operating in practice. He agreed that his reputation and that of the Euribor benchmark were intertwined.

76. On this basis, it is submitted that the decision in *Bittar* was plainly wrong and was reached *per incuriam*.

Discussion

77. We are of the view that this proposed ground of appeal is, on analysis, unarguable. The starting point is the decision in *R v Rashid (Yahya)* [2017] EWCA Crim 2; [2017] 1 Cr App R 25. In that case the trial judge, at a preparatory hearing, ruled that the accused's confession was admissible. This decision was upheld on an interlocutory appeal [27]. Following conviction, Rashid applied for leave to appeal, *inter alia*, raising the same arguments as regards the admissibility of the confession. In refusing permission to appeal on this ground, the court observed:

> "58. As we have set out […] this court had already determined the issue of admissibility of the interview on the interlocutory appeal brought by the defendant. It was not open to

the defendant to re-open that issue as the question of the admissibility had been determined by this court. The defendant's advocate, having made the decision to contest the correctness of the ruling on admissibility by way of the interlocutory appeal from the ruling at the preparatory hearing, took a course that was open to him. The decision of this court on the interlocutory appeal determined the issue of admissibility. That is the end of the matter."

78. In the present case, this issue was resolved after full argument. The Court of Appeal should only revisit an earlier decision if satisfied that it was reached *per incuriam* in accordance with the exceptions to *stare decisis* identified in *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718, or because this step is necessary in the interests of justice vis-à-vis an appellant because the law had been misapplied or misunderstood, and the accused had been improperly convicted (*R v Taylor* [1950] 2 K.B. 368; *R v Spencer* [1985] QB 771)).

79. The evidence now relied on was irrelevant to the issue of the correct approach to be taken to the interpretation of the common intention of the parties to the Code. The judge had concluded, wholly sustainably, that the intention of the parties was clearly established by the Euribor definition, as set out in Article 6.1. It has not been challenged on this appeal that Belgian law provides that if the common intention is clear from the contract, there is no need to rely on extraneous evidence. Accordingly, there is no suggestion that the judge or the Court of Appeal misapplied Belgian law in this regard.

80. We consider, furthermore, that the decision of this court is unassailable in upholding the judge's decision that the meaning of Article 6.1 was clear (see *Bittar* at [52]). As Davis LJ observed, the Code required that the rate is to be "the best price between banks", and this is by reference to hypothetical prime banks and not particular individual banks. Panel banks are required to have high ethical standards and enjoy an excellent reputation. The submission by the bank has to quote the rate "accurately with two digits behind the comma". The Panel banks were expected to refrain from any activity damaging to Euribor. We agree that these points strongly indicate that individual panel banks could not have regard to the institution's own advantage in making its submission. Furthermore, this was an objective test to the best of the individual's knowledge, which further tends to exclude considerations of trading advantage (see *Bittar* at [54]).

81. It follows that the aspects of the evidence of Guido Ravoet and Helmut Konrad that are submitted to be determinative of this ground of appeal, to the contrary, were irrelevant on this issue. Testimony of this kind, as foreshadowed by the judge in his ruling (see [70] above), was germane, *inter alia*, to the defendants' state of mind and, in particular, as to whether they acted honestly: this material potentially assisted on how the applicants interpreted the Code by throwing light, for instance, on the discussions concerning the banks' commercial interests at the design stage and during the Steering Committee meetings. Any evidence of an interpretation of the Code that tended to contradict the judge's direction in law did not create a "legal no man's land" for the jury. It was clear that the jury were

obliged to follow the judge's directions, and the jury would have focussed on the evidence of Helmut Konrad (and to a markedly lesser extent to Guido Ravoet) when considering the applicants' contention that they had not knowingly and dishonestly participated in a conspiracy to disregard the proper basis for making Euribor submissions.

82. It follows that it is unarguable that the decision in *Bittar* was wrong in law or was decided *per incuriam*, or that the jury were provided with inadequate guidance by being left in a "legal no man's land". We decline to grant leave to appeal on this ground.

Ground 3: i) conspiracy to defraud and the need for legal certainty and ii) the element of recklessness

Submissions

83. Mr Owen Q.C. (who, together with Ms Hardcastle, did not appear below) on behalf of Palombo developed in his application for leave to appeal certain new and additional grounds, encapsulated in various written documents served on the court and in his oral submissions that were not set out in the original Grounds of Appeal settled by trial counsel. Put shortly, he sought to advance a far-reaching submission that in the circumstances of this case the count of conspiracy to defraud brought against Mr Palombo and his co-defendants failed the test of legal certainty at common law, as reinforced by Article 7 of the European Convention on Human Rights (enacted into domestic law by the Human Rights Act 1998). The latter provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed [...]"

84. Mr Owen frankly acknowledged that this submission conflicted with several recent decisions of the Court of Appeal that are binding on us. In part, therefore, his submissions were directed to the possibility of seeking to review this line of authority in the Supreme Court.

85. By way of background to this contention, Mr Owen draws our attention to *Norris v Government of the United States* [2008] 1 AC 920; [2008] UKHL 16. In this decision the House of Lords concluded that there was no substantive offence in English law of price fixing and that extradition under the dual criminality principle was not possible by reason of the common law offence of conspiracy to defraud where the equivalent US offence did not require proof of dishonesty.

86. Under the heading 'legal certainty' from paragraphs 52 to 62 the Committee reviewed the legal requirement of certainty and approved at [53] *et seq* Lord Bingham's decision in *R v Rimmington* [2006] 1 AC 459 at [33] that:

> "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done".

87. As part of a composite opinion at [61] the Committee observed:

> "[…] it would be dangerous and impractical, particularly for the judges, to introduce a general principle that there is some sort of representation that the price at which goods are offered has been arrived at a certain basis. Finally, the very fact that it was not until 2005 that it was first suggested that secret price fixing could of itself constitute a common law offence in the 1990s."

88. At [62] the conclusion was expressed that without 'aggravating features' the test was not met in this case.

89. We interpolate to note, however, that at the same time as this decision was handed down, the Committee in *R v Goldshield Group PLC and others* [2008] UKHL 17; [2009] 1 Cr App R 33, concluded that the aggravating feature was made out in a price fixing conspiracy to defraud against the NHS when lies and deception were deployed. More recently, in *R v Barton and Booth* [2020] EWCA Crim 575; [2020] 2 Cr App R 7 this court observed:

> "122. Conspiracy to defraud does not apply to agreements to achieve a lawful object by lawful means. But there is no requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means. This approach was endorsed by the House of Lords in *R. v Goldshield Group Plc and Others* [2008] UKHL 17; [2009] 1 Cr. App. R. 33 (p.491)." […]

90. The court in *Barton* noted approvingly as regards the summing up in that case:

> "126. […] In our judgment there can be no doubt that the jury understood that the prosecution needed to establish that there was a dishonest agreement on the part of the defendants, by deceit or lies, to prejudice the proprietary rights or interests of the victims by obtaining property to which they were not entitled. […]"

91. The conduct pleaded in the present indictment was said to have taken place between 1 January 2005 and 31 December 2009 and was alleged to have consisted of the following elements:

> "i) Knowing or believing that the (relevant) Banks were party to trading referenced to the Euro Interbank Offered Rate (Euribor)

ii) Dishonestly agreed to procure or make submissions of rates into the Euribor setting process by one or more Euribor Panel Banks which were false and misleading in that they:

a) Were intended to create an advantage to the trading positions of employees of one or more of the above mentioned 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."

92. We observe that in a late additional submission Mr Owen contended that the last line of these particulars, along with the directions given by the judge in this context, watered down the requirement of dishonest intent to prejudice of others, creating the possibility that mere recklessness as to whether his conduct caused economic prejudice or the risk of economic prejudice to another would be sufficient. We shall consider this ground separately.

93. Mr Owen developed his principal submission along the following lines:

i) Although Parliament had preserved the offence of conspiracy to defraud in 1977 when it otherwise replaced common law conspiracies with statutory ones, its dimensions were protean and have given rise to legitimate criticism that in some cases it amounted to no more than a general allegation of dishonest conduct.

ii) Conspiracy to defraud criminalises an agreement by two or more people to undertake particular conduct when a person acting alone may not have committed any indictable offence or have acted tortiously.

iii) Interest rate manipulation was not made a specific offence in the UK until section 91 Financial Services Act 2012 was implemented, despite earlier opportunities to have legislated for such an offence.

iv) The unlawfulness relied on here was a breach of the provisions of the Euribor Code of Conduct that were incorporated into the terms of commercial dealings by Euribor banks pursuant to the requirements of Belgian law.

v) These contractual terms were imprecise and uncertain; they had never been the subject of a decision by the Belgian Court; and at least some of those who had drafted the Code in 1999 and 2000 (such as Helmut Konrad, see above at

[75]) did not consider that commercial advantage to a bank was precluded from consideration when participating banks made a submission.

vi) It had only been held by the Court of Appeal in 2018 pursuant to the preparatory hearing in the instant prosecution (*Bittar*) that it was impermissible to submit a rate designed to advantage the submitting bank (see [57]). It is suggested that this practice had never been the subject of adverse comment by the regulator in the period 2005 to 2009. Mr Owen recognises that similar rulings to that in the present case were made in the context of the Libor prosecutions: *R v H* [2015] EWCA Crim 46; *R v Hayes* [2015] EWCA Crim 1944; [2018] 1 Cr App R 10; and *R v Merchant* [2017] EWCA Crim 60; [2018] 1 Cr App R 11. However, he suggests all this learning was far too late to inform the defendants during the indictment period of whether they could be punished for their conduct.

vii) The defendants in this prosecution were not personally bound by these contracts. They received little or no training or guidance from their employers or others as to their meaning and ambit. They required no special qualifications to undertake their work. They were entitled to believe that taking the commercial advantage into account in the way contended for here was lawful and not dishonest according to trade practice and custom.

viii) Insofar as the element of dishonesty was concerned, it was seriously damaging to legal certainty that the second limb of the test propounded by the case of *R v Ghosh* [1982] 1 QB 1053 and applied for some 35 years had been changed by the dictum of the Supreme Court in the civil appeal of *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; [2018] AC 391, a case in which issues of legal certainty were not paramount. Mr Owen reserved the right to challenge elsewhere the decision of this Court in *Barton* applying *Ivey* as the correct test to be applied in criminal cases including cases where a count of conspiracy to defraud is charged.

Discussion

94. It is regrettable that there was no authoritative guidance as to whether taking account of a submitting bank's commercial interests was unlawful before the trial judge's ruling in this case was confirmed by way of the interlocutory appeal in *Bittar*. It is also regrettable that the test of what constituted dishonesty changed during the proceedings. However, despite Mr Owen's eloquent and erudite submissions to the contrary, we are satisfied that the requirements of legal certainty were fully met in this case by both the indictment and the agreed legal directions on the elements of the offence given by the trial judge.

95. The judge's directions, as relevant, were as follows:

> "[…] So, I begin with the definition of "to defraud". To defraud or to act fraudulently is dishonestly to prejudice another's right knowing that you have no right to do so.

Prejudicing another's right includes causing economic loss or exposing another to the risk of economic loss.

[…]

Before you can convict any defendant of conspiracy to defraud, you must be sure:

> (1) That there was a conspiracy to defraud.

[…]

There is no dispute that there was such a conspiracy. Bittar pleaded guilty to the count on 2 March 2018 and Moryoussef was convicted of the count on 29 June 2018. The convictions prove that there was a conspiracy and that Bittar and Moryoussef were parties to it. The convictions do not prove, of course, that any of the defendants in this trial were a party to the conspiracy. That is what you are here to decide.

If you are sure there was a conspiracy, then you go on to consider the second element of the alleged offence:

> (2) That the defendant you are considering knew or believed that the banks were party to trading referenced to the euro interbank offered rate (Euribor).

Again, there is no dispute that the defendants, all of them, did know or believe that the banks were parties to trading referenced to Euribor.

The third element:

> (3) (If you are sure about the second) […] the defendant you are considering was a knowing party to the conspiracy in that he or 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, thereby intending that the economic interests of others may be prejudiced. In other words, intending to prejudice or risk prejudicing another's right knowing that he or she had no right to do so.

[…]

Deliberate disregard, that's a reference of course to element (b) of (3) which we are dealing with at the moment: the prosecution must prove so that you are sure in the case of each defendant that he or 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 or she must have known what the proper basis for the submissions was at that time. He or she must have known that the submissions deliberately disregarded that proper basis for the submissions.

So that's how you look at deliberate disregard and I end now dealing with element 3 by saying if you are not sure of each part of element 3 of the offence, you will acquit. If you are sure, then you go on to consider the fourth element:

> (4) That the defendant you are considering intended that the criminal agreement should be carried out by himself or herself and one or more of the conspirators.

You decide intent in respect of this element in exactly the same way I directed you in respect of element 3 above. If you are not sure of this element, you will acquit. If you are sure, then go on to consider the fifth element, indeed the final element:

> (5) That the defendant you are considering was acting dishonestly.

I'm going to give you a specific direction as to dishonesty […] in a few moments time. Before I do that, those are the five elements, and you must be satisfied so that you are sure on all five elements before you could convict.

As the indictment alleges a conspiracy, the prosecution does not have to prove that any agreement actually resulted in the submission of a rate which was intended to advantage the trading position of an employee or employees of a panel bank, or that any agreement in fact affected the published Euribor rate.

You may think that it is only in a rare case that a jury would hear direct evidence of a criminal conspiracy. When people make arrangements to commit crimes, you would expect them to do so in private. You would not expect them to do so in front of others or to put their agreement into writing. But people may act together to bring about a particular result in such a way as to leave you in no doubt that they are carrying out an earlier agreement.

Accordingly, in deciding whether there was a criminal conspiracy, and if so whether the defendant you are considering was a party to it, look at the evidence as to what occurred during the relevant period, including the behaviour of each of the defendants and the alleged conspirators. If having done so you are sure that there was a conspiracy and that he or she was a party to it, you must convict. If you are not sure, you must acquit.

[…]

So finally at this stage, dishonesty, fifth element. In a criminal trial, where it is alleged that a defendant was dishonest, it is for the prosecution to prove that the defendant was dishonest. It is not for the defendant to prove that he or she was honest. The burden of

proof remains throughout the trial on the prosecution. The question of whether a defendant was dishonest is therefore for you the jury to determine.

Dishonesty is a central issue in this case. When considering the question of dishonesty, you must firstly, ascertain the defendant's actual knowledge or belief as to the facts; that is, ascertain what the defendant genuinely knew or believed the facts to be.

When considering the defendant's belief as to the facts, the reasonableness or unreasonableness of his or her belief is a factor that is relevant to the issue of whether the defendant genuinely held the belief. However, it is not an additional requirement that the belief must be reasonable. The question is whether the belief was genuinely held.

Secondly, having determined the defendant's state of knowledge or belief, go on to determine whether the defendant's conduct, as you have found it to be, was honest or dishonest by the standards of ordinary decent people.

There are no different standards of honesty which apply to any particular profession or group in society whether as a result of market ethos or practice. If you are sure that the defendant's conduct was dishonest, by the standards of ordinary decent people, the prosecution does not have to prove that the defendant recognised that the conduct was dishonest by those standards."

96. There was, accordingly, a close connection between the two issues relating to intention on which the prosecution needed to satisfy the jury to the criminal standard of being "sure". First, that each defendant deliberately disregarded the proper basis for the Euribor submissions when they either made or procured them. Second, that they did so dishonestly according to the reformulated *Ivey* test. Under the first requirement, a defendant could only deliberately disregard the proper basis if he or she knew what the proper basis was and despite this made or acted on false representations not permitted by the Code. Under the second, a jury could only be sure that the defendant had acted dishonestly if they had established (subjectively) the state of the individual's knowledge or belief as to the facts and, in the light of that, that the conduct was dishonest by the (objective) standards of ordinary decent people. Applying the first element of the *Ivey* test meant that the jury must have rejected the defendants' account of what they said they knew and believed as to the proper basis of making submissions to Euribor.

97. Together this set a demanding test for the prosecution to meet. In these circumstances, we are to an extent unsurprised that in the absence of authoritative guidance on the requirements of the Code a number of traders in the Euribor and Libor prosecutions have been acquitted. In this case, however, the jury must have concluded that the defendants' evidence as to their states of mind was false, and their deliberate disregard of what they knew was the proper basis for setting the rate was dishonest, applying the objective test of the standards of ordinary decent people to the defendant's state of mind. It is apparent from a number of questions the jurors asked during the trial that they were acutely aware of the difference

between the state of knowledge of the defendants at the time they did the acts alleged and what is now known about the proper meaning of the Euribor Code of Conduct.

98. The judge decided to admit evidence (*e.g.* Helmut Konrad) on the views of the drafters of the Code, as being relevant to the defendant's subjective state of mind although it was not clear that these views had been communicated to them, and he did not intervene to limit counsel's use of this material in their final speeches.

99. We observe that there was notably strong evidence in the relevant emails involving Moryoussef and Bittar of a climate of secrecy and a desire to mask what was happening consistent with knowledge that this conduct was dishonest. Mr Owen's submissions on the legal certainty of the charge would suggest that both of these accused were wrongly convicted as well as the present applicants.

100. In the present case, both unlawfulness and dishonesty needed to be established; these ingredients were the subject of clear and comprehensive directions; and they were established to the jury's satisfaction, as reflected in their verdicts. We are satisfied that the principle of legal certainty was not impugned in this regard. Furthermore, the clarification of the law in *Ivey* fell within the proper parameters of the developing common law, consistent with Article 7. As the European Court of Human Rights stated in *SW v United Kingdom* 21 EHRR 363 (the case concerning the retrospective application of the criminal law in the context of a man raping his wife):

> "36/34. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law- making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

101. In the recent decision in *Barton*, this court expressly rejected the suggestion that the offence of conspiracy to defraud lacks certainty, thereby falling foul of Article 7 (see [124]), emphasising the clear way that the indictment revealed the offence on which the jury were entitled to convict. As in *Barton*, these applicants would have been able readily to identify the case they had to meet.

102. We do not accept that these defendants were disadvantaged by the change in the standard dishonesty directions from *Ghosh* to *Ivey*. The first limb of the *Ivey* test gives a

substantial measure of protection from the application of an objective test unrelated to the state of mind of the defendant under consideration. As this court observed in *Barton*:

> "107. That said, we wish to endorse the respondent's submission that the test of dishonesty formulated in *Ivey* remains a test of the defendant's state of mind—his or her knowledge or belief—to which the standards of ordinary decent people are applied. [...]
>
> 108. […] All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused. In an example much used in debate on this issue, the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest than the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof."

103. Furthermore, we are bound by *Barton* but even if we were free to depart from it, we would not do so as we consider it is undoubtedly correct.

104. In these circumstances there is simply no basis for a submission that the applicants were unfairly convicted because they did not realise at the relevant time that what they were doing was wrong and the conduct made them criminally liable.

105. This leaves Mr Owen's submissions that the judge impermissibly gave a recklessness direction.

106. It was common ground between the parties before us, first, that in a conspiracy to defraud – just as in a statutory conspiracy – a party to the agreement must intend that each of the relevant elements of the offence will be carried out and, second, that prejudice to another's rights encompasses both actual economic loss and the risk of loss occasioned by the conduct. Put otherwise, as regards the second element, it is necessary that a proprietary right or interest of the potential victim is actually or potentially injured or put at risk (see *Barton* at [121]). The way the judge left this to the jury in his directions has been set out above at [95].

107. Mr Owen suggests that by directing the jury that the prosecution needed to establish that the accused under consideration "*deliberately disregarded the proper basis for the submission of those rates, thereby intending that the economic interests of others may be prejudiced. In other words, [intended] to prejudice or risk prejudicing another right knowing that he or she had no right to do so*" he thereby diluted the direction on intent by introducing recklessness as an alternative. The Crown respond by suggesting that the use of

the word "may" merely qualified prejudice and not the intent to prejudice. It was emphasised by Mr Waddington Q.C. that it is immaterial that the quantum of any economic loss might be difficult to establish. This was a "zero-sum" enterprise, and even a marginal difference to the Euribor rate by reference to impermissible considerations would mean that one party's gain was at the expense of another's loss. Equally, the case law makes plain that the fact that the defendant's motive in making the inducements or the submission are the gain to the bank and individual trader rather than loss to another party are irrelevant.

108. We agree with the Crown's submissions on this point. It is inconceivable that over two trials experienced leading and junior counsel for each of the parties could have imagined that the directions they agreed with the judge and that were given by him somehow rendered the defendants at peril of conviction for something less than an intent to prejudice the rights of others. We have no doubt that the jury fully understood the directions to mean that they must be sure that the defendants intended by their actions to prejudice the rights of another, but those rights would be prejudiced whether or not economic loss resulted, and it was sufficient if the other party might suffer such loss. As set out above, the judge made this clear in his direction:

> "To defraud or to act fraudulently is dishonestly to prejudice another's right knowing that you have no right to do so. Prejudicing another's right includes causing economic loss or exposing another to the risk of economic loss."

109. In the circumstances we conclude that there is nothing in Mr Owen's supplementary grounds that throw any doubt on the safety of these convictions. Accordingly, we refuse leave to appeal.

Postscript

110. For the avoidance of doubt, indictments in the future would be better framed in this context using, for instance, the expression "*thereby intending to prejudice the economic interests of others*" rather than "*thereby intending that the economic interests of others may be prejudiced*."

Other grounds (Bermingham)

111. No oral argument was advanced in support of two other Grounds of Appeal by Bermingham that were based on inconsistency: first, as to conviction in that it is suggested that his conviction is inconsistent with the acquittal of Bohart and, second, that his sentence (5 years' imprisonment) is inconsistent with the sentence imposed on Palombo (4 years' imprisonment). Neither argument has any credible foundation. The evidence against Bohart (who was a member of the money markets desk at Barclays Capital from June 2004) was not the same as the evidence against Bermingham. As the respondent observes, it was entirely open to the jury to conclude that Bohart, a junior trader, was unaware of the proper basis at the time of the relevant transactions and did not know that making submissions intended to create a trading advantage to employees at the bank deliberately disregarded that proper

basis. The jury were equally entitled to conclude that Bermingham, with his many years of experience on the Euro Money Markets Desk at the bank and of making benchmark submissions was fully aware of these matters. Furthermore, it was common ground between the parties that Bohart simply learnt how to do her job from Bermingham and followed his lead. As to sentence, the difference between the two applicants was entirely justified by the particular roles played by the two men during the period of the conspiracy, the judge having assessed them during the trial.

112. Finally, for completeness, in written submissions that were not pursued at the hearing of the applications, it was argued that the order by the judge that Bermingham should pay £300,000 towards the costs of the prosecution within two years was wrong and manifestly unreasonable on the grounds that the Legal Aid Agency has failed to respond to a request that it will modify its claim for a Capital Contribution Order following the judge's order in this regard. This submission is without any proper basis. As submitted by the prosecution, given there has been a change in the applicant's financial circumstances pursuant to the order for costs, upon being notified of the change by the applicant the Director of Legal Aid Casework is obliged to reassess the applicant's disposable capital, and if necessary to vary the Capital Contribution Order (see Regulation 35 The Criminal Legal Aid (Contribution Orders) Regulations 2013/483). The applicant is therefore seeking a remedy in the wrong court.

113. Leave to appeal is refused on these additional grounds.

Conclusions

114. It follows that we refuse to grant the applications for leave to appeal under Grounds 2 and 3 and the "other grounds". We grant leave to appeal under Ground 1 and dismiss the appeal.