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UK Supreme Court Decision in *R v Hayes/Palombo*

Client Alerts

September 3, 2025
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Last week the United Kingdom's Serious Fraud Office (SFO) announced that, as a result of the UK Supreme Court's decision in *R v Hayes/Palombo,* a number of convictions arising from allegations of manipulation of well-known key benchmark interest rates in the financial markets, including LIBOR and EURIBOR, are potentially unsafe. In this article we examine the background to the Court's finding and consider how recent changes to UK legislation might affect similar cases in the future.

1. Background to the Case

The Supreme Court's decision in *R v Hayes/Palombo* represents the culmination of a decade-long legal battle that began during the aftermath of the global LIBOR manipulation scandal. Tom Hayes, a former UBS and Citigroup trader, and Carlo Palombo, a former Barclays trader, were convicted of conspiracy to defraud for their roles in alleged attempts to manipulate the London Inter-Bank Offered Rate (LIBOR) and Euro Inter-Bank Offered Rate (EURIBOR) respectively.

Hayes was convicted in August 2015 at Southwark Crown Court before Cooke J following a 47-day trial. He was found guilty on all eight counts of conspiracy to defraud relating to manipulation of LIBOR rates between 2006 and 2010. His original sentence of 14 years' imprisonment was reduced to 11 years on appeal. Palombo was convicted in March 2019 before Judge Gledhill, also at Southwark Crown Court, of conspiracy to defraud in relation to EURIBOR manipulation between 2005 and 2009, receiving a four-year sentence.

Both men initially appealed their convictions unsuccessfully. Hayes's first appeal was dismissed by the Court of Appeal in December 2015, while Palombo's appeal was dismissed in December 2020. These early appeals raised similar grounds to those eventually successful at the Supreme Court, including arguments that the trial judges had misdirected juries by treating questions of fact as matters of law.

The cases took a significant turn following the January 2022 decision of the US Court of Appeals for the Second Circuit in *United States v. Connolly and Black*, which reversed the convictions of two former Deutsche Bank traders for LIBOR manipulation. Unlike in the UK courts at first instance and on appeal, where any consideration of commercial interests was held to taint a submission, the US

court focused instead on whether the rate submitted fell within a range of reasonable rates at which the bank could borrow, regardless of commercial motivations.

This US decision prompted fresh applications to the Criminal Cases Review Commission (CCRC). Hayes had initially applied to the CCRC in January 2017, but in December 2021, the CCRC provisionally decided there were no grounds for referral. However, following submissions relating to the *Connolly and Black* decision, the CCRC referred Hayes's conviction to the Court of Appeal in July 2023 and Palombo's in October 2023. The grounds for referral were that there was a real possibility that the Court of Appeal would 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's own case.

The Court of Appeal heard the fresh appeals in March 2024 but dismissed them both, refusing to entertain several grounds of appeal on the basis that they were not related to the CCRC's reasons for referral. However, importantly, the Court of Appeal certified a point of law of general public importance, enabling the appeals to proceed to the Supreme Court.

2. Supreme Court Decision

On 23 July 2025, the Supreme Court unanimously allowed both appeals and quashed the convictions. Lord Leggatt gave the judgment, with which Lord Reed, Lord Hodge, Lord Lloyd-Jones, and Lady Simler agreed. The Court's reasoning centred on fundamental errors in how the trial judges had directed the juries.

The Supreme Court answered "no" to both limbs of the certified question: (a) whether a LIBOR or EURIBOR submission influenced by trading advantage is automatically not genuine or honest, and (b) whether submissions must represent the single cheapest borrowing rate rather than a selection from a range.

The Core Legal Error

The Supreme Court identified that the trial judges had fundamentally conflated two distinct questions: whether a submission complied with the LIBOR/EURIBOR definitions as a matter of law, and whether it represented the genuine opinion of the submitter as a matter of fact. Lord Leggatt held that determining the rate required "a qualitative assessment of various data sources and was a matter of subjective opinion rather than empirical fact."

The Court emphasised that whether a submission was "genuine or honest" could not be determined by legal construction. Instead, 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," a question of fact for the jury, not the judge.

The Range Theory

The Supreme Court rejected the Court of Appeal's "cheapest rate theory," which had suggested that submissions must represent the single cheapest rate at which a bank could borrow. Instead, the Court accepted that LIBOR and EURIBOR submissions typically involved "a selection from within a range of borrowing rates" depending on market conditions and the submitter's subjective judgment.

The Court noted that identifying the appropriate rate was not "simply a matter of reading a number off a screen" but required subjective assessment of various data sources, particularly during periods of market illiquidity. The very process of calculating LIBOR by averaging submissions after excluding outliers was designed to accommodate this variability.

Jury Misdirection

The trial judges had instructed juries that if any consideration was given to trading advantage, the submission could not as a matter of law be genuine or honest. This direction was found to be legally inaccurate and unfair, as it removed from the jury's consideration the defendants' primary defence, that they had only sought to influence submissions within a range of legitimate rates.

In Hayes's case particularly, the Court found that the judge's directions had "usurped the jury's function and undermined the fairness of the trial." Hayes had admitted trying to influence submitters to select rates within acceptable ranges that would advantage his trading, but denied conspiring to induce wholly false submissions.

3. Observations

3.1 Setback for the SFO

The Supreme Court decision represents a significant blow to the SFO's decade-long prosecution campaign against LIBOR manipulation. Between 2013 and 2019, the SFO brought prosecutions against 20 individuals, securing nine convictions (seven at trial, two guilty pleas) with 11 acquittals.

Following the Supreme Court's decision, four additional traders have already announced their intention to appeal their convictions. Hickman & Rose, the law firm that represented Palombo, confirmed that Jay Merchant, Christian Bittar, Philippe Moryoussef, and Jonathan Mathew (all convicted in related LIBOR/EURIBOR cases) would be appealing their convictions. As noted above, the SFO itself has also recently acknowledged that some of its ongoing cases may now be unsafe in light of the Supreme Court's ruling.

This development poses serious challenges for the SFO, which has indicated it will not seek retrials of Hayes and Palombo, stating it would not be "in the public interest." The prospect of multiple successful appeals threatens to unravel much of the SFO's work in this area, potentially calling into question the entire prosecutorial approach taken in benchmark manipulation cases.

The decision also highlights systemic issues with the criminal appeal system. The Supreme Court noted that it "raises concerns about the effectiveness of the criminal appeal system in England and

Wales in confronting legal error," given that the same fundamental misdirection arguments had been repeatedly rejected by the Court of Appeal across multiple cases over nearly a decade.

3.2 Impact of ECCTA Reforms on Future Rate-Rigging Prosecutions

The Economic Crime and Corporate Transparency Act 2023 (ECCTA) introduces reforms that could significantly alter the prosecutorial landscape for future cases involving benchmark manipulation or similar corporate fraud. While Hayes and Palombo were prosecuted as individuals under the common law offence of conspiracy to defraud, ECCTA's reforms provide prosecutors with additional options with regard to corporate prosecutions, and a new statutory framework.

The New Failure to Prevent Fraud Offence

ECCTA introduces a corporate criminal offence of "failure to prevent fraud," which came into force on 1 September 2025. This strict liability offence applies to "large organisations" where an associated person commits a fraud offence intending to benefit the organisation, unless the organisation had reasonable fraud prevention procedures in place.

In the context of rate-rigging cases, this offence provides prosecutors with a route to corporate liability that was not available in the LIBOR prosecutions. Banks could face criminal liability for failing to prevent benchmark manipulation by traders, provided that the manipulation constitutes one of the specified fraud offences and was intended to benefit the bank. The only defence would be demonstrating that reasonable fraud prevention procedures were in place.

This would represent a significant shift from the approach taken in the LIBOR cases, where prosecution focused on individual traders and brokers rather than the institutions themselves. While banks faced substantial regulatory fines, criminal prosecutions were directed at individuals. With the new offence now on the statute books, we are more likely to see corporate prosecutions alongside individual cases.

The Reformed Senior Manager Test

ECCTA also reforms corporate criminal liability through an expanded "senior manager test" that applies to economic crimes from 26 December 2023. Under this test, and separately from the failure to prevent fraud offence, corporations can be held liable for economic crimes (including fraud, bribery, and money laundering offences) committed by senior managers acting within their actual or apparent authority.

A "senior manager" is defined as someone whose role includes making decisions about how the whole or substantial part of the organisation's activities are managed, or who actively manages such activities. This reform simplifies the assessment of which individuals' conduct can be attributed to corporations, although there are questions around the extent to which, in practice, it represents a broadening of the previous "directing mind and will" test.

In rate-rigging scenarios, the senior manager test could capture senior traders, desk heads, or other officials involved in benchmark submissions, potentially making corporate liability easier to establish than under the previous identification doctrine. The test may well have encompassed individuals at the level of Hayes and Palombo given their senior trading roles and involvement in rate-setting processes.

Practical Implications for Prosecutors

These reforms may make corporate prosecutions in rate-rigging and similar cases more likely in a number of ways.

First, the failure to prevent fraud offence offers a relatively straightforward route to corporate liability, with prosecutors needing only to establish that manipulation occurred, that it was intended to benefit the bank, and that adequate prevention procedures were absent.

Second, the senior manager test would facilitate corporate prosecution by simplifying the identification of individuals whose actions can be attributed to the corporation. The complicated "directing mind and will" test often proved problematic in large financial institutions with complex management structures.

Additionally, the specific statutory framework for benchmark manipulation under section 91 of the Financial Services Act 2012 (which post-dates the conduct in Hayes/Palombo) provides clearer definitional guidance than the common law conspiracy to defraud offence, reducing the interpretative difficulties seen in these cases.

However, the Supreme Court's emphasis on subjective assessment and the range of legitimate submissions would still require careful handling. Prosecutors would need to demonstrate that benchmark submissions fell outside any reasonable range, or that prevention procedures were genuinely inadequate, not merely that commercial considerations influenced submissions within a legitimate range.

The reforms therefore provide prosecutors with more effective tools while still requiring a rigorous and fair analysis of the boundary between legitimate commercial judgment and criminal manipulation.

4. Conclusion

The Supreme Court's decision in *Hayes/Palombo* represents a shift in financial market manipulation prosecutions. By recognising that benchmark submissions involve subjective judgment within legitimate ranges, the Court has drawn an important distinction between commercial considerations and criminal conduct.

The decision carries immediate consequences. The SFO faces the potential unravelling of its prosecutorial record on benchmark manipulation, with multiple convictions now under appeal. At

the same time, the decision highlights weaknesses in the criminal appeal system, where the same legal errors persisted across multiple cases for nearly a decade before being corrected.

At the same time, ECCTA's introduction of corporate failure to prevent fraud offences and expanded senior manager liability provides prosecutors with powerful new tools that could have transformed the original LIBOR prosecutions. In future benchmark manipulation cases, we may well see a greater tendency to prosecute companies as well as individuals.

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