Pursuing prosecutions for LIBOR offences

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Corporate Crime analysis: Two individuals were acquitted on Thursday 6 April 2017 of conspiracy to manipulate the rates at which Barclays set its London interbank offered rate (LIBOR) submissions during the period 2005–07. James Fletcher and Karl Masi, junior counsel provides his thoughts on the case and the jury's verdicts.

Original news

Former traders acquitted in LIBOR retrial, LNB News 06/04/2017 90

Two individuals, Stylianos Contogoulas and Ryan Michael Reich, have been acquitted of conspiring to manipulate the LIBOR interest rate at Southwark Crown Court, the Serious Fraud Office (SFO) has announced. The two men, both former traders for Barclays Bank, were first tried in April 2015 alongside three defendants convicted of the same charges, in addition to a fourth who pleaded guilty earlier.

What were the facts of the case and what arguments were advanced by the prosecution?

During the period 2005–07 short term swaps traders working on the US Dollar desk at Barclays bank in New York made requests of the US dollar LIBOR submitters in London. The submitter was required to submit the Barclays LIBOR rate in accordance with the LIBOR question as defined by the British Bankers Association (BBA) at approximately 11am GMT every day.

On various occasions throughout this period, the traders on the US Dollar desk requested the submitter enter high or low LIBOR submissions in an attempt to benefit the trading positions of their books.

In 2005 Mr Contogoulas was a newly appointed junior trader based in London. His job was to cover the New York desk when those traders were not there. As a result, when Barclays had to submit its LIBOR rate at 11am, the New York desk used Mr Contogoulas to pass on their requests to the submitters in London. Typically, the traders would request such rates in emails and occasionally orally.

The prosecution case at retrial was that Mr Contogoulas and Mr Reich knew that in making the requests they were deliberately disregarding the proper basis for the LIBOR submissions and were thus behaving dishonestly, seeking to rig the rate to benefit the financial position of the swaps desk to the detriment of counterparties to their deals.

What did the court decide at the first trial?

Mr Contogoulas and Mr Reich were first tried in 2016 together with Jay Merchant, Alex Pabon (both traders) and Jonathan Mathew (a submitter) all of whom were convicted after a three month trial. A senior Barclays Dollar LIBOR submitter, Peter Johnson, pleaded guilty.

At the end of that case the jury were unable to reach verdicts on Mr Contogoulas and Mr Reich. That is perhaps not surprising as they were the two most inexperienced traders. Despite strongly worded representations from his lawyers highlighting the convictions obtained, the defendants' lack of experience and the cost to the public purse of a retrial, the SFO chose to retry the defendants maintaining that it was in the public interest to do so.

Why did the SFO elect to prosecute and how was it deemed to be in the public interest to have a retrial?

It is likely that in choosing to proceed the SFO were emboldened by the convictions obtained. In the retrial they obtained permission to rely on the convictions of the co-defendants to prove the existence of the conspiracy.

In the trial itself, neither Mr Contogoulas nor Mr Reich disputed that they made requests of the submitters for LIBOR rates that would benefit the trading positions of the swaps desk. They both accepted that following regulatory intervention and legal pronouncements in the years post 2008 what they did could now be seen to be wrong, but maintained that at the time they did not think what they were doing was dishonest.

Both emphasised that they were junior traders with little experience. Indeed, before joining the dollar swaps desk, Mr Contogoulas' time at Barclays had been spent seconded on information technology projects within the bank. The defendants pointed out that their communications were open and on company email, which they were told was being monitored by the compliance department. They pointed to a lack of formal training on LIBOR. During the retrial, senior Barclays bankers told the jury that knowing the exact definition and submitting process for LIBOR was unnecessary for a trader's job. The jury was also told that the bank encouraged the exchange of information between desks (market colour) but there was no specific training as to what information traders could or could not exchange with the submitters in respect of LIBOR.

Simultaneously in 2005 the BBA was being told by a large number of banks that the LIBOR question was not being answered in accordance with the definition but rather by reference to commercial interest. However, neither the BBA, nor the foreign exchange and money markets committee (FX&MMC) who were meant to oversee LIBOR, nor the Bank of England, which was informed of the report, took any action.

What does the decision tell us about the SFO's investigation and why the case was not successful?

The speed of the jury's verdicts, coming some four hours after a five week trial, suggests that the SFO's case was comprehensively rejected. One can speculate that given the defendants' lack of training in relation to LIBOR and considering the prosecution's own witness' evidence that an in-depth knowledge of LIBOR was not necessary for a swaps trader's job, the jury decided the defendants did not have the requisite knowledge in the first place to enable them to have, 'deliberately disregarded' the proper basis for Barclays LIBOR submissions. Additionally, given the openness of the communications, the lack of 'red flags' or any intervention from compliance or more senior colleagues telling them that what they were doing was wrong, the jury must have accepted the defendants' cases that they did not think at the time they were doing anything dishonest.

James Fletcher and Karl Masi, also junior counsel at 5 St Andrews Hill, led by John Ryder QC of 6 KBW, represented Stylianos Contogoulas in the case.

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