[2018] UKUT 0186 (TCC)

Appeal number: FS/2016/0003

FINANCIAL SERVICES – prohibition order – whether applicant knowingly participated in conduct intended improperly to influence LIBOR submissions by reference to bank's trading positions in derivatives - whether applicant acted dishonestly or without integrity - s 56 FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ARIF HUSSEIN

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

The Authority

TRIBUNAL: Judge Timothy Herrington
Jo Neill
Sue Dale

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 2, 3, 4, 5 and 8 January 2018

Sara George, Partner, Stephenson Harwood LLP, for the Applicant

Benjamin Strong QC and Eleanor Campbell, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision concerns a reference made by the Applicant ("Mr Hussein") on 19 February 2016. The reference relates to a Decision Notice dated 22 January 2016 (the "Decision Notice") given by the Financial Conduct Authority (the "Authority") to Mr Hussein pursuant to which the Authority decided to make an order pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA") prohibiting Mr Hussein from performing any function in relation to any regulated activity carried on by an authorised person, an exempt person or an exempt professional firm.

2. The Authority's decision maker, the Regulatory Decisions Committee ("RDC") decided to make a prohibition order against Mr Hussein because it concluded in the Decision Notice that Mr Hussein, while employed by UBS AG ("UBS") as a derivatives trader in sterling denominated instruments, engaged in internal chats with a UBS trader-submitter knowing that it would be improper to participate in conduct intended to influence UBS's LIBOR submissions. The RDC found that Mr Hussein understood that it would be improper for LIBOR submissions to be made with the aim of benefiting UBS's trading positions but on a number of occasions he informed those responsible for UBS's LIBOR submissions of his preferences for sterling LIBOR rates (on the basis of his trading positions). The RDC rejected the contention put forward by the Authority's Enforcement Division ("Enforcement") that Mr Hussein had acted dishonestly in attempting to influence UBS's LIBOR submissions for the benefit of the profitability of his trading book knowing that to be improper. The RDC found that Mr Hussein closed his mind to the risk that his preferences would be used to influence LIBOR submissions with the aim of benefiting his trading positions and in so doing, he acted recklessly and therefore without integrity.

3. As is apparent from its Statement of Case in these proceedings, Enforcement did not accept the RDC's finding that Mr Hussein did not act dishonestly. It is well-established that it is open to the Authority to pursue before the Tribunal an issue that was rejected by the RDC provided, as is the case here, the issue falls within the scope of the matter referred. The relevant provisions of the Statement of Case can be summarised as follows:

> (1) Mr Hussein took part in internal chats with a UBS trader who also had responsibility for making LIBOR submissions (a "Trader-Submitter") in which he communicated his preference for LIBOR rates by reference to his derivatives positions;
>
> (2) in so doing, Mr Hussein knowingly participated in conduct intended to influence UBS's LIBOR submissions;
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> (3) he knew that this was wrong;
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> (4) alternatively, if (as Mr Hussein contended before the RDC) he was, in the relevant chats, soliciting internal trades to hedge his trading position:

(a) he knew that he was communicating with persons who were themselves responsible for UBS's LIBOR submissions or were in communication with such an individual; and

(b) he closed his mind to the possibility that the information he provided would be used for an improper purpose.

4. In those circumstances, the Authority contends that Mr Hussein:

(1) knowingly or recklessly engaged in conduct which he believed was improper;

(2) was knowingly or recklessly complicit in conduct intended to bring about a misrepresentation to the BBA of the rate or rates at which UBS believed that it could borrow funds on the interbank market; and

(3) displayed a lack of honesty and/or integrity.

5. In his case before the RDC, Mr Hussein had contended that he did not know that in the internal chats on which the Authority relies he was in conversation with Trader-Submitters who were LIBOR submitters and that his motive for entering into the chats was to explore internal opportunities to hedge or "net" his trading positions. He contended that it was reasonable for him to assume that the Trader-Submitters were engaging with him in their capacity as short-end derivatives traders.

6. In his Reply to the Authority's Statement of Case, Mr Hussein continues to contend that the chats were from his perspective concerned with the question of internal hedging opportunities, but the primary emphasis of the Reply is that Mr Hussein believed that it was acceptable practice for trading positions to be taken into account in determining LIBOR submissions provided no deviation from the submissions being in the "middle of the pack" resulted, he did not know that such a practice was improper and this was regarded as good practice at UBS at that time. These contentions did not feature in Mr Hussein's representations to the RDC.

7. Consequently, the Authority now contends that the difference between Mr Hussein's case before the Tribunal and what he has told the Authority previously is so stark that it displays a further lack of honesty and integrity. The Authority contends that on a number of important points, if what Mr Hussein told the Authority prior to this reference was true and not misleading, his current position must be false or misleading; equally, if what he now says to the Tribunal is true and not misleading, what he said before must have been false or misleading. Therefore, the Authority contends that the case for a prohibition order is now even stronger than it was when the RDC issued the Decision Notice.

Applicable law and regulatory provisions

General

8. The Authority's regulatory objectives are set out in s 1B FSMA and include securing an appropriate degree of protection for consumers and protecting and

enhancing the integrity of the UK financial system (and, specifically, ensuring that it is not being used for the purposes of financial crime).

Prohibition

9. The power to make a prohibition order is contained in s 56 FSMA which so far as relevant provides as follows:

> "(1) The FCA may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by-
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> (a) an authorised person,
>
> (b) a person who is an exempt person in relation to that activity, or
>
> (c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity.
>
> (1A) ……
>
> (2) A "prohibition order" is an order prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to-
>
> (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;
>
> (b) all persons falling within subsection (3A) or a particular paragraph of that subsection or all persons within a specified class of person falling within a particular paragraph of that subsection.
>
> (3A) A person falls within this subsection if the person is-
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> (a) an authorised person,
>
> (b) an exempt person, or
>
> (c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity.
>
> (4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (5) In proceedings for an offence under subsection (4) it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.
>
> (6) A person falling within subsection (3A) must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.
>
> …..
>
> (9) "Specified" means specified in the prohibition order."

Fitness and Propriety

10. That part of the Authority's Handbook known as FIT sets out the factors to which the Authority will have regard when assessing the fitness and propriety of a person to perform a particular controlled function.

11. FIT 1.3.1B states that in the Authority's view, the most important considerations will be the person's:

> honesty, integrity and reputation;
>
> competence and capability; and
>
> financial soundness.

Clearly, in relation to this reference because of the way in which the Authority presents its case the relevant consideration is Mr Hussein's honesty, integrity and reputation.

12. FIT 2.1.3 gives further guidance on the matters to which the Authority will have regard in determining a person's honesty, integrity and reputation. This provision states that among other things relevant matters will include but are not limited to:

> (1) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities; and
>
> (2) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.

13. As regards the first of those factors, the Authority contends that Mr Hussein was knowingly concerned in UBS's failure to observe proper standards of market conduct contrary to Principle 5 of the Authority's Principles for Businesses, as found by the Authority in its Final Notice given to UBS as described at [62] to [71] below. As regards the second of those factors, the Authority contends that this factor is relevant because of Mr Hussein's change of case before the Tribunal, as described at [7] above.

14. At paragraph 9.2.2 of its Enforcement Guide the Authority makes it clear that it has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the Authority may, as it does in this case, seek to prohibit an individual from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. At paragraph 9.2.3 of the Enforcement Guide the Authority states that the scope of the prohibition order will depend on the range of functions which the individual

concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally. At paragraph 9.3.5 of the Enforcement Guide the Authority gives as an example of the type of behaviour which has previously resulted in the Authority deciding to issue a prohibition order as including "severe acts of dishonesty", for example those which may have resulted in financial crime.

Powers of the Tribunal on a reference of a decision to make a prohibition order

15. Section 57 (5) FSMA provides that a person against whom a decision to make a prohibition order is made may refer "the matter" to the Tribunal.

16. Section 133(4) FSMA provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. This is not an appeal against the Authority's decision but a complete rehearing of the issues which give rise to the decision.

17. Sections 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provide as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either-
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> (a) dismissing it; or
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> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with findings of the Tribunal.
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> (6A) The findings mentioned in subsection (6) (b) are limited to findings as to-
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

18. "The decision-maker" in relation to this reference is the Authority.

19. It can be seen that there is now a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to take action under s 66 FSMA, that is to impose a financial penalty on an approved person. The term does not include a reference of a decision to impose a prohibition order under s 56. Thus, this reference may be referred to as a "non-disciplinary reference". In relation to a "non-disciplinary reference", the powers of the Tribunal as set out in s 133(6) are limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the reference to have no merit and therefore dismisses it its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal.

20. The Tribunal explained the extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [39] and [40] as follows:

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

21. Thus, in this case the Tribunal would have to dismiss the reference unless it made findings of fact and law which indicated that the decision made by the Authority to make a prohibition order against Mr Hussein was not one that was reasonably open to the Authority. Furthermore, even if the Tribunal were to find flaws in the Authority's decision-making process, for example by making findings of fact which were at variance with the findings on which the Authority based its decision, it should not remit the reference if it were of the view that despite such failings, it was inevitable that if the matter were remitted the Authority would come to the same conclusion: see on this point *Palmer v FCA* [2017] UKUT (TC) 0313 at [270].

22. As is well-established in references of this nature, the burden of proof lies with the Authority and the standard of proof to be applied is the ordinary standard on the balance of probability, namely whether the alleged conduct more probably occurred than not.

Dishonesty

23. The question of what constitutes dishonest behaviour in the context of the alleged manipulation of LIBOR submissions has been considered in the course of the criminal proceedings brought against another UBS employee, Mr Tom Hayes.

24. Mr Hayes was made the subject of a criminal investigation and subsequently convicted on eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen LIBOR. The basis of the conviction was that Mr Hayes, together with others, agreed to manipulate Yen LIBOR in order to advance his trading interest, the profits of the bank for which he worked and indirectly the rewards which he would receive in the form of bonuses and status, to the disadvantage of the counterparties to the trades.

25. The Court of Appeal handed down on 21 January 2015 a judgment relating to an interlocutory application made for permission to appeal against certain rulings made by Cooke J in various preparatory hearings relating to the Hayes trial. In particular, Cooke J had made a number of rulings in relation to submissions by the defence as to the definition and true effect of LIBOR.

26. At [8] of the judgment Davis LJ observed that the "proper basis" for submission of LIBOR rates was in accordance with the definition of LIBOR then published by the British Bankers' Association which was in the following terms:

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

27. At [15] Davis LJ described the process for setting LIBOR as follows:

> "LIBOR itself, as its name suggests, broadly speaking, connotes the rate at which interest banks can charge one another for loans on a commercial footing. It has operated, as we gather, since 1986 and has become a (perhaps *the*) benchmark for all sorts of financial markets and in relation to various currencies. For each currency there are selected a number of prestigious panel banks. Each such panel bank submits its rates for the relevant period or "tenor", doing so without reference (or at least intended to do so without reference) to any other panel banks. The resulting submissions made by the various panel banks are then collated via Thomson Reuters and averaged, typically with the top quartile and bottom quartile submissions being eliminated (or "trimmed") and the average of the remainder then taken with a view to setting the promulgated rate."

28. The Court of Appeal agreed with Cooke J's dismissal of the defence's submissions that there was no evidence that any counterparty to a contract benchmarked to LIBOR was prejudiced by any conspiracy to manipulate the rate, that there was no legal bar to putting in a submission which fell within what was described as an "acceptable range" for the appropriate LIBOR rate and that any submission to the BBA could properly have regard to the commercial interests of the submitting panel bank, such commercial considerations not being inconsistent with the average mean selection process used for setting the ultimate LIBOR rate. Davis LJ observed at [34] that the prejudice to a counterparty was obvious; whether or not it itself had been directly deceived, it stood to lose money in that any potential gain to the bank which was manipulating the rate would be matched by a corresponding loss to the counterparty.

29. As summarised later by the Court of Appeal in its judgment on Mr Hayes's appeal against his conviction, in refusing leave to appeal to the Court of Appeal against Cooke J's rulings, Davis LJ said at [41] to [44]:

> (1) It was inherent in the LIBOR scheme that the submitting panel bank was putting forward its genuine assessment of the proper rate. Although it had the subjective element inherent in an opinion, it was otherwise to be made by reference to an objective matter – the rate at which the panel bank could borrow funds etc.
>
> (2) Any submission made had to be made under an obligation that the submitter genuinely and honestly represented its assessment.
>
> (3) Assessments by different panel banks could legitimately differ, but that did not displace the obligation that the submission made must represent the genuine opinion of the submitter.
>
> (4) Where there was a range of figures, the submission made had to represent a genuine view and not a rate which would advantage the submitter.
>
> (5) The submitting bank could not rely on or take into consideration its own commercial interests in making its assessment. The bank was not free to let its submission be coloured by considerations of how the bank might advantage its own trading exposure; that would be contrary to the definition and the whole object of the exercise.

30. The central issue for the jury at trial was whether or not Mr Hayes had acted dishonestly. The trial judge (Cooke J) directed the jury on the basis of the decision in *R v Ghosh* [1982] 1 QB 1053 where Lord Lane CJ set out the well-known two limb approach to the issue of dishonesty:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are

> obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

31. Cooke J, in directing the jury on the *Ghosh* test, said in relation to the first objective limb of the test that the jury had to decide whether what Mr Hayes agreed to do with others was dishonest by the ordinary standards of reasonable and honest people, not by the standards of the market in which he operated, if different, not by the standards of his employers or colleagues, if different, or the standards of bankers or brokers in the market even if many, or even all, regarded it as acceptable. Following that direction, the jury convicted Mr Hayes.

32. On his appeal against his conviction Mr Hayes submitted to the Court of Appeal that, because of the judge's ruling, the defence was wrongly precluded from putting forward matters of evidence as relevant to the jury's consideration of the first objective limb of *Ghosh*. In summary, that evidence was said to be the following:

(1) the ethos of the banking system at the time regarding LIBOR;

(2) the prevalence of commercial LIBOR requests from traders to LIBOR submitters; in this respect the defence relied upon evidence of over one hundred of these requests, in currencies other than Yen, between 2006-2009, which were within the defence jury bundle; the appellant had not been involved in these requests;

(3) the prevalence of commercial LIBOR submissions in banking generally;

(4) the use of interdealer brokers to discuss potential LIBOR submissions;

(5) the attitude of the BBA, which operated LIBOR and which (since at least 2005) knew of the association between LIBOR submissions and the panel banks' commercial positions and that the benchmark rate was not 'accurate';

(6) the attitude of the Bank of England and the Financial Services Authority (now the Financial Conduct Authority ("the FCA")) towards the benchmark, i.e. a refusal to step in or regulate LIBOR until the US Regulator, the Commodity Futures Trading Commission (the CFTC), commenced an investigation in 2008, despite knowing that (a) the benchmark suffered from flawed governance and (b) the LIBOR rate was not accurate.

33. It was said that these six factors militated against the suggestion that banks or individuals within the banks who were engaged in the LIBOR market were acting dishonestly. The factors were all evidence of contemporaneous market practice and would not have undermined the *Ghosh* standard the jury were bound to apply. In its judgment (*R v Hayes* [2015] EWCA Crim 1944) the Court of Appeal held at [32] that there was no authority for the proposition that objective standards of honesty are to be

set by a market and that such principle would gravely affect the proper conduct of business because the history of the markets has shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people. However, the court held at [33] that although the evidence referred to above was irrelevant to the determination of the objective standards of honesty, it was plainly relevant to the second subjective limb. The Court of Appeal observed that the judge expressly directed the jury to have regard to it and summarised the evidence at length.

34. At the time of this judgment, a different test for what constituted dishonesty had been developed in civil proceedings, notably cases involving allegations of a breach of trust. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, a decision of the Judicial Board of the Privy Council which concerned the issue of knowing assistance in furtherance of a fraudulent and dishonest breach of trust, Lord Nicholls, who gave the judgment of the Board, stated at 105j that in this context honesty was an objective standard, although it did have a connotation of subjectivity, as distinct from the objectivity of negligence. He went on to say at 105j to 106e:

> "Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.
>
> However, the subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless…."

35. At 107g Lord Nicholls referred to the need to look at other relevant circumstances and the personal attributes of the person concerned in these terms:

> "Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."

36. The objective test set out by Lord Nicholls was explained in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 by Lord Hoffmann at pp 1479-1480 in the following terms:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

37. The Supreme Court has now held, in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, a case concerned with the question as to what amounted to cheating at gambling, that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that in criminal cases directions based upon it ought no longer to be given.

38. Lord Hughes, who gave the single judgment with which the other members of the court agreed, stated at [59] that there is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are "whether in the context of insurance claims, high finance, market manipulation or tax evasion." He was critical of the fact that the second limb of the *Ghosh* test allows the accused to escape liability where he has made a mistake of fact as to the contemporary standards of honesty.

39. Accordingly, the court held that the test of dishonesty adopted in civil proceedings should apply in all circumstances. Lord Hughes set out the test at [74] to [75] of the judgment as follows:

> "74. …..The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*… When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.
>
> 75. Therefore in the present case, if, contrary to the conclusions arrived at above, there were in cheating at gambling an additional legal element of dishonesty, it would be satisfied by the application of the test as set out above. The judge did not get to the question of dishonesty and did not need to do so. But it is a fallacy to suggest that his finding that Mr Ivey was truthful when he said that **he** did not regard what he did as cheating amounted to a finding that his behaviour was honest. It was not. It was a finding that he was, in that respect, truthful. Truthfulness is indeed one characteristic of honesty, and untruthfulness

> is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions, as indeed was the defendant in *Gilks*…."

40. Following the judgment in *Ivey*, what the Court of Appeal said in its interlocutory judgment in *Hayes* as to the objective element of the test of dishonesty as set out at [30] above is still relevant. We must decide whether by the standards of ordinary decent people Mr Hussein's actions in relation to UBS's LIBOR submissions were dishonest. We should also take into account in that context what the Court of Appeal said in that judgment as to the genuineness of LIBOR submissions, as set out at [29] above. It is clear from that statement that a person who is a party to the submission of a LIBOR rate that was not a genuine and honest assessment of the proper rate and which took into account the commercial interests of the submitting bank or an individual trader's positions would, by the standards of ordinary honest people, be acting dishonestly.

41. However, as a consequence of the test now formulated in *Ivey*, the factors set out at [32] above have limited relevance in the context of the subjective element of dishonesty. As Mr Strong submitted, the focus of the subjective element must be on what Mr Hussein knew about the definition of LIBOR. In our view, this means what Mr Hussein believed fell within the scope of what can properly be taken into account in making a LIBOR submission within the terms of that definition, in other words what did Mr Hussein genuinely believe were the factors that could properly be taken into account in determining the objective LIBOR rate according to the terms of the definition of LIBOR, as set out at [26] above. In that context, it is also necessary to take into account what Mr Hussein believed as regards how the information he provided to the Trader-Submitter would be taken into account in determining UBS's LIBOR submissions.

Integrity

42. The Authority seeks to prohibit Mr Hussein on the basis that he lacks integrity. It seeks to do so primarily on the basis that it contends that Mr Hussein acted dishonestly, but it is clear that a person can act without integrity even if he had not acted dishonestly.

43. The question as to whether in particular circumstances a person has acted without integrity has been considered on many occasions in this Tribunal and its predecessors. The principles to be applied were summarised in *Batra v The Financial Conduct Authority* [2014] UKUT 0214 (TCC) at [13] to [15] of the Decision and we do not need to set them out again here. It is clear from that summary that acting recklessly is one example of acting without integrity, and it is also clear from that summary that a person acts recklessly when he turns a blind eye to what was obvious to a person in his position. As this Tribunal held at [25] of *Carrimjee*, such a formulation results from no more than an application of the authoritative formulation of the concept of recklessness by Lord Bingham of Cornhill at page 1057 of the opinion of the House of Lords in *R v G* [2004] 1 AC 1034 where he stated that a person acts recklessly

when he acts with respect to (i) a circumstance when he is aware of a risk that exists or will exist and (ii) a result when he is aware of a risk that it will occur; and it is in the circumstances known to him, unreasonable to take the risk.

44. It is clear from the summary of the Authority's Statement of Case in this matter that the Authority pleads as an alternative to its plea of dishonesty that Mr Hussein acted without integrity by acting recklessly by closing his mind to the risk that the information he provided to the Trader-Submitter was being provided for an improper purpose. We therefore approach our determination as to whether Mr Hussein's behaviour can be characterised as lacking integrity by applying the test set out at [43] above.

Issues to be determined on this reference

45. In the light of the manner in which the Authority pleads its case, the manner in which Mr Hussein states his case in his Reply and the discussion set out above as to the relevant facts for the purpose of assessing Mr Hussein's state of mind, it seems to us that there are two broad issues that we need to determine on this reference as follows:

(1) What factors did Mr Hussein believe fell within the scope of what could properly be taken into account in making a LIBOR submission and what did he believe as to the use that would be made of the information he provided to the Trader-Submitters in determining UBS's LIBOR submissions?; and

(2) did Mr Hussein make false or misleading statements to the Authority prior to the making of his reference and/or or has Mr Hussein made false or misleading statements to the Tribunal in his evidence?

46. Having determined those issues, we will then need to consider whether in the light of those findings we should either dismiss the reference or remit it to the Authority for further consideration.

Evidence

47. In support of its case that Mr Hussein knew or recklessly engaged in conduct which he believed was improper and was knowingly or recklessly complicit in conduct intended to bring about a misrepresentation to the BBA of the rate or rates at which UBS believed that it could borrow funds on the interbank market the Authority relies entirely on its interpretation of 21 electronic chats which took place on UBS's internal systems between Mr Hussein and two Trader-Submitters between 28 January 2009 and 19 March 2009.

48. In support of its case that Mr Hussein has either before or after making his reference made false statements to the Authority and/or the Tribunal the Authority relies on what Mr Hussein said to the Authority in the course of his interview, his subsequent responses to the Authority's preliminary investigation report and his representations to the RDC prior to the issue of the Decision Notice, as well as the evidence that he has given to this Tribunal.

49. Accordingly, the Authority called no witnesses of fact and relied entirely on documentary material.

50. Mr Hussein filed a witness statement on which he was cross-examined. There was no other live evidence in support of Mr Hussein's case. As will be apparent from our findings, we have not found Mr Hussein's evidence to be satisfactory in all respects, although we have found a large part of his evidence to be truthful. In particular, we have found that Mr Hussein has at various points during the process reconstructed past events in a manner so as to be most favourable to his own interests. Accordingly, the change in his case before this Tribunal from that which he pursued before the RDC has led us to conclude that he inevitably made misleading statements to the Authority before and during the regulatory proceedings and despite knowing that to be the case he has not recognised that fact in his evidence to this Tribunal.

51. In addition, we had expert witness reports from Mr Alexander Broderick, whose report was commissioned by the Authority, and Mr Michael Zapties, whose two reports (the original report that was prepared in the context of Mr Hussein's proceedings before the RDC and a supplemental report prepared for the purpose of these proceedings) were commissioned by Mr Hussein.

52. The expert reports dealt primarily with the question as to whether the language used by Mr Hussein in the various chats that formed the basis of the Authority's case against Mr Hussein was consistent with him engaging in discussions about hedging with the Trader-Submitters as well as providing other evidence in relation to the hedging and netting of derivatives positions and market conduct and practice in relation to LIBOR submissions from 2007 to 2009.

53. No joint memorandum of the experts was produced and the experts disagreed in their respective reports as to how the language used by Mr Hussein in the chats was to be interpreted.

54. We found Mr Broderick to be a competent and highly knowledgeable witness with substantial expertise on the matters on which he gave his opinion. We found his explanations as to the products Mr Hussein traded and the role of hedging in relation to those products helpful. Ms George did not challenge Mr Broderick's evidence to any material extent and we have in some respects relied on Mr Broderick's interpretation of the chats in making our findings of fact in relation to that matter.

55. We found that Mr Zapties's evidence lacked credibility in a number of respects and have therefore treated it with caution and placed limited weight on it. In particular, Mr Zapties's original report focused primarily on the question as to whether the primary concern between the communications between Mr Hussein and the Trader-Submitters was hedging; he did not deal in any material respect with the question as to whether the conversations could be construed as attempts by Mr Hussein to influence UBS's LIBOR submissions by reference to his trading positions. Mr Zapties did address that issue to a limited extent in his supplemental report, but it would have been more helpful had he revisited his original report in the light of the

change of case and he was somewhat evasive in his answers to Mr Strong on that issue. We therefore have some concerns about the objectivity of some of his evidence.

Findings of Fact

56. From the evidence that we heard, and the documents we have seen we make the following primary findings of fact. We draw inferences from these findings later in this decision.

The period up to the commencement of the Authority's investigation into Mr Hussein's conduct

Background – the Authority's findings against UBS in relation to the manipulation of LIBOR

57. This summary largely repeats findings set out in Judge Herrington's interlocutory decision on a disclosure application made by Mr Hussein in the course of the Tribunal proceedings on his reference.

58. As is well known, the Authority has undertaken a number of investigations into the conduct of leading banks as regards allegations that those banks had manipulated their LIBOR submissions over a considerable period of time. LIBOR, or to give it its full name, the London Interbank Offered Rate, is a benchmark reference rate fundamental to the operation of both UK and international financial markets including markets in interest rate derivatives contracts. As has been referred to at [27] above, during the period to which the Authority's investigations related, LIBOR rates were set by a process of averaging submissions made by banks on a panel constituted by the British Bankers Association ("BBA"). To recap, the definition of LIBOR published by the BBA was:

> "The rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, just prior to 11.00 am London time."

59. Interest rate derivative contracts typically contain payment terms that refer to a benchmark rate such as LIBOR, which is a prevalent benchmark rate used in OTC interest rate derivatives contracts and exchange traded interest rate contracts.

60. As the Authority found in its Final Notice given to UBS, which is described below, the definition of LIBOR does not allow for consideration of factors unrelated to borrowing or lending in the interbank market.

61. UBS was one of the banks whose practices concerning the making of LIBOR submissions was investigated by the Authority. The investigation concluded with UBS accepting the terms of a settlement with the Authority which resulted in the Authority imposing on UBS a financial penalty of £160 million, as set out in a Final Notice given by the Authority to UBS on 19 December 2012 (the "Final Notice").

62. The Final Notice records findings that UBS breached Principle 3 of the Authority's Principles for Business (failure to take reasonable care to organise and control its affairs responsibly and effectively) and Principle 5 of those Principles (failure to observe proper standards of market conduct). The period during which those failures were found to have occurred was between 1 January 2005 and 31 December 2010 (the "Relevant Period").

63. In so far as they are relevant to this reference, the Principle 5 breaches can be summarised as follows. UBS's traders who also had responsibility for making LIBOR submissions ("Trader-Submitters") routinely took the positions of its interest rate derivatives traders ("Traders") into account when making LIBOR submissions.

64. In particular, UBS's Traders routinely made requests to the individuals at UBS responsible for determining its LIBOR submissions to adjust their submissions to benefit their trading positions. The Final Notice states that in relation to sterling LIBOR at least 90 documented requests were made, directly involving at least 9 individuals, three of whom were Managers, that is UBS employees with direct line management responsibility over Traders and/or Trader-Submitters. The Final Notice also records that requests were expected to be taken into account by Trader-Submitters and that Trader-Submitters also solicited requests from the Traders and sometimes indicated if the request suited their own positions. As well as receiving specific requests, Trader-Submitters were informed about the overall trading exposure and took this into account when determining submissions. From 1 January 2005 to 1 September 2009, sterling LIBOR submissions were made by Trader-Submitters from the short term interest rate desk (known as the STIR Desk) which was located in Zürich.

65. The Final Notice records that a number of Managers knew about and accepted the practice of manipulating submissions in certain LIBOR currencies. For example, paragraph 98 of the Final Notice states:

> "For reasons explained later in this Notice, on 9 August 2007, Manager C sent an email to Manager D, and Senior Manager A, Senior Manager B and Senior Manager C stating: *"... It is highly advisable to err on the low side with fixings for the time being to protect our franchise in these sensitive markets. Fixing risk and PNL thereof is secondary priority for now".* The statement that *"Fixing Risk and PNL thereof is secondary priority for now"* means that by no later than this date, all the recipients of the email were aware that *"fixing risk and PNL"* (i.e. the financial exposure on derivative positions and improving profits through LIBOR manipulation) was (if only in Manager C's view) usually the first priority and would be of only secondary importance *"for now."* The email was not limited to any particular currency or currencies."

66. Insofar as they are relevant to this reference, the findings in the Final Notice as to the Principle 3 breaches can be summarised as follows.

67. During the period from 1 January 2005 to 1 September 2009, UBS combined the roles of determining its LIBOR submissions and proprietary trading in derivative products referenced to LIBOR. This created a clear conflict between the obligation to

make submissions in accordance with the published criteria and the responsibility for the profitability of trading positions. In addition to manipulating their submissions to take account of requests from Traders, Trader-Submitters also had the unfettered opportunity to try to manipulate the published rates that determine the profitability or otherwise of their own trading positions.

68. During the period from 1 January 2005 to 7 August 2008, UBS had no systems, controls or policies governing the procedure for making LIBOR submissions. In addition, no formal training was provided to submitters about the submission process. A review of UBS's LIBOR processes and procedures was undertaken during 2008 culminating in the preparation of formal procedures and guidelines on 7 August 2008. However, these procedures were inadequate in design because, among other things, they did not provide any practical guidance to LIBOR submitters or compliance in determining rates; no specific training was provided to those involved in the LIBOR submission process and the procedures did not direct Traders and Trader-Submitters that it was improper to attempt to manipulate LIBOR to benefit trading positions.

69. In its analysis of the nature, seriousness and impact of the breaches found, the Final Notice makes the following finding:

> "There was a culture where the manipulation of the LIBOR… setting process was pervasive. The manipulation was conducted openly and was considered to be a normal and acceptable business practice by a large pool of individuals."

70. Since the Final Notice, a number of individuals employed by banks have been made subject to either criminal or regulatory investigations as a result of concerns that they may have been involved in the manipulation of LIBOR along the lines described in the Final Notice. Therefore, for example, in addition to the corporate failings identified in the Final Notice, the Authority has investigated the conduct of some of the individuals involved in the behaviour described in the Final Notice so as to determine whether or not sanctions may be pursued against those individuals.

71. We are aware that two individuals formerly employed by UBS have been the subject of such an investigation in addition to Mr Hussein. We have no knowledge as to whether any of the more senior managers referred to in the Final Notice as having known about and accepted the practice of manipulating LIBOR submissions have been made the subject of investigation or regulatory proceedings by the Authority.

72. The first individual was Mr Tom Hayes reference to the criminal proceedings taken against him has already been made at [23] to [33] above.

73. Secondly, Mr Panagiotis Koutsogiannis, a colleague of Mr Hussein who was senior to Mr Hussein but in the same team and who like Mr Hussein engaged in chats with respect to LIBOR submissions with Trader-Submitters, was investigated by the Authority and made subject to regulatory proceedings. Like Mr Hussein, Mr Koutsogiannis was given a Warning Notice informing him that the Authority proposed to impose a financial penalty on him and make him the subject of a prohibition order. The primary allegation against Mr Koutsogiannis was that he was dishonest and lacked integrity because he was aware of, condoned and participated

directly in the practice by Traders at UBS of making requests to Trader-Submitters in an attempt to influence LIBOR submissions with a view to benefiting UBS's trading positions. However, the Authority's decision-maker, the Regulatory Decisions Committee ("RDC"), decided that Mr Koutsogiannis did not behave dishonestly or without integrity in making requests for submissions. The RDC decided not to issue a decision notice and consequently the proceedings against Mr Koutsogiannis were discontinued. We refer later in more detail to these proceedings.

Background – UBS's approach to LIBOR submissions

74. The first point to note is that UBS itself never borrowed sterling cash in the interbank market during the period which is relevant for the purpose of this reference. Consequently, in assessing the appropriate rate to be submitted those responsible would have to exercise judgment as to the rates at which UBS could borrow were it to choose to do so. As Mr Broderick said in his report, even before the financial crisis started in the summer of 2007, there were issues around LIBOR. He says that unsecured term-deposits were scarce between financial institutions while most term-deposits were held for corporate treasuries who were looking for higher interest rate returns than other short-term money market instruments would generate. This meant that the LIBOR rates given by financial institutions were only good estimates of what the interbank rate might be if there had been an active market, albeit these rates were estimates given in good faith.

75. Mr Broderick also says that a high rate of LIBOR submission by an individual bank, relative to the rest of the market, was regarded as a warning signal of funding difficulties and potential financial distress. It is therefore fair to say that at this time in practice LIBOR fulfilled two functions; first a Panel Bank's LIBOR submissions were an indicator of that Bank's financial health, and secondly it was an important reference rate in the derivative markets. As Mr Broderick states, there were many rumours at the time that bank submissions were being kept artificially low (through a practice known as "low-balling") and closely aligned to avoid their institutions becoming the outlier and thus the focus of market attention regarding their creditworthiness.

76. It is therefore apparent, as Mr Broderick stated, that any bias introduced to a submission from taking a bank's own trading positions into account could alter the market perception of a bank's creditworthiness and would also be inappropriate because trading positions are not relevant to the rate at which a bank can borrow.

77. Ms George referred Mr Broderick to a statement that the then Governor of the Bank of England made to the House of Commons, Treasury Select Committee on 25 November 2008 where he said that LIBOR "is in many ways the rate at which banks do not lend to each other, and it is not clear that it either should or does have significant operational content." Nevertheless, as Mr Broderick answered, there was still an obligation for individual banks to submit an estimate of where they could borrow if there was a functioning market and that is how Mr Broderick understood the market to operate at that time. Mr Broderick accepted that this meant that the submitters had a very difficult job to do because the creditworthiness of the bank was

dependent on the market's view of where the bank was in terms of being at risk of failing.

78. We had very little evidence as to what process UBS followed in coming to a view as to the appropriate rate to be submitted before the financial crisis in 2007 and what its policy was in that regard. We were shown a UBS document which appeared to have been created in late 2006 headed "Publishing LIBOR rates", which largely described the mechanics of how a submission was to be published but did contain a statement which Mr Broderick agreed could be suggesting that UBS's trading positions would be taken into account in adjusting the rate that would otherwise have been submitted. Mr Hussein said both in interview and cross examination that he had not seen this document and we place no reliance on it as a statement of UBS's policy in regard to LIBOR submissions.

79. Indeed, as we record at [68] above, the Final Notice states that prior to 2008 UBS had no systems, controls or policies governing the procedure for making LIBOR submissions. Mr Broderick's evidence in answer to questions from the Tribunal was that although at the bank at which he worked at the relevant time compliance procedures might have dealt with LIBOR they were not formalised at the time and that he learnt what was appropriate or not in relation to LIBOR submissions from other colleagues and passed that on to people who worked with him. Mr Broderick did not regard that as being uncommon in other banks, but he did mention that some banks had more formalised procedures than others. For example, in one bank in which he worked between 1994 and 1998 there was a Chinese Wall between the submitters and the derivatives traders.

80. We therefore think it likely, and we so find, that until formal procedures were introduced by UBS in 2008, those at UBS who had responsibility for providing the information in relation to the LIBOR submission process would have done so through informal training from other more experienced colleagues.

81. In answer to another question from the Tribunal, Mr Broderick stated that a bank which did not borrow in sterling could define what its sterling rate would be through taking the rates being submitted in other currencies in which the bank did borrow, and rates in the foreign exchange forward market or a potential commercial paper market, and reverse engineer so as to determine an acceptable level at which borrowings could have been made in sterling.

82. As the Final Notice records, UBS did put in place procedures relating to the calculation of LIBOR in 2008. The preparation of these procedures appears to have been prompted by a consultative paper issued by the BBA on 10 June 2008 headed "Understanding the construction and operation of BBA LIBOR-strengthening for the future". This paper stated that there was confusion amongst market commentators about what BBA LIBOR is for, and how it is constructed and that there was a need to clarify the definition. Having quoted the current definition, the paper set out requirements that were inherent in the definition, including that the rate at which each bank submits must be formed from that bank's perception of its cost of funds in the interbank market and that the rates must be submitted by members of staff at the bank

with primary responsibility for the management of a bank's cash, rather than a bank's derivative book.

83. Mr Koutsogiannis, who by this time was a member of the BBA's Foreign Exchange & Money Markets Committee which was the body at the BBA responsible for LIBOR, circulated the paper to colleagues, asking them to review it and provide comments. Mr Hussein is shown as a recipient of the email but we accept that he did not read it or attend the meeting that Mr Koutsogiannis convened to discuss UBS's response to it.

84. A reply was prepared to the Consultation Paper on behalf of UBS which went through a number of drafts before being submitted to the BBA on 3 July 2008. As well as responding to the specific questions asked by the BBA in its consultation, earlier versions of the draft contained text describing how UBS had implemented stricter internal governance around its setting of its LIBOR rate and a description of the process followed so as to "get an understanding of whether this fell within the permissible process". This description and request does not appear in the final version of the draft but on the same day a document was produced headed "UBS procedures for submissions to BBA LIBOR fixing" which did draw on the description of the process contained in the early draft of the submission to the BBA.

85. The procedures document set out the definition of LIBOR and the BBA's clarification of it contained in the consultation document. UBS's process was described as follows:

> "UBS's short term interest rate (STIR) cash desks in Zürich have primary responsibility for all LIBOR fixes submitted. Each morning the cash traders may use a variety of sources to collect information about current market interest rates and conditions. This includes, but is not limited to, broker colour on where rates are, as well as information from the derivatives desk on current market sentiment on a tenor basis, particularly the 3m/6m and 3m/12m tenors. The cash trader should then post his/her levels the bank's LIBORs to reflect his/her, good faith, firm belief as to where he/she believes UBS can borrow money in reasonable size in the interbank market. **The cash trader retains overall responsibility for the fixing.** [original emphasis]"

86. The document also listed a main contributor and backup contributor for each of the relevant currencies. Mr Hussein was described as a backup contributor to Adrian Keller, a derivatives trader based in Zürich, in relation to sterling. That appears to be a mistake, because there is no evidence that Mr Hussein actually performed that role and Mr Hussein could only speculate as to why his name had been included. The document states at the end that any questions relating to the guidance should be referred to Compliance and we therefore infer that UBS's Compliance Department had some input into the document before it was circulated.

87. As the Final Notice records, these procedures were adopted in August 2008 and, as Mr Hussein accepted in his evidence, circulated around the bank. We therefore think it likely that Mr Hussein would have received them at that time and we so find. Bearing in mind Mr Hussein's working relationship with Mr Koutsogiannis in the

same team and, as stated in the document, Mr Koutsogiannis's overall responsibility for the integrity of the process and for oversight and monitoring of the rate submitted by UBS, we think it is likely that Mr Hussein would have been aware of what the document said about the process to be followed and so find.

88. The passage we have quoted at [85] above indicates a non-exhaustive number of factors that may be taken into account in coming to a good faith submission which is mindful of the need to reflect a firm belief as to where the cash trader believes UBS could borrow money in the interbank market, notwithstanding the fact that it did not do so in practice. There is a reference to taking into account "information from the derivatives desk" which is focused on current market sentiment but it does not explicitly rule in or rule out taking into account the bank's derivatives trading positions. Mr Hussein said in evidence that he thought that nothing changed in terms of UBS's practice after this document was circulated and that it therefore remained the practice to take trading positions into account.

89. In our view the document does not deal with this important issue with sufficient clarity, which in effect is what the Authority found in the Final Notice: see [68] above. In the light of that lack of clarity, in our view the document does not demonstrate that UBS had a policy of taking trading positions into account, but that is not to say that individual traders and teams did not interpret the document as permitting that practice, a question that we will return to later.

Events during Mr Hussein's career at UBS prior to March 2008

90. Mr Hussein joined UBS in October 2000, having recently graduated from the University of Cambridge. He was 21 years old when he joined UBS for his first job in the financial services sector and was hired as a trader in its Interest Rates ("Rates") business area. He remained employed at UBS until May 2009, when he was 29 years old.

91. We accept Mr Hussein's evidence that it was solely at UBS where he developed his technical skills and his understanding of the market and accepted business practices and that his participation and reaction to these matters were exclusively shaped by the training and advice he received and the behaviour he observed at UBS.

92. As Mr Hussein explained, the Rates business was principally concerned with hedging clients' exposures to risks arising from fluctuating interest rates and did so by entering into interest rate derivatives, primarily interest rate swaps. An interest rate swap enables a client to exchange, or swap, its exposure to floating rate interest rates for the certainty of a fixed rate. Swaps similarly enabled clients to exchange fixed interest rate income for floating rate exposures.

93. When Mr Hussein first joined UBS, he was assigned to the Euro Interest Rate Derivatives Desk in London, reporting to Mr David Coombs. His remit was to trade Euro denominated Forward Rate Agreements ("FRA"). FRAs are another form of derivative used to mitigate interest rate risk. A FRA is an agreement between two parties who wish to hedge against future movements in rates and by entering into a

FRA, the parties lock in an interest rate for a stated period of time, starting on a future settlement date, based on a specified notional principal amount. Thus, UBS would enter into FRAs in order to hedge or mitigate the interest rate risk arising from its swaps book.

94. Mr Hussein moved to the EUR swaps desk in early 2003, where he traded with clients in EUR interest rate swaps. His line manager was Mr Robert Pearson, but he also worked under the informal guidance of Ian Ash, another EUR swaps trader.

95. At this time, there were two relevant benchmarks for the lending of Euros in the interbank market. The active benchmark was EURIBOR, which was the rate at which Euro inter-bank term deposits were being offered within the European Monetary Union by one prime bank to another at 11 am Brussels time. However, there was a legacy benchmark, EUR LIBOR, which operated in the same fashion as sterling LIBOR. This benchmark existed for continuity purposes in respect of long-dated swaps written in pre-EURIBOR days and which underpinned many derivatives transactions. In common with the other LIBOR currencies, the EUR LIBOR fixing was published at around 11 am UK time.

96. In addition to his trading responsibilities, at Mr Coombs's request Mr Hussein acted as UBS's EUR LIBOR submitter for around 6 months in 2005 (having previously performed the role from 2000 to 2002). It was an informal responsibility that was usually given to the most junior trader on the desk.

97. The EURIBOR fixing was published around an hour before the EUR LIBOR submission needed to be made and Mr Coombs instructed Mr Hussein to take the published EURIBOR fixing as a base and adjust it according to prevailing market conditions. Therefore, for example, if the derivatives market moved between 10 am and 11 am that would imply that the short end rates in the market had moved, and therefore the LIBOR fixing should be slightly different to the EURIBOR fixing. As Mr Hussein explained in his witness statement, he did not need to consider the bank's Euro cash trading position as the published EURIBOR fixing acted as a proxy, UBS having contributed to EURIBOR as one of the panel banks an hour before he contributed the EUR LIBOR submission.

98. Mr Hussein also explained that he had no reason to believe that adjusting the EUR LIBOR submission to take account of market factors (aggregate trading positions being one such factor) was inappropriate and that it was consistent with what he understood to be accepted market practice, and best practice within UBS.

99. Mr Hussein explained that through personal research (rather than any formal instruction or guidance from UBS Legal or Compliance) he came to understand that the BBA required contributing banks to ask themselves at what rate they could borrow funds, were they to do so by asking for and accepting inter-bank offers in reasonable market size just prior to 11 am. He noted that in the absence of any significant inter-bank lending in many of the currencies concerned due to market conditions, other factors were looked at when contributing LIBOR submissions. He referred to Mr Ash having told the Authority that in the absence of any compliance or

trading guidelines, it was routine for banks to look at their swaps books when contributing their LIBOR submissions and consequently Mr Hussein said that taking aggregate trading positions into account when formulating LIBOR submissions was something he considered normal, mechanical, routine and consistent with accepted standards of market practice.

100. Mr Hussein did not give any explanation in his witness statement as to how he had come to the view at this time that it was normal and consistent with accepted standards of market practice to take the aggregate of trading positions into account when formulating LIBOR submissions. In his witness statement, Mr Hussein says that Mr LaSala's email, as referred to at [113] below, corroborated his contemporaneous understanding that aggregate trading positions were routinely factored into the LIBOR submission and that it was routine and accepted as best practice within UBS. He drew a distinction between requesting a particular submission in order to benefit his own position and providing information which the submitters could use in making their decision as to what was a "good faith submission". In his cross examination, he accepted that UBS's trading position in swaps was irrelevant to the rate at which it could borrow funds according to the terms of the LIBOR definition and that when another bank was deciding the rate at which it would lend to UBS, it was not interested in what positions UBS held on its swaps trading book. Nevertheless, he said he was taught from the day he joined UBS that at UBS it was part of the process that the net swap position of a bank would be taken into account when making a LIBOR submission, on top of a number of other factors. His evidence was that he had been trained by people like Mr Coombs, Mr Koutsogiannis, Mr Ash and Mr Pearson and seen those individuals adopting that practice. He said it was not a thought that occurred to him individually and he did not have a view on it but he simply accepted that that was how the process was conducted at UBS. He said he regarded the practice as acceptable because it was the responsibility of the submitter to make the final decision in good faith based on such factors as he felt were relevant, although he did accept that taking into account trading positions may not be relevant and that if the bank put in a submission that was not its genuine estimate of the rate at which it could borrow, then that could affect the published LIBOR rate. In his interview with the Authority, when asked about the risk that the information he provided to the Trader-Submitters could be used improperly, he said that he assumed that there would be proper compliance procedures in place that should prevent that happening.

101. However, Mr Hussein did tell the Authority at interview that he did not necessarily consider the EUR Swaps Desk's trading positions when considering the level at which the EUR LIBOR submission should be made. He said that the risk to UBS in respect of EUR LIBOR trading positions was very small and would often be hedged at the same time as the earlier EURIBOR fixing.

102. In May 2006 Mr Hussein moved to the Sterling Swaps Desk where his formal line manager was Mr David Leeming, a Managing Director. His role was to trade with clients in sterling interest rate swaps with maturities of less than 10 years, that is towards the lower end of medium-term trading. At this time, short-term swaps were dealt with by a different department, the Short-Term Interest Rate department ("STIR").

103. As mentioned above, the swaps that the Sterling Swaps Desk entered into would need to be hedged, which required the Desk to enter into further derivatives transactions, such as FRAs. The effect was that the desk built up a large portfolio of transactions under which there were very frequent payment obligations. On any day on which payments fell due on the swaps in Mr Hussein's book, the net position would be that the book was paying or receiving floating-rate interest in one or more of the LIBOR tenors. Any swap that had been entered into with a customer would expose Mr Hussein's book to the risk of movements in LIBOR for the whole of the life of the swap so it was part of Mr Hussein's job to hedge against that risk through entering into other derivatives contracts.

104. Mr Hussein tracked his book's exposure to the level at which LIBOR fixed each day using a spreadsheet, known as a reset report, which was the means by which Mr Hussein was able to keep track of his book and decide what steps he needed to take to reduce his exposure to LIBOR, commonly known as "reset risk". One method of hedging, used by Mr Hussein, would be to send to a broker details of his book's positions in respect of which an FRA was sought as a hedge following which the broker would match the positions with opposite positions being posted by other banks. Alternatively, FRAs could be entered into with another bank directly or internal hedges could be obtained, so for example, Mr Hussein could arrange an FRA with the STIR desk. Mr Hussein explained how the internal hedging process would work; the person seeking the hedge, that is where he has a position or "axe" that needs hedging, would disclose his position (which could be through the provision of his reset report internally) and the other desk would execute a trade if it had an offsetting position.

105. Mr Hussein's reset report was posted on an intranet site open to all relevant desks within UBS, including STIR, with whom it would have been possible for Mr Hussein to undertake internal hedging transactions. It was clearly sensible for Mr Hussein's reset report to be made available in this way in order that others within the bank who had opposite positions to Mr Hussein's could respond with offers of hedging transactions.

106. Mr Hussein was promoted to Executive Director in March 2008. Mr Leeming left the Sterling Swaps Desk later in 2008, whereupon Mr Hussein assumed sole responsibility for the sterling swaps trading book. It was, however, a desk of one in that he had no direct or indirect reports, nor did he have any supervisory responsibilities. His formal line manager was Mr Sascha Prinz.

107. At this time, responsibility for making UBS's LIBOR submissions rested with traders based in Zürich on the STIR desk. Therefore, the conflict of interest referred to in the Final Notice and summarised at [67] above was readily apparent.

108. Mr Andrew Walsh, who was head of sterling instruments on the STIR desk at the time was interviewed by the Authority about the processes that were followed. He said that the inputter was Neil Snowdon, a cash trader, but as head of desk he had a role in determining what the rate should be. He then said:

> "The market practice was to submit LIBORs within the range, that cash and CP [Commercial Paper] are traded that morning, and yes, your book's position would be taken into account in that process…if we are receiving the fix, we would fix on the higher end of the range; if we were paying a fix, we'd fix on the lower end of the range". He said that it was done that way because "that was the profitability of the book".

He went on to say:

> "We, as a desk, [in Zurich] would co-ordinate with the rates desk [in London]. As previously discussed we didn't have access to their systems but they would let us know if they had a – they had a big position...Through – generally through the chat…We always want to submit within the range... the market determines the range."

109. Mr Koutsogiannis, in his regulatory proceedings before the RDC, accepted that he had on a number of occasions made requests to Trader-Submitters in an attempt to influence LIBOR and EURIBOR submissions with a view to benefiting UBS's trading positions but that he had only made suggestions which he understood to be within a range of possible submissions, all of which would be objectively justifiable, and left it to the Trader-Submitter to decide what submission to make. That is consistent with the practice described by Mr Walsh, as set out at [108] above.

110. The RDC accepted Mr Koutsogiannis's representations and concluded that Mr Koutsogiannis did not behave dishonestly or without integrity in making requests for submissions within what he understood to be an acceptable range. In a record of its decision to discontinue the proceedings against Mr Koutsogiannis dated 2 April 2015 the RDC said that it took into account all the evidence, including Mr Koutsogiannis's particular experience and lack of training or guidance from his employers on the benchmark submissions process; the insignificant part of his day-to-day role which the submissions process occupied; the non-compliant culture within both UBS and the market at large which, on the particular facts of this case, in the RDC's view would afford Mr Koutsogiannis some excuse for not appreciating that this was improper conduct.

111. Mr Hussein does not now say that he held the same view as Mr Koutsogiannis as to the permissibility of seeking to influence submissions within a range of possible submissions which were objectively justifiable, although he did plead in his Reply that he understood that it was perfectly permissible to take into account the bank's overall or aggregate LIBOR exposures if this did not result in a significant deviation from the market expectation of where UBS's LIBOR submission would be, which he referred to as being "in the range" or "middle of the pack". Mr Hussein did not mention this in his witness statement and Ms George in her closing submissions said that there was a difference of view between Mr Hussein and Mr Koutsogiannis as to the correct approach, resulting from Mr Koutsogiannis having given the question a great deal more thought because of his industrywide role, whereas Mr Hussein simply thought that it was the duty of the bank to come to a good faith submission and in that process was entitled to take into account its aggregate commercial interest rather than individual positions. In his oral evidence, Mr Hussein said he knew nothing about the

"range" argument before these proceedings and he simply looked at it from the perspective that Mr Keller would make a good faith submission at the relevant time. We return to that issue in more detail when considering how to interpret the various communications that Mr Hussein had with the Trader-Submitters.

112. It is also clear that more senior managers sanctioned the practice of taking derivative positions into account when fixing LIBOR submissions. Mr Koutsogiannis said in his interview with the Authority that from August 2007 there was a direction from management for the various business areas to talk to each other and exchange derivative information "and for the numbers to stay within the pack" and the exercise involved the exchange of as much derivative market information as possible to help the submitters come up with the appropriate numbers they could consider to submit for LIBOR. He said that, some of the submitters were reaching out to derivative traders and asking them for information about their reset risk, and at the time Mr Koutsogiannis thought nothing wrong of them doing it, given that any of those numbers would have been appropriate in picking a number within the numbers that they could have considered on a particular day would benefit the bank's profit and loss and was therefore a sensible thing to do, bearing in mind there were no cash transactions actually happening at the time. Mr Koutsogiannis clearly saw it in terms of details of derivatives positions being given to the submitters so that they had a number of different data points they could consider in coming up with an appropriate LIBOR submission.

113. This practice is confirmed by an email of 9 August 2007 from Mr Gaspare LaSala, a manager, to Mr Koutsogiannis and others. The relevant text of that email is set out at paragraph 98 of the Final Notice, as quoted at [65] above, and in our view, has been correctly interpreted by the Authority as requesting giving less priority to making submissions that favoured UBS's derivatives positions, because of the feeling that for the time being it was in the bank's interest to err on the low side with its submissions.

114. It was also clear that Mr Prinz was aware of the practice. On 11 December 2007 Mr Michael Pieri sent an email to Mr Prinz asking how much pressure could be exerted to raise the 3 month yen fixing over the next week stating that "everyone will be trying to influence the fixing next Monday reflecting their positions. If we don't do the same we risk an adverse PL". We do not know the outcome of that request, but Mr Prinz replied that he would "talk to [a colleague]". Mr Prinz said in interview to the Authority that he told Mr Pieri that the request was inappropriate.

115. It was against that background that Mr Hussein had the chats which the Authority rely on in this case.

Chats on which the Authority does not rely

116. Prior to the chats on which the Authority relies having taken place, Mr Hussein participated in a number of chats where the question of derivatives positions being taken into account during the LIBOR submission process appears to have been discussed. In the Decision Notice the Authority referred to five communications which took place between 27 April 2007 and 3 March 2008 in which Mr Hussein

informed Trader-Submitters of his preference (or his lack of a preference) for sterling LIBOR rates and that the Authority had not found that Mr Hussein was acting improperly by reason of his part in these communications.

117.For example, on 2 November 2007, in one chat in which among others Mr Koutsogiannis, Mr Snowden (a sterling LIBOR submitter) and another colleague, Mr Heusser, took part the following exchange took place between Mr Heusser and Mr Hussein:

> "Heusser: any preferences?
>
> Hussein: i am pying the fix so as low as poss… but I had it vs dec so that's worked well so don't really mind that much
>
> Heusser: ok… will go neutral… I need a high one"

118.It should be noted that Mr Heusser was a STIR derivatives trader and on 30 March 2007 Mr Hussein and Mr Heusser had had a chat where they agreed that it made sense to speak to each other about the possibility of them offsetting their respective positions through internal hedges rather than having to go externally to execute FRAs in the market so that as well as informing the Trader-Submitters as to their respective positions, the traders concerned could learn about each other's positions. Indeed, in his interview with the Authority, when referred to this chat, Mr Hussein said his request for "as low as possible" was a description of his hedging requirement and not a request for a LIBOR submission, observing that he had no relevant interest in the bank's LIBOR submission and that his conversations on these chats was always in terms of trying to hedge his risk.

119.Similarly, on 19 November 2007 the following exchange took place between Mr Walsh, a Trader- Submitter based in Zürich and Mr Hussein:

> "Walsh: u have an axe mate?
>
> Hussein: nah-im rec the 6m fix… which ain't moving!"

120.Mr Hussein said in interview in relation to this chat that he did not take Mr Walsh's question as being a solicitation for a request for a submission and that he had no reason to think that this was anything other than a conversation about risk in the context of Mr Hussein looking to hedge his risk, and he provided the information requested in good faith. The other chats in this period were in a similar vein, with Mr Hussein responding to enquiries from the Trader-Submitter as to the state of his trading book and whether he had any preference for a higher or lower LIBOR fixing.

The events of 20 March 2008

121.On 20 March 2008, Mr Hussein entered into a chat with Mr Adrian Keller, who, as we mentioned at [86] above, was a derivatives trader based in Zürich who also had responsibility for LIBOR submissions. Mr Hussein referred to the state of his trading

book, as did another trader, Mr Daya, who was participating in the chat and then, in relation to the LIBOR fixing, the following exchange took place:

> Hussein: high would be good if poss
>
> Keller: so u need a higher fixing… ok we will fix the 3m higher

122. Mr Hussein's evidence to the Tribunal was that Mr Keller's response "initially caused me to think that something may have been awry." His reason for that concern was that although he understood that submitters could take into account trading positions alongside other factors when determining their submissions, they could not favour one trader's position over that of another and that Mr Keller's response might have meant that he would reflect Mr Hussein's position in isolation. Mr Hussein therefore raised his concerns with his line manager, Mr Leeming, and asked him whether, in his view, the chat raised any issues. Mr Hussein was cross-examined as to what was said in his conversation with Mr Leeming, and in particular whether he got any comfort from Mr Leeming about the difference between taking into account his own individual trading position and UBS's aggregate trading positions, but all he was able to say he remembered was that Mr Leeming reviewed the chat and confirmed that it did not give rise to any concerns. Mr Hussein's explanation of his concerns regarding this chat in his interview with the Authority was that his concern was that Mr Keller might have misunderstood him and, whereas he was talking about hedging his risk, Mr Keller might have misunderstood the answer as indicating that Mr Hussein was requesting a high LIBOR fix.

Chats on which the Authority relies

123. It appears that there was no further contact between Mr Keller and Mr Hussein until January 2009. Mr Hussein speculates that the reason for this was that the trading information that he provided to Mr Keller was obtainable from his reset reports, but we can make no findings in that respect.

124. Contact between Mr Hussein and Mr Keller resumed in January 2009. It would appear that this was a result of a restructuring at that time and Mr Holger Seger, a senior manager based in Zürich, wanted relationships to be built between the STIR and Rates business areas, Mr Hussein's understanding being that increasing the frequency and depth of communications between Rates and STIR, particularly communication of trading positions, was a key means of improving the way UBS did business.

125. Mr Hussein's evidence was that he was instructed by Mr Seger to share his trading positions with STIR. This is consistent with the opening words of the chat which took place between Mr Keller and Mr Hussein on 27 January 2009. The relevant text of that chat is as follows:

> *kellerad: u got the mail from Hoger* [sic.] *as well*

husseiar: yeah i guess its a good idea to get cracking on what we can do better as soon as possible

kellerad: that this is a good idea as well...let me think about it...give u a feedback this afternoon

husseiar: sure

kellerad: can we do the meeting with Holer [sic.] *tomorrow afternoon at 15.00 zurich time?*

husseiar: thats fine by me

[...]

Husseair: shall we have a chat later this afternoon about both of our businesses...i have to admit i know some of what you guys do...but not all

kellerad: have the same prob on u side but let's chat this afternoon

[...]

kellerad: hi Arif here my feedback: I think from my side we need to improve communication (that should be the main focus) – showing the interest that we can act for each of the books – netting the position, especially in the short end – narrowing spreads – communicate libor fixings interest

husseiar: hi Adrian...i completely agree with the libor fixings...i have a whole book of them and i would want you guys to be able to lean on them

[...]

husseiar: i save down a reset report everyday which i save down on a drive so ist accessible to everyone

kellerad: we can do the same as well on our side...i think patrick [Patrick Heusser] *also set up a internal matching system as well...yes will sort that our with Patrick to see how they are doing it*

126. Unfortunately, the Authority has not been able to locate a copy of the email that Mr Hussein refers to at the beginning of this chat, but we infer from what Mr Hussein says that he and Mr Keller were asked to cooperate with each other and the chat indicates that the discussions that Mr Seger envisaged occurring had a dual purpose. First, the reference to "netting the position" refers to the ability to effect an internal hedge. For example, where Mr Hussein had a swap under which he was receiving LIBOR on a particular day and Mr Keller had a swap under which he was paying LIBOR on the same day, neither needed to find a hedge because they could net against each other. Secondly, the reference to "communicating LIBOR fixings interest" could indicate Mr Keller was envisaging that Mr Hussein's trading positions would be taken into account in making LIBOR submissions and Mr Hussein's comment that he would like "you guys to be able to lean on them" could indicate that Mr Hussein wanted STIR to take his positions into account in their LIBOR submissions each day, although Mr Hussein's oral evidence was that he was suggesting that Mr Keller could use his positions to narrow spreads to customers through the amalgamation of their respective positions. He also said that if Mr Keller had passed his trading data to the LIBOR submitter (who he understood to be Mr Snowdon) for factoring into a particular day's submission he would not have considered that impermissible as long as an individual trader's positions were not treated in isolation and allowed to skew the submission. He said that his understanding of UBS's policy was that closer alignment of Rates and STIR would facilitate communications so as better to align LIBOR submissions with aggregate exposures.

127. From the following day, 28 January 2009, until the day he left UBS's employment on 19 March 2009 Mr Hussein routinely took part in electronic chats with Mr Keller or one of his colleagues on the STIR Desk shortly before 11 am in which Mr Hussein told the STIR Desk whether he had any preferences regarding that day's sterling LIBOR rates, and if so what those preferences were. Mr Keller would also be able to see Mr Hussein's reset report with all of his positions.

128. As Mr Hussein said, the majority of the chats adopted a similar pattern; Mr Keller usually initiated the communication by asking whether Mr Hussein had "any special LIBOR fixings" for that day, which Mr Hussein says he took to mean any particularly material LIBOR exposures and consequent preferences for where the LIBOR rate would fix, and Mr Hussein responded with details of his trading positions and preferences as to where the market LIBOR rate would fix.

129. For example, in the chat which took place on 28 March 2009 the chat commenced as follows:

> "Keller: …any special wishes for the libor fixings today?
>
> Hussein: …i only have very small fixings today rec both 3m and 6m
>
> Keller: so u need a high fixing
>
> Hussein: yeah but its so small

Keller: ok

Hussein: only 6k of each"

130. Mr Hussein's explanation of this chat is that he thought that Mr Keller was asking whether he had any particular preferences for where the sterling LIBOR fixing would set and that his reference to the "fixing" in the chats was to the market sterling LIBOR fixing rather than UBS's submission.

131. On 29 January 2009 the relevant exchange was:

"Keller: hi Arif any special LIBOR fixings today?

Hussein: a low 6s fix would be good today i am paying about 20k

Keller: ok will do

Hussein: thanks very much"

132. On 4 February 2009 the relevant exchange was:

"Keller: morning Arif any special libor fixings today?

Hussein: I am paying the 6m fix today

Keller: ok will put in low 6m fix

Hussein: yes pls"

133. In both of those chats, Mr Hussein does not accept that he understood that Mr Keller would put in a submission that reflected his trading position in isolation as it would make no commercial sense for the submission to be based on his exposures alone and that he was not seeking to have the submission skewed to reflect his own position.

134. On 2 March 2009 the relevant exchange was:

"Keller: do u have any spec fixings today?

Hussein: small rec of 3m and 6m today

….

Hussein: im rec the 6m fix in decent size in the next few months.. so im hoping for hi basis!"

135. Therefore, in this chat Mr Hussein was indicating that a high fixing of LIBOR would be helpful to the extent that he was unable to remove the risk from his book.

136. On 4 March 2009 the relevant exchange was:

Keller: hi Arif any LIBOR fixings today?

Hussein: very small rec of 3m and 6m

Keller: ok tks

137.We observe in relation to this chat that there is no suggestion Mr Keller was going to take any particular action in relation to the information given, which suggests, as Mr Hussein said, that the information given would merely be taken on board.

138.Just to indicate that the pattern continued up to the point at which Mr Hussein left UBS, the relevant exchange in the last chat which took place on Mr Hussein's last day at UBS was:

"Keller: any libors today?

Hussein: I am rec the 3m fix

Keller: okay high 3m

Hussein: yes pls"

139.In summary, in relation to all of these chats, Mr Hussein's evidence to the Tribunal was that he was disclosing the state of his book as envisaged by instructions from Mr Seger. He was hoping that, in return, he may be offered internal hedging opportunities from the STIR desk but these never materialised.

140. It is clear to us that at no point during the relevant chats did Mr Keller give any indication that he could offer a hedging transaction and neither did Mr Hussein specifically ask for one. Asked to explain in cross examination why if the conversation had been about hedging Mr Keller did not either offer something or say that he had no interest, Mr Hussein said that Mr Keller should have told him what his position was but he did not. He said that it was clear to him that Mr Keller was just interested in collecting the information that he was given and keeping it to himself and that he felt he did not need to communicate any further with Mr Hussein.

141. On that basis and consistent with his understanding of how the submissions process worked, it did not occur to Mr Hussein that his individual trading position would be directly reflected in UBS's submission, nor did he ask for his position to be so reflected. It was all well and good if his exposures were consistent with STIR's view of the market and UBS's aggregate position (and this may have been Mr Keller's meaning when he said on occasion "ok will fix them high") and he never asked for the LIBOR submission to be skewed for his benefit. Nor, Mr Hussein says, did he ask for the LIBOR submission to be changed once a figure had been finalised, nor did he engage with Mr Keller or others after the 11 am submission deadline to ask where it eventually fixed. In summary, he simply expressed his preference, which was a necessary consequence of his trading position, and moved on.

The end of Mr Hussein's employment with UBS

142.Mr Hussein was unhappy with the structural changes that took place at UBS which affected his business unit. He said he came to realise that the information he

was sharing with STIR was resulting in no commercial benefit for him. He began exploring other opportunities in January 2009, eventually accepting a position at Royal Bank of Canada and left UBS on 19 March 2009.

UBS's practices following Mr Hussein's departure

143. It would appear that there was no material change in UBS's practices as regards LIBOR submissions in the months following Mr Hussein's departure. In a letter dated 21 May 2009, in response to a request from the Authority, UBS's legal department set out the current processes undertaken by UBS in relation to LIBOR submissions. The letter referred to UBS's short-term interest rate (STIR) cash desks in Zürich having primary responsibility for all fixes submitted to the BBA on a daily basis and having sole responsibility for the calculation and accuracy of each rate submitted. Mr Koutsogiannis and Mr Seger were mentioned as having overall responsibility for the integrity of the process and oversight and monitoring of the rates submitted.

144. The letter substantially repeated the description of the process set out in the 3 July 2008 document quoted at [85] above, although it made no specific reference to taking into account information from the derivatives desk. The description was as follows:

> "The cash traders on the STIR desk in Zürich refer to a variety of sources in formulating their "perception" of UBS's cost of funds in any particular interbank market for any given currency. This will include, amongst other sources, information about money market cash positions and trades executed by UBS (buy or sell) on the money market desks for various tenors (if any), general liquidity information available within the bank, publicly available information about current market interest rates and conditions, broker "colour" on where particular cash rate levels are, as well as previous rates submitted both by UBS and other contributing banks in the previous 24 hours. The ultimate responsibility remains with the cash desk trader to post the level that he or she believes, in good faith, represents UBS's "perception" of the level at which UBS could borrow money in a reasonable size in the interbank market."

145. It would therefore appear that by this time UBS had sought to deal with the criticism that the Authority made in the Final Notice that the 2008 procedures did not direct Traders and Trader-Submitters that it was improper to attempt to manipulate LIBOR to benefit trading positions.

146. However, a chat in which Mr Koutsogiannis and Mr Keller participated on 25 June 2009 demonstrates that there were still exchanges as regards preferences for LIBOR fixings. The following relevant exchange took place:

> Koutsogiannis: I hope it doesn't lag given the size of fixing i have today
>
> Demeyela: u need low 3s and/or 6s?.. We need low 6s.. boys, we send the fixings in about 1hr, so let us know pls

147. Later that morning, there was a further chat between those two participants in which it was agreed that they should not have been talking about putting fixings for their positions on a "public chat", which indicates that by that stage it had been made

clear within UBS that it was not permissible for trading positions to be taken into account when fixing LIBOR submissions.

The experts' interpretation of the chats

148. Mr Broderick's interpretation of the chats can be summarised as follows:

(1) The language used by Mr Keller does not relate to offsetting reset risk or hedging and indicates that he is seeking Mr Hussein's preferences as to UBS's LIBOR submission for the day;

(2) The language Mr Hussein uses in the chats is not language which would be used to find offsets for reset risk or any other form of hedging transactions; and

(3) There is nothing in the chats to indicate that Mr Keller, or anyone else, would aggregate Mr Hussein's positions with any other positions before determining the UBS's LIBOR submission.

149. Mr Broderick therefore concludes that none of the chats are to enable a hedge or any trade to happen between Mr Hussein and Mr Keller. They are all concerned with gathering information about Mr Hussein's risk on the day and then for Mr Keller to use that information to bias his submission for the LIBOR fixing.

150. As regards his reasons for that conclusion, Mr Broderick says that had the discussions been about possible hedging transactions, he would have expected specific requests to be made by Mr Hussein for a quote for a trade to cover a specific position and would expect the response to be either that there was no interest or, if there was interest, an indication of a price for the trade to happen.

151. Mr Broderick says, that when Mr Hussein indicates that a high fixing would be "nice" or would suit his book and where Mr Keller replies to the effect that "ok will do" it indicates that Mr Keller's intention was to bias the UBS submission so as to benefit Mr Hussein's position. Mr Broderick did not find any indications of an intention to trade hedges, nor any discussion relating to hedging and said there was no language that allowed him to conclude that they refer to anything other than UBS's LIBOR submission and the bias requested by Mr Hussein. Mr Broderick says that he cannot ascribe any definitive meaning to the phrase "lean on" as used in the chat which took place on 27 January 2009 and he did not rely on that phrase having any particular meaning when drawing his conclusions as to the meaning of the conversations that followed.

152. Ms George did not seek to challenge Mr Broderick's evidence to any material extent. Indeed, she commenced her cross examination with a statement that there was relatively little in his report with which she disagreed.

153. Mr Zapties, in his initial report prepared for the RDC hearing, focused on whether the language in the chats use was consistent with Mr Hussein's case as it was then being put that his purpose for engaging in the chats was solely to explore hedging opportunities. His supplemental report, prepared for the Tribunal hearing, focused

primarily on UBS's policies and procedures for the making of LIBOR submissions and he made only one brief reference to the dual purpose that Mr Hussein said in his evidence to the Tribunal that he now realised the chats had. Mr Zapties said that it was reasonable to conclude that Mr Hussein knew that his preferences could possibly have been included in the LIBOR submission but that the chats appeared to be concerned with the sharing of reset information around hedging. In the absence of any elaboration of that conclusion and the reasons for it, we have not, as explained at [55] above placed any significant weight on Mr Zapties's evidence.

The period after the commencement of the Authority's investigation into Mr Hussein's conduct

The commencement of the investigation and Mr Hussein's interview with the Authority

154.Following completion of its investigation into UBS, the Authority appointed investigators on 29 November 2012 in relation to Mr Hussein's conduct. This was shortly before the publication of the Final Notice on 19 December 2012. In response to questions from the Tribunal, Mr Hussein said that he was very worried when he received the notice of investigation but he did not recall anything that he had done that he thought was wrong at the time because UBS had conducted its own internal investigation and he would have thought that if he had done something wrong then somebody from UBS would have asked to interview him. He was also worried when he read the Final Notice, which was published before he was called for an interview by the Authority in relation to his own investigation, but said that he did not recall any of the chats referred to in the Final Notice and could not recall anything at the time that would lead him to believe that he was involved in any of the behaviour referred to in the Final Notice.

155.Mr Hussein was sent a number of documents prior to his interview, including transcripts of a number of the chats in which he was involved and which are referred to in this decision. That included the chats of 20 March 2008 and 27 January 2009 that took place between himself and Mr Keller. He was also given copies of the internal UBS document setting out its procedures for submissions to the BBA referred to at [85] above. He was given copies of a number of the remaining chats on which the Authority relies on the day of the interview, and the remaining ones shortly thereafter.

156.It was some months after the publication of the Final Notice and the commencement of his investigation that Mr Hussein was interviewed. The interview took place on 2 July 2013.

157.At his interview, Mr Hussein was asked whether it would have been appropriate for a rates trader to have involvement in UBS's LIBOR submission to which he responded that "it wouldn't have been something that I would have been prepared to do", his reasons being that he did not want to put himself in a position wherein one might misinterpret what he was doing, adding that it was a role for Compliance to make sure that he was not put in that position. He said that his communications with

the STIR desk in Zürich were about his risk. He said he made those communications in good faith and he had no control over what happened to the information that he gave but he nevertheless needed to speak to them about his positions because he needed them to help with his hedging risk. Asked about the risk that his positions could be taken into consideration when LIBOR submissions were made he replied:

> "…. There should be proper compliance and procedures in place to ensure that doesn't happen, and I would always have assumed that there were proper compliance and procedures in place and that should that ever happened, and that was always my understanding when I had any of these conversations, was that I'm being protected by the compliance procedures which make sure that that didn't happen. So I can only control what I can control. I have to have the conversations about hedging risk because that it is a group that hedges risk…. I'm always assuming that there are proper checks and balances in place to ensure that my information is not treated in any way apart from the way it should be treated in… I'm speaking to individuals who are.. Traders, and I'm speaking to them in their capacity as traders. I don't know who is setting LIBOR. I don't know what conversations they have with their colleague who sits next to them, and I'm assuming that--, just as I would, you'd follow the correct procedures."

158. Mr Hussein was asked about the risk that a LIBOR submission would be influenced by his trading position, which he accepted was a risk without the correct procedures in place. When asked whether traders ought to be making LIBOR submissions he answered:

> "With-- the benefit of experience, and having understood the business a lot more, it would not be something that I would put in place in my business…"

159. Mr Hussein was then asked about the chat which took place with Mr Walsh on 19 November 2007, as referred to at [119] and [120] above. Mr Hussein's stance was that these conversations were always very vague, he was always very non-committal about his positions and he was talking about risk. He did, however, agree that with hindsight on a few occasions he was being asked about requests for LIBOR submissions when he was asked by Mr Keller "Arif, any special LIBORs today?"

160. In general, Mr Hussein's answers in interview were that when he was being asked about his positions, he was being asked if he had any risk he needed to hedge on the day in question and he gave the same answer in relation to similar chats involving not himself but Mr Koutsogiannis.

161. Mr Hussein was clear in his answers that he did not interpret his communications with Mr Keller as Mr Hussein asking for Mr Keller to increase the sterling LIBOR submission for the benefit of his trading, his consistent answers being that the conversations were about what he was looking to hedge on the day and he was seeking to clarify which way round his positions were so that Mr Keller understood what his risk was. When asked whether he was sure that Mr Keller was not soliciting him and Mr Hussein simply had not understood that, his answer was that he gave his information in good faith so he knew what he was trying to achieve and all he could do was give Mr Keller the information in good faith, without knowledge about the

procedures on the other side of the business, his interest being in hedging his risk and to try as hard as he could to be proactive in reducing the risk on his book. He did, however, say that there was obviously some doubt about the conversations and that if he had the choice he would not be involved in them. He said:

> "I would not want anyone to think that I am-- I am asking for a LIBOR submission to be changed because on a personal point of view. I don't think that is something that is-- that I would want to do if I had my choice about it."

162. When asked towards the end of his interview whether senior management had instructed him to have these communications with Mr Keller because they wanted Mr Keller to submit LIBOR in a way that was beneficial to his trading position, he reiterated his position that his conversation with Mr Keller was always about risk and that he did not know what happened after the communication. His position was that the only result of those conversations should be either that he traded with Mr Keller or he did not.

163. It is clear from the summary of the key points raised in Mr Hussein's interview, that at no point did he state or imply, as he clearly stated before the Tribunal, that he knew at the time the conversations took place that account would be taken of his trading positions by Mr Keller and others when determining the appropriate LIBOR submission to be made. The clear impression that arises out of the interview is that from his perspective the conversations were purely about hedging, and if Mr Keller had another reason for seeking the information, then that was a matter for him; the assumption from Mr Hussein's perspective was that any use of that information would be made appropriately in accordance with relevant compliance procedures. When it was suggested to him at the interview that the communications could have had another purpose, he conceded that it was only with the benefit of hindsight that he now realised that the communications could be interpreted as a solicitation by Mr Keller of Mr Hussein's trading positions so that they could be taken into account in making the LIBOR submission.

The Authority's Preliminary Investigation Report

164. The Preliminary Investigation report dated 14 October 2013 ("PIR") drew conclusions, it would seem, purely from the evidence that Mr Hussein gave in his interview, its interpretation of the various chats referred to above, and the evidence of Mr Coombs and Mr Prinz in their respective interviews. On the basis of this material, the Authority's preliminary view was that Mr Hussein was knowingly concerned in UBS's breach of Principle 5 on the basis that:

(1) he understood that LIBOR submissions were supposed to be based on the cost of borrowing in the interbank market;

(2) he was aware of requests for submissions being made on a basis other than the cost of borrowing in the interbank market;

(3) he made requests for submissions himself on a basis other than the cost of borrowing in the interbank market; and

(4) he was motivated by profit and sought to benefit the bank's trading positions in making such requests.

165. The Authority also concluded that Mr Hussein gave a false or misleading account of his actions to the investigation team in his interview by attempting to characterise the communications concerned as explorations of opportunities for internal hedging.

Mr Hussein's response to the Authority's Preliminary Investigation Report

166. In his response to the PIR, Mr Hussein stressed a number of times that he did not assume that Mr Keller was a LIBOR submitter or that his apparent requests to Mr Hussein were in the context of his formulation of UBS's submissions. Mr Hussein represented that at no point did Mr Keller suggest that the communications would feed into UBS's sterling LIBOR submission process. He did, however, accept that with the benefit of hindsight he could appreciate that Mr Keller was a sterling LIBOR submitter and therefore now acknowledged that Mr Keller and other correspondents were at times asking for his preference for sterling LIBOR submissions.

167. However, he also represented that at the time of these communications he became increasingly uncomfortable with his forced participation in internal chats which offered no benefits but created potential risks, which he described as the possible misinterpretation of his intent in providing trading information to Mr Keller and others. That explanation clearly indicates that Mr Hussein was stating that he knew that there was a risk that Mr Keller would use information he provided for an improper purpose and therefore also suggests that at that time Mr Hussein believed that it was improper for trading positions to be taken into account in the LIBOR submissions process.

The Warning Notice

168. The Authority did not accept any of Mr Hussein's representations on the PIR. The case put to Mr Hussein in the Authority's Warning Notice, given on 26 February 2014, was in essence that Mr Hussein acted improperly and was knowingly concerned in UBS's breaches of Principle 5 because he made requests to UBS's sterling LIBOR Trader-Submitters in an attempt to influence their LIBOR submissions. The Warning Notice states that Mr Hussein knew that the definition of LIBOR required submissions from Panel Banks based on their cost of borrowing in the interbank market. It states that Mr Hussein understood the factors that were proper, and improper, to take into account when determining LIBOR submissions. In particular, he knew that the LIBOR definition did not allow for consideration of trading positions. The Warning Notice also states that Mr Hussein was motivated by profit when making requests to UBS's sterling LIBOR Trader-Submitters and knew therefore that it was wholly improper of him to act in the manner described.

169. The Warning Notice alleged that Mr Hussein's actions when making requests to UBS's Trader-Submitters in an attempt to influence their LIBOR submissions were dishonest and lacked integrity. It concluded that this misconduct warranted the

imposition of a financial penalty of £500,000 and the making of a prohibition order against Mr Hussein as the Authority considered that he was not a fit and proper person to perform any function in relation to any regulated firm.

Mr Hussein's representations to the RDC

170. Mr Hussein made both written and oral submissions to the RDC on the Warning Notice.

171. The focus of Mr Hussein's written representations dated 9 May 2014 was that he did not know that Mr Keller or any of the other Trader-Submitters were LIBOR submitters. In the conversation on 27 January 2009 Mr Keller had represented to Mr Hussein that the increased emphasis on communication between STIR and the Rates Desk had legitimate business drivers: hedging positions internally and showing narrower pricing spreads to customers and Mr Keller did not at any point represent that information which Mr Hussein provided would have an inappropriate impact on LIBOR submissions. Mr Hussein therefore had neither actual or constructive notice that the chats were actually about the alteration of LIBOR submissions to benefit his trading positions; it was wholly reasonable for him to assume that the Trader-Submitters were engaging with him in their capacity as short-end derivatives traders.

172. Mr Hussein also represented that he did not at any point seek improperly to influence LIBOR submissions; the chats rather demonstrate Mr Hussein's motivation to hedge or "net" his trading positions. He said that his references in the internal chats to the "fix" or "fixing" were in respect of the 11 am LIBOR market fixing not UBS's LIBOR submissions.

173. Mr Hussein, however, did refer in his written representations to the chat dated 20 March 2008 referred to at [122] above and, consistent with his evidence to the Tribunal on this point, said that he did "appreciate contemporaneously that something may have been awry". He said that he thought that in that chat Mr Keller had incorrectly understood him to be requesting a high LIBOR submission; as he said in his interview this caused him "no small concern" and to be "very uncomfortable" so he showed the chat to his supervisor, Mr Leeming, and ceased to interact with Mr Keller. However, he did not say in his written representations, in contrast to what he told the Tribunal, that his concern was that Mr Keller's response might have meant that he would reflect Mr Hussein's position in isolation as opposed to UBS's positions as a whole.

174. On 25 July 2014 the Authority wrote to Mr Hussein informing him that Enforcement had, on the basis of limitation concerns, decided to discontinue its case against Mr Hussein for the imposition of a financial penalty under s 66 FSMA. Therefore, as is the case before the Tribunal, the regulatory proceedings now proceeded purely on the basis of Enforcement seeking a decision from the RDC that Mr Hussein be made the subject of a prohibition order on the basis of a lack of fitness and propriety on the grounds that when making requests to UBS's Trader-Submitters in an attempt to influence their LIBOR submissions he was acting dishonestly and lacked integrity.

175. Mr Hussein had an initial oral representations meeting with the RDC on 8 December 2014. The main focus of that meeting was on Mr Hussein's continuing concerns regarding compliance by the Authority with its disclosure obligations but he did repeat his explanation of the chat of 20 March 2008 in terms consistent with what he said in his written representations. Ms George also told the RDC that senior management at UBS thought it was perfectly proper for its trading positions to be taken into account in the LIBOR submission processes and did not seek to conceal this from Mr Hussein but simply never told him that there was such a policy.

176. That meeting was adjourned so as to deal with the disclosure concerns and was resumed on 20 October 2015.

177. The case that Mr Hussein put in his oral representations was consistent with that he set out in his written representations as described at [171] above. In particular, he reiterated that he believed that the Trader-Submitters who were the counterparties to his chats were derivatives traders, did not believe that they were cash traders and consequently did not believe that any of them were LIBOR submitters. Ms George said, however, that Mr Hussein did know that Mr Snowdon was a cash trader and believed that he was the sterling LIBOR submitter.

178. Mr Hussein did not explicitly put his case before the RDC on the basis that he did not know that any discussion with a Trader-Submitter would be inappropriate in so far as he sought to influence submissions to take account of the profitability of his trading positions. On the contrary, the RDC chairman observed during the oral representations meeting that Mr Hussein had said (presumably on the basis of what Mr Hussein had previously said in interview to the Authority) that he would recognise that trying to influence LIBOR for commercial interests was wrong and he would not do that. Ms George responded to that observation by stating "that he would recognise it was wrong and he did raise it is a concern", which we take to be a reference to the chat of 20 March 2008.

179. However, in answer to questions from members of the RDC, Mr Hussein confirmed that his feeling uncomfortable with the conversations was not because he was doing anything wrong, because that did not come into his mind at that time, but because the conversations were a waste of time because he was not achieving anything out of them in terms of hedging opportunities and also because he believed that the focus of the business had changed from a customer facing, market making business to one "where we had to talk internally". He also said that he had no concerns about the propriety of the chats as he assumed that there was compliance oversight of the decision that there should be this level of communication between the different parts of the business when it was brought together.

180. There was therefore the implication in some of what Mr Hussein said in answer to the RDC's questions that he believed he was not doing anything wrong by having these conversations because it was the policy of UBS, as demonstrated by the merger of the Rates Desk and STIR that trading positions could be freely disclosed and taken into account in fixing a LIBOR submission.

181. Nevertheless, it is clear that the essence of Mr Hussein's case before the RDC was that from his perspective the conversations were all about how his positions might be hedged. Any discomfort he felt about the conversations was because the opportunities to hedge did not arise and he therefore considered them to be a waste of time. Neither did he draw the distinction that he sought to do before the Tribunal between sharing information concerning his positions that may be used along with other information deciding the appropriate LIBOR submission, which he now says he regarded at the time as being acceptable, and altering a LIBOR submission to take account of his own individual positions, which he now says he recognised at the time as being unacceptable.

182. He did, however, say that he felt under pressure during his interview to say that in hindsight he could see he was being asked for his positions in order to affect the LIBOR submission.

The Decision Notice

183. As we have summarised at [2] above, the Decision Notice records that the RDC considered that Mr Hussein was not a fit and proper person to carry out any functions in relation to any regulated activity carried on by an authorised or exempt person, or exempt professional firm in that he lacks integrity. The RDC made a finding that Mr Hussein understood that it would be improper for Trader-Submitters to make LIBOR submissions with the aim of benefiting UBS's trading positions, but between 28 January to 19 March 2009 he informed Trader-Submitters of his preferences for LIBOR rates (on the basis of his trading positions). The RDC found that he did so while closing his mind to the risk that Trader-Submitters would use those preferences to influence LIBOR submissions they made on behalf of UBS, with the aim of benefitting his trading positions and in so doing, he acted recklessly.

184. Accordingly, although the RDC found that Mr Hussein knew that it would be wrong to permit trading positions to be taken into account in making LIBOR submissions, it rejected Enforcement's case that he acted dishonestly on the basis that he made requests to Trader-Submitters in attempt to influence their LIBOR submissions for the benefit of the profitability of his trading book knowing that to be improper. On the basis of the chat which took place on 20 March 2008, referred to at [28] above, the RDC found that Mr Hussein appreciated that he was communicating with a Trader-Submitter, or that the information about his preference might be passed onto a Trader-Submitter, and that it would be improper for Trader-Submitters to use LIBOR submissions with the aim of benefitting his trading positions. The RDC rejected Mr Hussein's representations that when he said he would have preferred not to be a party to some of these chats it was because he was finding them to be of no benefit to him, in particular because hedging opportunities were not materialising. Nor did it accept his explanation that he was not concerned because he was working in an environment which was subject to supervision by compliance oversight. The RDC found that Mr Hussein's comments in interview on these chats are consistent with closing his mind to the possible purpose of the communications.

185. The RDC seemed to accept that when expressing his preferences for LIBOR Mr Hussein was doing so, as he represented, as a convenient way of indicating his hedging requirements, but in so doing closed his mind to the possibility that the Trader-Submitters intended to use the information for the purposes of influencing LIBOR with the aim of benefiting his trading positions, rather than with a view to internal hedging.

Mr Hussein's reaction to the Decision Notice

186. In his evidence to the Tribunal, Mr Hussein said that the Decision Notice caused him to reflect on what he knew at the time he had the chats with Mr Keller. He said that he now realised that UBS's aggregate positions would be taken into account when making LIBOR submissions and that this was UBS's policy at the time. He said that he did not spend a lot of time himself thinking about the process and simply did what he was asked to do by senior management. He reiterated that his view was that it was up to the submitter to decide what was taken into account when making the submission, recognising that at the time LIBOR was not a fair reflection of borrowing in any shape or form.

187. In relation to the chat which took place on 4 February 2009, referred to at [132] above, Mr Hussein agreed that it would have been apparent to him at the time that Mr Keller was informing him that he was going to put in a low 6 months submission and it was not simply a matter of hindsight. In response to Mr Strong's suggestion that in his interview with the Authority he felt very uncomfortable about that chat, he replied that when he attended that interview he had just read the Final Notice which was the first time that he realised that what was going on was wrong and therefore when he went into the interview what he wanted to make sure that it was understood what his motives were for entering into those chats with Mr Keller and that it was understood that it was not him who was driving the process. His motive had always been to reduce the risk on his book.

188. He said that he did not mention to the RDC that taking trading positions into account was standard market practice when UBS made its LIBOR submissions as he wanted the RDC to understand that his motivation was to reduce his risk through hedging his positions. On reading the Decision Notice, he was pleased that the RDC found that he was not dishonest but accepted that he must have appreciated at the time that Mr Keller was taking his positions and feeding them into the UBS LIBOR submission process. He was now clear that he had no concerns about the content of those chats at the time. He went on to say that he had now been able to recall that taking into account net positions, and having his risk position factored into the net position, was seen by him to be permissible at the time.

189. When challenged by Mr Strong to accept that his evidence before the Tribunal was inconsistent with the case he advanced to the RDC, namely that taking trading positions into account when making a LIBOR submission was wrong, Mr Hussein reiterated that he was seeking to make the RDC clear about what his motivation was and that he was at no time asking for the LIBOR submission to be changed to suit his position, which he accepted would be wrong.

Mr Hussein's Reply

190. Mr Hussein's Reply to the Authority's Statement of Case was in general terms consistent with the evidence he gave to the Tribunal. In particular, he accepted that he knew at the time that LIBOR submissions were made by individuals who combine the role of trader and submitter and that these Trader-Submitters would routinely ensure that their submissions reflected the aggregate of UBS's LIBOR exposure. Although he maintained that he did not know Mr Keller to be a LIBOR submitter, he accepted that he knew that Mr Keller worked in close proximity to the submitters and was likely to be in communication with them and was likely to use the information Mr Hussein provided about his trading positions to influence the level of UBS's LIBOR submissions.

191. There was one contention in Mr Hussein's Reply that he did not pursue in his evidence to the Tribunal, as we have previously explained. This was his contention that he was taught that it was permissible to take into account UBS's overall or aggregate LIBOR exposures if this did not result in a significant deviation from the market expectation of where UBS's LIBOR submission would be, as described by his colleagues as being "in the range" or "the middle of the pack". It is therefore not clear to us why Mr Hussein's solicitors included this contention in the Reply but we accept that it did not reflect Mr Hussein's own understanding.

Discussion

192. We now turn to the specific issues to be determined on this reference, as identified at [45] above.

193. We start by making findings as to Mr Hussein's understanding of the LIBOR submissions process, what factors may be taken into account in making a LIBOR submission, and Mr Hussein's understanding of the purpose of the chats that took place between him and the Trader-Submitters.

194. In relation to these matters, Mr Strong's submissions can be summarised as follows:

(1) There was a common theme to all of the chats on which the Authority relies. Mr Hussein was saying that he would like a low or high LIBOR submission to be made and Mr Keller was replying that he would achieve that and Mr Hussein thanks him for it. It is a red herring that Mr Hussein's positions were to be aggregated with other positions in the bank; either way Mr Hussein's trading positions were being taken into account when making the LIBOR submission.

(2) It was sufficient for the Authority's case that Mr Hussein understood that he is taking part in an arrangement to provide information which might be used to skew LIBOR submissions as Mr Hussein now accepts. The suggestion that the chats were about hedging opportunities is nonsense and it is clear that the chats were only about LIBOR submissions and adjusting them in the light of trading positions.

(3) Mr Hussein knew from his own researches what the definition of LIBOR said and that submitters at UBS collated information regarding the bank's aggregate positions and it was for them to make the final submission. He accepted that if UBS put in a submission that was not a genuine estimate of the rate at which it could borrow sterling that could affect the published LIBOR rate and could affect what people pay on loans and derivatives transactions. A person who knows all of those things and passes on trading positions in the knowledge that they will or may be taken into account is behaving contrary to market standards and is therefore behaving dishonestly. It does not matter whether that person thinks his positions are going to be taken into account in isolation or only when aggregated with other books; he knows that trading positions are being taken into account for commercial advantage.

(4) Mr Hussein could not explain in his evidence why it was proper to take trading positions into account in making LIBOR submissions and there is no credible explanation for Mr Hussein's omission to say that in 2009 he thought it was permissible for a bank's aggregate trading position to be taken into account. It was more likely that his new case is a fabrication and more likely that he knew all along that his conduct was improper and therefore it is his current case that is a fabrication.

195. We have, on the balance of probabilities, and contrary to Mr Strong's powerful submissions, accepted Mr Hussein's explanation as to his interpretation of the chats as explained in his evidence to the Tribunal and consequently have concluded that he acted neither dishonestly nor recklessly in relation to those chats. In view of our conclusions on the second part of the Authority's case we can give our reasons relatively briefly.

196. We have found that Mr Hussein had these chats against a background where there had been no formal procedures within UBS as regards the LIBOR submission process and Mr Hussein obtained such knowledge as he had through his own researches and informal training from other more experienced colleagues. It was clear that Mr Hussein regarded the submissions process, when he was responsible for it himself, as a minor administrative task and gave no real thought as to what was involved. That also appeared to us to be the culture within the business area in which he operated. The procedures document which we have referred to at [85] above is very unclear as to the extent to which "information from the derivatives desk on current market sentiment on a tenor basis" envisages that the aggregate of a bank's trading positions can properly be taken into account when making LIBOR submissions.

197. The evidence given by Mr Walsh in his interview, as set out at [108] above, and which we have found is consistent with Mr Koutsogiannis's understanding as to the practice within the relevant business areas of the bank, as described at [109] above, indicates a practice of taking aggregate positions into account when making a submission, a decision that would be made by the Trader-Submitters having taken all relevant matters into account. This is consistent with Mr Hussein's belief that what he reported as to his own positions would be taken into account as part of the process. In our view, it was naive of Mr Hussein to believe that it was acceptable for him to pass on information as to his trading book in order that it could be considered as part of the

process and that it was acceptable for the aggregate of the bank's trading positions to be taken into account but that a submission should not be skewed simply because of his own individual position, but we do not believe that Mr Hussein gave any real thought to such an inconsistency. He saw how the process operated, sanctioned by those who were more senior to him and he was given clear instructions from senior management to share his trading information with the Trader Submitters. We accept that he believed that the extent to which it was proper for his information to be taken into account would be the subject of relevant compliance procedures which the Trader Submitters were required to follow and which required them to act in good faith.

198. We therefore find that it was likely that, illogical and unreasonable though it may seem, Mr Hussein believed at the time that this approach was consistent with the definition of LIBOR against a background where not only did UBS itself not borrow sterling but the interbank market was effectively not operating, that alternative ways needed to be found to reflect the likely cost of borrowing and that it was consistent with such procedures that at the time of the chats concerned existed as they did not clearly rule out taking into account derivatives trading positions.

199. We therefore accept Mr Hussein's evidence, as summarised at [100] above.

200. Turning to the chats themselves, as we have previously stated, these did not take place at Mr Hussein's instigation. It is clear from the evidence that he had no particular desire to enter into these chats and that initially, in March 2008, he had concerns about them. He only engaged in them because he was instructed to do so. It is therefore clear that there was no evidence that Mr Hussein saw the chats as a means of benefiting his own individual trading positions for profit, an allegation that was made in the Warning Notice, but which was rejected by the RDC and forms no part of the Authority's case before this Tribunal. We therefore do not interpret the chats as requests by Mr Hussein that LIBOR submissions be skewed so as to benefit his own individual trading positions. We therefore accept that it was likely that in so far as Mr Hussein saw any benefit in the discussions, it would be that they might offer the opportunity of hedging his positions.

201. The very first chat that we have referred to, and on which the Authority does not rely, was the one that took place on 2 November 2007, referred to at [117] above, indicates to us that Mr Hussein and others are being asked for their preferences for where LIBOR would fix, but there is no evidence of a specific request by Mr Hussein for any particular submission to be made. As regards the subsequent chats, although some might be interpreted as Mr Keller agreeing to ensure that submissions reflected Mr Hussein's own individual positions, others, such as those on 2 and 4 March 2009 simply indicate what ultimate fix would suit Mr Hussein's positions rather than any suggestion that his positions would determine the submission itself. We therefore accept Mr Hussein's evidence that he was not in any of these chats seeking to obtain a benefit for his own individual trading positions through the submissions process. Indeed, Mr Hussein was alert to the possibility that Mr Keller might be offering to skew a submission for his own benefit in the chat that took place on 20 March 2008 and he subsequently talked to Mr Leeming about his concerns. In the light of him having received an assurance that there were no concerns, it is not surprising that

when similar language was used in later chats, Mr Hussein did not raise further concerns.

202. However, neither is there any evidence that in reality these discussions were all about Mr Hussein's seeking hedging opportunities. At no time do they make any specific enquiry of Mr Keller as to whether he could be offered an internal hedge, and at no time did Mr Keller seek to offer Mr Hussein a hedging transaction or seek to discuss the possibility that such transactions might take place. It is not unusual in investment banks for colleagues not to act in a collegiate fashion and seek to help each other out; Mr Hussein's attitude was that he did not see any particular benefit in these discussions and we assume that Mr Keller felt the same way, as far as helping out each other was concerned.

203. We therefore accept Mr Broderick's evidence that the language used by Mr Keller does not relate to offsetting reset risk or hedging and indicates that he is seeking Mr Hussein's preferences as to UBS's sterling LIBOR submission for the day. We also accept his evidence that the language Mr Hussein uses is not language which would be used to find offsets for reset risk or any other form of hedging transaction. However, we do not think that Mr Broderick gives sufficient weight to the background against which Mr Hussein engaged in these chats, and for the reasons we have given we do not interpret the chats as being requests by Mr Hussein that UBS's sterling LIBOR submissions should be skewed so as to benefit his individual trading positions.

204. In the light of our findings, insofar as any particular meaning can be given to the phrase "you guys to be able to lean on them", as used by Mr Hussein in the chat of 27 January 2009 when referring to his own positions, we accept Mr Hussein's evidence that he was suggesting that Mr Keller could use his positions to narrow spreads to customers through the amalgamation of their respective positions. We note that Mr Broderick did not ascribe any definitive meaning to the phrase.

205. It follows from the above discussion that we accept Mr Hussein's evidence as to his attitude to the LIBOR submissions process as summarised at [141] above.

206. Consequently, in the light of our findings about what Mr Hussein knew or believed as regards the definition of LIBOR and what factors might properly be taken into account in determining a LIBOR submission, the fact that we have found that he did not seek personally to manipulate UBS's LIBOR submissions, applying the test in *Ivey,* we conclude that Mr Hussein's knowledge of the use to which information he provided would be put was not such so as to render his participation in the chats contrary to the ordinary standards of honest behaviour. In our view his conduct was not contrary to those standards given his knowledge of the relevant facts and matters.

207. As far as recklessness is concerned, given our findings that Mr Hussein did not address his mind to the question as to whether it would be improper for his individual trading positions to be taken into account in the aggregating process that he believed would take place before UBS's LIBOR submissions were made, we do not find that

he closed his mind to the risk that the information he provided would be used improperly.

208. Accordingly, we do not find that Mr Hussein acted dishonestly or without integrity as regards his participation in the chats on which the Authority relies. Had that been the only issue that we had to consider, we would have made a direction that the Authority reconsider its decision in the light of our findings.

209. As regards the second issue that we need to determine, as set out at [45] above, there can be no doubt that the case that Mr Hussein advanced before the Tribunal is substantially different to that which he maintained before the RDC and, in some respects, is inconsistent with the answers which he gave to the Authority during the course of his interview prior to the instigation of the regulatory proceedings.

210. Although Ms George had previously denied that Mr Hussein was advancing a significantly different case, particularly in the course of extensive correspondence with the Authority on this issue and in the course of previous case management hearings held on this case, she accepted in her closing submissions that Mr Hussein's case had changed.

211. Her submissions on this point, echoing Mr Hussein's evidence to the Tribunal, were as follows.

212. In relation to the interview, Ms George submits that this was held at short notice, Mr Hussein was given little documentation before the interview and he had little recollection at the time of the chats or their significance. Accordingly, he was incoherent in his answers which was unsurprising since he was faced with a situation where he had been accused of serious wrongdoing. It was therefore understandable that the evidence he gave during the interview was unreliable.

213. As regards the RDC proceedings, it was only after Mr Hussein received the Decision Notice and reflected on it that he realised that he must have known at the time he had the chats that the information he was providing to Mr Keller would be taken into account in determining UBS's LIBOR sterling submission. At the outset of the RDC proceedings, Mr Hussein had been distracted by the potential devastating effects of a large financial penalty being imposed upon him and directed his efforts to resisting that proposal, which was ultimately successful as a result of the Authority's failings in the disclosure process. Ms George accepts that the Authority was misled by Mr Hussein's answers during interview and during the RDC process but said that Mr Hussein did not intend to mislead the Authority.

214. There is no doubt that Mr Hussein did mislead the Authority through his answers in interview. However, we characterise what happened as Mr Hussein being economical with the truth rather than deliberately giving false answers. His sin was one of omission, in that he put emphasis on the communications being relevant to his need to manage his risk but failed to disclose that he was aware that the conversations had a dual purpose and that the information he provided about his trading positions would be taken into account by the Trader-Submitters. He had by this time seen the

Final Notice and, as he said in answer to questions from the Tribunal, he was very worried when he received the notice of investigation. He admitted that he did not handle the interview very well and was extremely nervous.

215. We are prepared to give Mr Hussein the benefit of the doubt and say that he had not had adequate time to prepare for the interview and think through in detail what he remembered from those chats back in 2009, which at the time he would have regarded as routine and without controversy. Whilst there was no evidence that the interview was improperly conducted or that he was put under undue pressure, we can understand why in the heat of the moment fully complete answers may not always be given.

216. However, we cannot accept that after plenty of time for mature reflection, and with lawyers engaged so as to assist him in the process, that Mr Hussein failed thereafter to remember that the chats had a dual purpose.

217. Mr Hussein's response to the PIR was positively misleading in that he had clearly by then considered whether the chats concerned could have been about LIBOR submissions as well as hedging transactions because he stated that he knew that there was a risk that Mr Keller would use information he provided for an improper purpose. It is therefore not credible that at this stage, Mr Hussein had still forgotten that the chats had a dual purpose.

218. This situation was clearly compounded by Mr Hussein's representations to the RDC. As we have found at [181] above, Mr Hussein put an emphasis on how the conversations were all about how his positions might be hedged. He said nothing about his knowledge that his trading positions would be taken into account in the submissions process.

219. We cannot therefore accept his explanation that it was not until after he received the Decision Notice that he remembered the full extent of what he knew at the time the chats took place as to their purpose. Neither Mr Hussein in his evidence under cross examination nor Ms George in her submissions could offer any rational explanation as to why Mr Hussein was unable to appreciate the true position before he received the Decision Notice.

220. We have to accept Mr Strong's submissions that if, as we have found to be the case, Mr Hussein is now telling the truth as to the true position, then his failure to say it before now was a breach of his duty to be candid with his regulator.

221. We have tried to rationalise why Mr Hussein has adopted the approach that he has and why he did not tell the truth at an earlier stage in the process. We think the reason is, as Ms George hinted at in her closing submissions, that Mr Hussein was genuinely frightened at the prospect of a large financial penalty. He would have seen how the case was starkly put to him in the PIR and may have considered that if he told the truth at that point he was unlikely to have been believed by the Authority. He therefore decided to continue the emphasis that he put at the interview on his understanding that the discussions were all about hedging. After he had received the

Decision Notice and decided to make a reference to the Tribunal, he probably realised by then that his original version of events no longer had any credibility and it had to be abandoned.

222. It also therefore follows that Mr Hussein has been untruthful in his evidence to the Tribunal when he says that it was only when he received the Decision Notice that he realised what he knew in 2009. As we have said, when he received the Decision Notice, what he did realise was that his original explanation was no longer credible.

223. Had Mr Hussein been candid and open about that in his evidence to the Tribunal and laid all his cards on the table, then the Tribunal may well have considered the situation sympathetically. Indeed, Judge Herrington even gave him the opportunity to do that at the end of his evidence when he asked him whether, looking back on it, he would have handled the RDC process differently. He was also asked whether in his representations to the RDC he had been trying to rationalise what might have been in his mind at the time. It would have been much to his credit had he candidly admitted that earlier in the process he had been frightened by the consequences of losing his case, was worried that it would not be believed, but was now able to accept that he had acted wrongly and was now telling the truth in all respects.

224. Therefore, whilst it might be understandable why Mr Hussein behaved the way he did, we cannot excuse it. It is a very serious matter not to be candid and truthful with one's regulator and equally serious, if not more so, to give untruthful evidence under oath to a Tribunal. Those are failings that we cannot ignore and go right to the heart of whether a person wishing to work in the financial services industry can be relied on to act honestly and with integrity.

225. Therefore, and whilst we have thought long and hard about this, we cannot see that there is any basis on which we could properly ask the Authority to reconsider its decision to make a prohibition order against Mr Hussein. It cannot be said that in the light of the circumstances, the decision to prohibit is one that is not reasonably open to the Authority to make.

226. This is a tragedy for Mr Hussein because we do not believe him to be a thoroughly bad person. He has made a serious error of judgment but nevertheless we do not think that it is one that should bar him from working in the financial services industry indefinitely. Although this is not a matter for us, and is entirely now in the hands of the Authority, we are aware that it has the power to indicate that it would be willing to revoke the prohibition order after an appropriate period of time and it may consider whether it is appropriate to do so in this case.

227. We should, however, add that there are other aspects of this case which are troubling. Mr Hussein was a relatively junior trader at UBS and he was put under investigation in relation to a limited number of chats which took place over a very short period. This was against a background of widespread manipulation of LIBOR within UBS for which senior managers bear ultimate responsibility and which, as shown by the Final Notice was widely condoned.

228. We have no responsibility for deciding what cases the Authority chooses to make the subject of enforcement proceedings. At many points in the process Ms George questioned why none of the senior managers had been brought to account. Mr Strong made one observation in that regard which we found troubling. He said "…as regards more senior people, one has to remember in relation to UBS that not everybody is in the jurisdiction and when one looks at the Final Notice, the documentation that is referred to as fingering senior people is not extensive. As is the way of these things, the senior people somehow manage to keep their fingerprints off the relevant documents sometimes." We have no knowledge as to what investigations may have taken place and which have not been made public. However, it is hoped that the observation referred to above is not a true reflection of the Authority's attitude to pursuing senior management either in this jurisdiction or elsewhere when it is necessary to do so.

Conclusion

229. The reference is dismissed. Our decision is unanimous.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 20 June 2018