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The Libor Prosecutions: what you need to know

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We have seen a substantial interest in stories involving the criminal prosecution of bankers since the banking crisis in 2008. The allegations surrounding the Libor rate have received significant media interest over the past two years.

The London Interbank Offered Rate (Libor) is an interest rate used to set the financial terms of many financial deals. It also is an indicator of how much faith the banks have in each other. It is used to set trillions of dollars of financial contracts including personal loans, student loans, credit cards, securities and mortgages as well as complex financial transactions from around the world.

The Libor interest rate was set by leading banks submitting rates for currencies. These interest rates are what the banks estimate they would have to pay to other banks in order to borrow from them. These figures are in fact estimations and not actual transactions so there have been some allegations in some cases that false figures were submitted. Banks are supposed to submit the actual interest rates they are paying or would expect to pay for borrowing from other banks. Over $5 trillion is traded each day on the currency markets so small differences in the Libor rate can have a significant effect.

Currency prices, as we know from the dark days of 1992, can fluctuate violently on any given day. In trading currency, global businesses tend to take the exchange rate at 4pm GMT each day. This is known as the “London fix.” Many large institutional investors, including pension funds and hedge funds, ask their banks to transact currency at the London fix.

Knowing that a large order for currency was due to be executed at 4pm, there were allegations in some instances that some traders were boosting their profits by buying currency more cheaply, before the 4pm fix had been set, while still charging their customer the higher rate set at 4pm.

The two relevant regulators and prosecutors in the UK in the Libor investigations are the Financial Conduct Authority (‘FCA’) and the Serious Fraud Office (‘SFO’). The FCA have the power to fine; the SFO have the power to prosecute through the courts.

There has been considerable comment about Libor and the charges that have ensued in the UK. We know that one banker from a leading British bank pleaded guilty to conspiring to manipulate Libor in a UK court in September 2014. The banker cannot be named for legal reasons.

The Financial Conduct Authority

The FCA has pursued manipulations of Libor with vigour. They have levied fines for misconduct relating to Libor. Those fines include:

- The Royal Bank of Scotland plc were fined £87.5 million for misconduct relating to the Libor in February 2013.
- ICAP Europe Limited were fined £14 million on 25th September 2013 for similar misconduct.
- In October 2013 Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Rabobank) was also fined £105 million for misconduct relating to the Libor.
- In July 2014 Lloyds Bank plc and Bank of Scotland plc were fined £105 million for serious misconduct relating to the special liquidity scheme, the REPOSs rate benchmark and the LIBOR.

The Serious Fraud Office

The role of the SFO

The SFO started investigating the alleged manipulation of Libor back in 2012. The SFO apply a number of criteria

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in deciding whether to proceed with prosecutions in individual cases. The questions they ask include:

- Does the financial element exceed £1 million?
- Is there a significant international dimension?
- Is the case likely to be one of widespread public concern?
- Does the case require a highly specialized knowledge?

The law and the facts in fraud cases can be very complex. A jury have to be convinced “beyond reasonable doubt” of two things. The first is the objective element of the fraud. A jury also have to be convinced of the guilty mind, known as the “mens rea” of the Defendant. The complexity of alleged Libor rigging has posed a problem for the SFO both in terms of investigations and prosecutions. In October 2014 the SFO disclosed it had asked for an additional £26.5m to cover significant investigations including Libor. This follows supplementary funding of £19m in 2013-14 in addition to its annual budget of £35m which the SFO explained in its Annual Report here. Chancellor of the Exchequer George Osborne said this month he would make funds available for the SFO for both the Libor and foreign exchange investigations to root out any criminal conduct by the banks.

The law

Some of the most important law on fraud is now in the in the Fraud Act 2006. It simplifies and clarifies some of the dishonesty offences that previously appeared in the Theft Acts. One important difference is that the Fraud Act 2006 does not require a victim in order for the offence to be made out. S12 of the Act provides that where an offence against the Act was committed by a corporate body but was carried out with the “consent or connivance” of a “director, manager, secretary or officer of the body or any person purporting to be such” that that person is liable also. Such a person can be guilty of fraud by omission.

People can be jailed under the Fraud Act 2006 for up to ten years.

Under the Financial Services Act 2012, Part 7, it is an offence to make false or misleading statements or to create false or misleading impressions in relation to Libor. The maximum sentence for this offence is 7 years.

Fraud trials can be unbelievably complex and in the past juries have sometimes struggled to keep up with the significant amounts of documentation, the complex argument and the labyrinthine facts of particular cases. Fraud trials can often last several months adding to the challenge that individual jurors have during these cases.

Who has been charged?

In terms of how things stand at the moment, it is understood that at least 12 people stand charged with fraud offences in relation to allegations relating to Libor. The first criminal guilty plea in the UK arising from the SFO’s Libor investigation was entered on 3rd October 2014.

On 28th October 2014 the SFO issued criminal proceedings against a former employee at Tullet Prebon Group Plc in connection with the manipulation of Libor in connection with an alleged conspiracy to defraud between 1st February 2009 and 3rd December 2009. These are the first cases to come to the courts since the start of the Libor investigation.

Quite properly, the SFO has said that it cannot comment on any of this for legal reasons. Fraud trials are notoriously delicate. Years of investigations can be undone by Defendants having their Right to a Fair Trial (under Article 6 of the Human Rights Act) compromised by unfair or hostile comment in the media. A fair trial needs to have an impartial jury.

The UK Financial Conduct Authority is continuing to investigate allegations into the manipulation of Libor and the SFO prosecutions have not yet been dealt with.

This is a story that has only just begun.

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Patrick O’Kane is Compliance Counsel with Cordery in London

Patrick O'Kane**,** Cordery, Lexis House, 30 Farringdon Street, London, EC4A 4HH

Office: +44 (0)207 118 2700

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