

**IN THE MATTER OF A REPORT TO THE OVERSIGHT COMMITTEE
OF THE BANK OF ENGLAND**

OPINION

- 1** I am instructed to advise Mr Jesse Norman, the MP for Hereford and South Herefordshire, on legal issues arising out of his work as a member of the Treasury Select Committee. The role of the Select Committee includes calling the Bank of England to account. Mr Norman is concerned about the Bank’s conduct and oversight of a process of external review into its employees’ conduct in the foreign exchange market, which involved it obtaining a report from Lord Gribiner QC on 21 November 2014.
- 2** The questions on which I am instructed to advise can be restated as follows:

 - (A) Whether the Bank can be satisfied that the terms of reference for that external review have been properly discharged.
 - (B) Whether the Bank can be satisfied that the terms of reference of the external review were adequate.
- 3** The external review and its questions were not expressly required by any rules. Obtaining answers to those questions was not therefore an end in itself but, as is obvious, must have been intended to further some ultimate objective. The general purpose of this kind of review must be to protect the reputation of the Bank and to demonstrate public accountability when serious issues are raised about its officials’ conduct. On 11 March 2014 (the day before the announcement of Lord Gribiner’s review) the Governor of the Bank told the Select Committee¹ *“I am acutely aware of our responsibility to complete a thorough, comprehensive investigation of all aspects related to this issue. You rightly said this is incredibly important. It is incredibly important for the foreign exchange market and it is fundamentally important to the integrity of the Bank of England. We cannot come out of this at the back end with a shadow of doubt about the integrity of the Bank of England...”*
- 4** Applying that general approach, there is a question underlying the two issues identified above which is:

¹ See Qs 60-61 of Dr Carney’s evidence. Dr Carney is not on the Oversight Committee but properly has been asked and able to answer some questions relating to its activities.

² See Qs 17-19 of Mr Habgood’s evidence.

³ *Doughty v General Dental Council* [1988] AC 164.

(C) Whether the review process as a whole, together with any other steps which may have been taken by the Bank, has enabled the Bank to be satisfied that any failings have been brought to light so that the public can judge whether the institution's response to those failings is satisfactory. Unless there is a transparent investigation of the relevant problems, the public will not be able to have informed confidence in the Bank's future conduct.

- 5 On 25 June 2014 Anthony Habgood, the incoming chairman of the supervisory board (known as "Court"), told the Select Committee, in the context of discussing what would be a successful conclusion to the external review, that he agreed entirely that the Bank's reputation required a broader look than simply involvement in manipulation and also involved "*knowing about it or being given information that should have alerted the Bank to it*" (my emphasis).²
- 6 The answer given by Mr Habgood in June 2014, and indeed the question put to him, are to the effect that the reputation of the Bank includes an enquiry into: has it done what it ought to do? This would include failing to act on information which in fact gave grounds to suspect market misconduct or which called for further investigation.
- 7 This objective approach therefore embraces the standard inquiry which is legally recognised for cases of professional misconduct. No dishonesty or moral stigma is required but simply "serious professional misconduct". This is "*a wide expression that was not restricted to dishonesty or moral turpitude but included all professional conduct, whether by acts of omission or commission, by which [the professional] had seriously failed to attain the standards of conduct which members of the [relevant] profession expected*".³ Again, "*serious professional misconduct was not restricted to conduct which was morally blameworthy but could include seriously negligent treatment measured by objective professional standards*".⁴ In the latter case Lord Hoffmann stated: "*[t]he public has higher expectations of doctors and members of other self-governing professions. Their governing bodies are under a corresponding duty to protect the public against the genially incompetent as well as the deliberate wrongdoers*". Put another way, the public interest in a profession includes how it avoids and, if necessary, exposes and sanctions serious failings falling short of bad faith. It is hard to understand why any different standard should apply to a central bank. However, neither the Bank nor the Select Committee in 2014 appear to have addressed this point.

² See Qs 17-19 of Mr Habgood's evidence.

³ *Doughty v General Dental Council* [1988] AC 164.

⁴ *McCandless v General Medical Council* [1996] 1 WLR 167.

8 Dr Carney on 11 March 2014 specifically told the Select Committee that the Oversight Committee “*are investigating, as they have disclosed publicly, whether any Bank officials were involved in either attempted manipulation of foreign exchange, whether they were aware of the potential for such manipulation, whether they facilitated any collusion between market participants, sharing of client information or otherwise aware of improper behaviour or practices in the foreign exchange market*”.

9 This alternative, and narrower, approach was to focus solely on the Bank’s actual state of mind. Here the issue can be paraphrased as: did the Bank do something it should not have done?⁵ The formal terms of reference read as follows:

The Oversight Committee has appointed Lord Grabiner QC to lead its investigation into the role of Bank officials in relation to conduct issues in the foreign exchange market... [T]he investigation ... will focus on matters relevant to the FAC’s current investigation... and specifically whether any Bank official, during the period July 2005 to December 2013:

(a) was either (i) involved in attempted or actual manipulation of the foreign exchange market... or (ii) aware of attempted or actual manipulation of the foreign exchange market, or (iii) aware of the potential for such manipulation, or (iv) colluded... or was aware of any such collusion...

(b) was either (i) involved in ... or (ii) aware of the sharing of [confidential client] information...

(c) was involved in, or aware of, any other unlawful or improper behaviour or practices...

10 Dr Carney also referred on 11 March 2014 to a new process of requiring staff to “*attest*” to what conduct they were aware of in relation to various markets.⁶ This was, as he made plain, something entirely separate from the external review: “[W]e will finish this investigation but what we will do in tandem is ... a series of measures ... that reinforce the best aspects of the culture...”

The context

11 The Bank was not a regulator for the foreign exchange market. Indeed, there was no regulator. However, that market was regulated by the general application of high-level principles to UK banks as well as by competition law. The Bank was a participant in the market, on its own account (including for its clients) and for government departments. It also gathered market intelligence, in particular through

⁵ Including keeping quiet about actual knowledge of market wrongdoing.

⁶ See Qs. 38-40, 98-102.

a market sub-committee of bank traders⁷ chaired by Mr Mallett as the Bank's chief dealer and forming part of the Foreign Exchange Joint Steering Group set up under the auspices of the Bank in 1973 and involving it and various market participants. This market intelligence was then fed through to other Bank officials responsible for its policy functions of monetary policy and financial stability.

- 12** In my view, notwithstanding that the Bank had no direct regulatory function for the foreign exchange market, its general role as central bank, its financial stability function, and the steps it had taken to involve itself in some element of market scrutiny, all suggest that it had some element of general responsibility. It would be completely unrealistic to consider the Bank as on the same level as other banks dealing in that market, and it does not appear that this is how it was seen. It would be reasonable to expect it to do more than merely conduct its own activities properly.

The review process

- 13** The immediate background to Lord Grabiner's report is that the Bank is ultimately supervised by a board known for traditional reasons as "Court" and which has a statutory Oversight Committee. The Oversight Committee consists of the non-executive members of Court and within the Bank is the only authority which can hold officials to account independently of line management. Under s. 3C of the Bank of England Act 1998 the Oversight Committee can commission external reviews although it is unclear on the material I have seen whether this process was seen as falling under that specific power. In March 2014 the Bank seems to have received information suggesting that its chief dealer, Mr Mallett, might have been aware of improper activity by banks participating in the forex market. Mr Mallett was suspended and an externally-led investigation announced within days. Lord Grabiner QC, an eminent commercial barrister, was engaged to lead the investigation. An experienced City law firm, Travers Smith LLP, assisted in coordinating the review of a large population of electronic documents and recorded telephone conversations.
- 14** Lord Grabiner reported on 21 November 2014 in a published report. He appeared before the Select Committee on 21 January 2015 and provided further explanation of his findings in a lengthy letter of 28 January 2015. It is fair to say that the members of the Select Committee on 21 January generally appeared dissatisfied with aspects of Lord Grabiner's report. On 2 February 2015 Mr Norman wrote to the Governor of the Bank and raised a number of points suggesting a "mistake of interpretation" by Lord Grabiner of one conversation between Mr Mallett and a market trader which had received detailed consideration in the report. Mr Norman

⁷ I.e. the CDSG.

asked the Governor and his colleagues to consider his arguments or invite Lord Grabiner to consider them.

- 15** The Governor replied on 13 February 2015 “on behalf of Court”. He acknowledged the principle that the author of a report could be asked to reconsider his findings but stated, in effect, that the Select Committee hearing and the subsequent correspondence from Lord Grabiner amounted to just such a process, at the end of which Lord Grabiner had stood by his conclusions that Mr Mallett was “not aware of specific instances” of improper market behaviour. As for Mr Mallett’s future, the Bank would have considered disciplinary action against him but he was dismissed around the time of the report for other reasons.
- 16** Thus in the Bank’s view there is nothing further that is, or could, be done. The review process has concluded and been tested, its recommendations for general action accepted, and action against the only individual found to have had awareness of market impropriety is now impossible because he is no longer employed.

The report

- 17** For present purposes the report can be broken down into the instances where Lord Grabiner made adverse findings and those where he decided not to make such findings.
- 18** Lord Grabiner made adverse findings as follows:
- 18.1** Mr Mallett knew from 2008 that banks were having chat room discussions about their positions for that day in order to net them off. Mr Mallett was worried about it and thought regulators might be interested.⁸ The implication is presumably that this activity would assist a bank in influencing that day’s fix of the rate and/or was a disadvantage to others in the market.⁹
- 18.2** Mr Mallett knew from at least 2011 that traders were sharing confidential information, and was concerned that there was “*a level of inappropriateness*”.¹⁰
- 18.3** In March 2012 Mr Mallett said he would feel uncomfortable justifying it to the regulator.¹¹

⁸ Para 52 of the Grabiner Report (“GR”).

⁹ See the general description of “*Attempts to manipulate [the] fix*” at paras 20-22 GR, summarising FCA concerns.

¹⁰ Para 73(a) GR.

¹¹ Stated in terms by Mallett in the transcript at p 54 GR. The corresponding finding in the Report is at para 75.

- 18.4** From November 2012 at least, Mr Mallett had concerns (which he formulated in a conversation) about collusion.¹²
- 18.5** In April 2013 Mr Mallett had serious concerns and clearly thought regulators would consider information-sharing inappropriate.¹³
- 18.6** Mr Mallett did not escalate his concerns at any time. Two emails which he sent to more senior officials in April/May 2013, and which referred in general terms to fixing processes and chatrooms, did not indicate the concerns he had about market practices.¹⁴
- 18.7** Lord Grabiner concluded¹⁵ that Mr Mallett should have escalated these concerns even though no specific written policy applied to them. It was “*an error of judgment*” not to escalate “*once Mr Mallett had concluded that regulators might consider the practice improper*”. Mr Mallett also failed to distribute relevant market intelligence as he should have done. In reaching those conclusions, Lord Grabiner rejected Mr Mallett’s evidence to the effect that he did not actually take seriously the concerns he himself expressed.
- 18.8** Lord Grabiner’s report does not locate the point in time at which Mr Mallett reached the conclusion that regulators might consider the practice improper. It must have been at least March 2012 given Mr Mallett’s own expression of discomfort (paragraph 18.3 above). The Report states that the Bank had no written escalation policy “*during a large part of the relevant period*”.¹⁶
- 18.9** Since a relevant policy was introduced on 1 August 2012, and the adverse findings run up to April 2013 (and by implication continue up to the end of the review period, December 2013), and given the finding summarised at paragraph 18.2 above, it seems likely that “*the relevant period*”, during which Mr Mallett was at fault in not escalating his concerns, ran from at least 2011.
- 19** Lord Grabiner decided not to make adverse findings in relation to a conversation on 3 October 2011:¹⁷
- 19.1** Lord Grabiner describes this as “*an event of importance*”.

¹² Para 68 GR.

¹³ Para 70 GR.

¹⁴ Paras 71-72 GR.

¹⁵ Para 77 GR.

¹⁶ Para 77(a) GR.

¹⁷ Paras 56-58 GR.

19.2 A salesperson at a bank told Mr Mallett that his trader had something which he needed to tell Mr Mallett. The salesperson used the language of *“really getting outta hand... getting really concerned that there’s gonna be a major issue at some stage”*. He expanded on that as *“where these guys are sharing mainly tickets that don’t exist or y’know just making noise around the fix which is probably more than it should be”*.

The salesperson’s introduction is not recorded in Lord Grabiner’s report but appears from the transcript which was sent with his letter of 28 January 2015.

19.3 The trader complained that participants were putting forward unusually large and late trades. He cited a specific and recent day as an example and identified two brokers. He stated that *“some of these banks want to build a book and try and bully the fix”*. This was being done *“without an interest”* and by misrepresenting their true position as buyers when they were actually sellers, or perhaps by misrepresenting themselves as having an interest when they had none. The trader agreed *“absolutely”* when Mr Mallett described this as *“market manipulation”*.

19.4 However the trader also appeared to say that the brokers were facilitating the banks (i.e. were not the principal instigators) and when Mr Mallett suggested that the banks were manipulating the market through the brokers said *“It’s not that, they’re just trying to build a book”*. The denial here is ambiguous and might relate either to manipulation via the brokers or manipulation altogether.

19.5 Mr Mallett ended the conversation by asking the trader to keep in touch and let him or his deputy, who was listening in, know if he heard more of this.

19.6 There was no further contact on either side.

19.7 Lord Grabiner found that the trader was unclear and that neither Mr Mallett nor his deputy understood what they were being told. On that basis he declined to criticise them.

20 Lord Grabiner’s finding on this point was the subject of critical questioning by the Select Committee. His letter of 28 January 2015, and to some extent his answers to the Select Committee at the hearing on 21 January, expanded on his reasons.

20.1 He said that *“it is unclear whether the trader was even complaining about conduct which was unlawful or improper, or was only complaining about heavy speculative trading around the fix”*.

20.2 Mr Mallett’s evidence to Lord Grabiner had been that he could not recall the conversation but at least initially understood it to refer to brokers’ behaviour.

Lord Grabiner's letter reiterated that he accepted Mr Mallett's evidence and gave him the benefit of the doubt.

20.3 Lord Grabiner also stated to the Select Committee¹⁸ that *“the word ‘manipulation’ is ambiguous... You can have perfectly lawful manipulation. It is a very odd word, because it has inappropriate connotations... [but] you could use the word ‘manipulation’ in a perfectly lawful context and you can also use the word in an illicit context... The mere presence of the word ‘manipulation’ does not tell you necessarily which of the categories we are talking about.”* Lord Grabiner went on to state that Mr Norman in his questions about the trader conversation was *“wrongly interpreting the word ‘manipulation’ . I do not accept the spin that you are putting on that word. You are wrong.”*

Analysis

21 The October 2011 conversation is open to differing interpretations.

21.1 On any view, it is not clear, although names were mentioned.

21.2 One interpretation of the October 2011 conversation is that the trader was concerned that very large positions were being taken by banks in a way which was improper, or which was indicative of impropriety.

21.3 It appears from Lord Grabiner's other conclusions that Mr Mallett was probably aware by this time of bank traders sharing information in a way which at least increased the potential for collusive behaviour.¹⁹ It is therefore possible that Mr Mallett might have understood the trader's concerns in the same light when they had their conversation. Although the trader did not directly refer to inappropriate information sharing, he did refer to unusual market behaviour which could be the result of collusion. The salesperson's introduction did refer to *“sharing”*.

21.4 It is of course also possible that the trader's concern was about something which on fuller examination might not exist at all or might not be anything improper. In particular it is possible that the trader might have been doing no more than complaining about heavy speculative trading. Lord Grabiner's report records that this had been a market concern since at least 2006.²⁰

21.5 Speculative trading is well understood, even if many bank participants disliked it. Paul Fisher, the bank's head of foreign exchange, pointed out to

¹⁸ Qs 80-86.

¹⁹ Para 18.2 and 18.9 above.

²⁰ Para 46 GR.

the Select Committee in March 2014 that many bank dealers might consider it to be manipulation even though it is perfectly legitimate,²¹ and the Bank's own minutes of a July 2008 meeting apparently used the word "manipulation" in that lawful context.

- 22** Under the terms of reference, Lord Grabiner was only required to form a view on whether Bank officials "were aware" of improper conduct. The legal validity²² of his report relating to the October 2011 conversation therefore turns simply on (i) whether Lord Grabiner did ask himself that question, (ii) whether there was material before Lord Grabiner on the basis of which it would not be perverse for him to reach his conclusion (namely, that Mr Mallett did not think he had been told of improper conduct), and (iii) whether, in reaching that conclusion, Lord Grabiner left out of account any relevant information, or demonstrably misunderstood any part of the evidence.
- 23** These are very low tests and they have been satisfied. In order to discharge his terms of reference, it was sufficient for Lord Grabiner to analyse the conversation of October 2011 and decide whether he could be sure that Mr Mallett must have interpreted it as a communication of some market malpractice. Lord Grabiner subjected that conversation to detailed analysis and decided that, giving the Bank the benefit of the doubt, it had not been understood in that way. He asked himself the right question and answered it in accordance with evidence which had been presented to him and as to which there was no irrefutably contradictory material. It follows that tests (i) and (ii) above are met.
- 24** I have considered carefully two facets of Lord Grabiner's approach which in my judgment might give rise to arguments about the legal validity of his report under test (iii) above.
- 25** The first is whether Lord Grabiner's approach to the term "manipulation", that it is inherently ambiguous, was a manifest error or misunderstanding. The issue is not that as a matter of language, "manipulation" can be used to describe lawful activities in a disapproving way. Lord Grabiner is obviously correct on that. The question is whether when the trader and Mr Mallett used that term in their conversation in 2011, they might have been using it in that sense, or even in an ambivalent way.
- 26** The difficulty with any reading of that kind is that, unless the context makes it otherwise clear, the default understanding, both legal and market, of

²¹ Qs 71, 82-89.

²² By this I refer to the tests which would be applied if, for example, anyone were in a position to bring a judicial review in respect of the report. It is likely, in my opinion, that an individual who had been criticised would have standing to bring such a complaint. However, for present purposes my point is simply that this body of legal rules provides a basis on which to assess whether the report is legally invalid.

“manipulation”, is of improper activity. That this is the presumptive understanding is demonstrated by Lord Grabiner’s own terms of reference (see paragraph 9 above) and which refer repeatedly to “*attempted or actual manipulation of the foreign exchange market*”. Such manipulation, described without further elaboration, is plainly seen as one example of a broader category residually defined as “*other unlawful or improper behaviour*”.

- 27** If Lord Grabiner had approached the trader conversation on the basis that its protagonists were or might have been using “manipulation” in any sense other than improper activity, his conclusion on that aspect would be open to legal challenge as based on a false premise. However, notwithstanding Lord Grabiner’s comments in the Select Committee hearing (paragraph 20.3 above), I doubt whether that was his reasoning in his report. Since the Select Committee hearing, he has provided an edited transcript of the relevant section of his interview with Mr Mallett on 30 September 2014. This shows that “*market manipulation*” was discussed between Lord Grabiner and Mr Mallett as something which could generate “*concern*” and “*accusation*” and lead to Mr Mallett “*pressing for more evidence*”.²³
- 28** It therefore appears that Lord Grabiner’s conclusion was based on an acceptance of Mr Mallett’s overall interpretation of the conversation as not containing information he would have regarded as significant and as accurately reflecting how he would have responded at the time.
- 29** That leads to the second potential argument, which is whether Lord Grabiner failed to assess Mr Mallett’s failure to take action in response to the trader conversation against the background of the concerns which Lord Grabiner concluded Mr Mallett in fact already had about the foreign exchange market. Given those pre-existing concerns, it is natural to consider why Mr Mallett, faced with a conversation which could be interpreted as a complaint of (inappropriate) market manipulation, did not choose to take it further.²⁴ Put another way, the suggested lack of clarity of the trader’s complaint could be a factor of much less weight once it is accepted that there was more general evidence known to the Bank of involvement in practices liable to lead to collusion.
- 30** In my opinion it would have been better had this potential overlap been articulated in Lord Grabiner’s report, together with reasons for not holding it against Mr Mallett. Paragraphs 56-58 of Lord Grabiner’s report treat the trader conversation as an episode on its own and do not refer forward to the later conclusions reached

²³ I have not overlooked that at p 46 lines 18-23 Lord Grabiner asked directly whether Mr Mallett understood “market manipulation” as meaning something wrongful. Mr Mallett did not directly answer with a “yes” but the sense of his response and the subsequent five exchanges is to that effect.

²⁴ If Mr Mallett had deliberately turned a blind eye to the possibility of improper behaviour, that would be capable of falling within the terms of reference, since it is well understood that such a state of mind is equivalent to actual awareness.

adverse to Mr Mallett and the rejection of his evidence on those aspects of the investigation. However, I consider that it is very unlikely that Lord Grabiner did not have this overlap in mind.

- 31** Accordingly, I conclude that Lord Grabiner's report is a legally valid discharge of the terms of reference.
- 32** There is a separate issue whether the Oversight Committee as the body commissioning the report is satisfied with the report's approach. The test for when a report is legally invalid is different from, and much more restrictive than, the issue of whether a report is considered sufficiently thorough and probing by those commissioning it. That broader issue embraces both the report as delivered and the original terms of reference. In considering that broader issue, the commissioning body is entitled to apply its own standards (i.e. not just the minimum legal test for validity), as well as considering how far its ultimate objectives are served by the report as delivered. I have already pointed out that the ultimate objectives are the protection of the Bank's overall reputation and in principle extend to considering what it should have known and done, and not merely what it wrongly did not do.

The overall outcome of the Bank's review process

- 33** The upshot is therefore that the performance of the Bank's officials at various levels has not been subjected to scrutiny in the way in which professional people are normally assessed when a serious problem comes to light. In particular the narrow terms of reference mean that (1) there has not been an examination of whether Mr Mallett's failure to act on the conversation was a serious failure, and (2) there has not been an examination of the supervision of Mr Mallett by others in relation to his intelligence-gathering and escalation responsibilities.
- 34** In particular the narrow focus of the terms of reference mean that the broader questions raised by the trader conversation have not been examined and reported on. The broader questions do not concern the minute forensic dissection of a telephone conversation but the bigger picture. In this case the chief dealer of the foreign exchange desk of the central bank had a market participant report something to him. That report was introduced by a colleague who expressed serious concern. The participant used the language of manipulation and said banks wanted to "*bully the fix*". Brokers were named. These expressions of concern did not come in a vacuum but in circumstances where the chief dealer had already concluded that behaviour was going on which would be difficult to justify to a regulator. The chief dealer did nothing other than ask the trader to keep in touch. He took no steps either to report the matter to anyone else or actively to follow up with the trader.
- 35** Assessing what if any precise meaning it is possible to attribute to the statements in the trader conversation does not answer the questions (1) in what circumstances it should be the duty of a Bank official to take some further action when a concern is

reported to him from the market, even in unclear or potentially contradictory terms, (2) what further action would be appropriate in a case such as this, and (3) what steps should be taken by senior officials to ensure that the duty, assuming there is one, is properly understood and enforced.

- 36** The response to potential whistle-blowing is a crucial part of the overall credibility of the Bank. For reasons explained above, a central bank is liable to be seen as having a broad public responsibility, and a broad public reputation, even outside its specific areas of statutory responsibility from time to time. At present the review process has only dealt with part of the general questions raised. It has not addressed all the broader issues which the Select Committee and the Chairman of the Bank's Court of Directors appeared to agree in June 2014 were part of what ought to be investigated. The broader question of serious professional misconduct which would be a standard part of an equivalent investigation in other spheres of life was not part of the reference.
- 37** I do not, with respect, agree with the Governor that Lord Grabiner has reconsidered any points. His letter of 28 January 2015 is clear that he is simply explaining, in greater detail than his original report, what his reasoning was. It is a fair inference that if Lord Grabiner had independently reached the view that he should reconsider his work, he would have said so, and therefore that he has not reached that view. Simply restating one's reasoning in greater detail is, however, a different exercise from being mandated to reconsider it.
- 38** It follows, in my opinion, that if questions are raised about whether the report attains the degree of visible thoroughness and public reassurance which is the ultimate objective of the review process, it is not sufficient for the Oversight Committee simply to ask itself a question amounting to whether the report is legally invalid. Nor is it possible on the facts so far for the Oversight Committee to conclude that the report has been reconsidered in the light of the concerns about it raised at the Treasury Select Committee's hearings.
- 39** The Oversight Committee should therefore consider the matter and reach one of three decisions: (a) It does not wish to consider the Select Committee's members' concerns at all because it regards them as too late, irrelevant in principle, not embodied in any collective report of the Select Committee, or some similar threshold objection. (b) It has considered those concerns but regards them as ill-founded. (c) It regards those concerns about the report as well-founded, or potentially well-founded, and therefore will take further action.

CHARLES BÉAR QC

**Fountain Court
Temple
London EC4Y 9DH**

2nd March, 2015