End Of The Road for LIBOR Rigging Claims; or Just a Detour?

4 New Square Chambers

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The Court of Appeal's decision in *Property Alliance Group v RBS* [2018] EWCA Civ 355is a decisive victory for RBS over PAG. However, the door has undoubtedly been opened for other potential claimants.

While the CA also made some significant findings on the bank's advisory duties and implied contractual terms, this article focuses on LIBOR and benchmarks. Many negligence and contract claims arising out of swaps mis-selling are likely to be statute barred under the Limitation Act 1980.

The LIBOR Issue

PAG had entered a series of swaps. It sued RBS alleging that in the discussions leading up to those transactions, RBS had impliedly represented that it had not been rigging LIBOR and would not do so in the future. PAG argued that those representations were false, and that it was therefore entitled to damages, to be put in the position it would be in, had it not entered them at all.

At First Instance

Asplin J ([2016] EWHC 3342 (Ch)) found (a) that there was no such representation and (b) even if there had been, it was not proved to be false.

Many commentators found the first conclusion (no representation) surprising. It appeared to have resulted at least in part from the elaborate way in which the representations were pleaded by PAG. There is certainly a lesson to be learned for future claimants on that front.

As to whether LIBOR rigging had taken place, the issue here was *what* LIBOR benchmark was being rigged. In 2013 RBS was fined £87.5m by the FSA for breaches of regulatory principles. The FSA made specific findings about the manipulation of Japanese yen, Swiss franc and US dollar LIBOR submissions. No findings were made about sterling 3 month LIBOR; which was the currency and tenor of PAG's swaps. Having heard evidence from bank employees, Asplin J found the claim of manipulation of 3 month sterling LIBOR not made out. The LIBOR rigging claims failed.

The Court of Appeal

Importantly the Court of Appeal found that LIBOR representations were made.

In doing so it reformulated and simplified the representations, and applied the following test for implication:-

Ultimately, the Court was unwilling to overturn to Asplin J's findings of fact on whether there had been manipulation of sterling LIBOR, and as the representation did not extend to other currencies, the appeal was dismissed.

Where next for LIBOR and other benchmark rigging claims?

The Court's acceptance that LIBOR representations were made is a significant step for potential claimants, reopening a door that had been shut by Asplin J's decision at first instance. In doing so the Court cited Longmore LJ's observations in the earlier interlocutory decision in *Graiseley v Barclays* [2013] EWCA Civ 1372:

> *In the present case, however, the banks did propose the use of LIBOR and it must be arguable that, at the very least, they were representing that their own participation in the setting of the rate was an honest one. It is, to my mind, surprising that the banks do not appear to be prepared to accept that even that limited proposition is arguable.*

Thus: where there have been regulatory findings or bank admissions of manipulation of LIBOR (or another benchmark) and the same benchmark is used in a swap, loan or other financial transaction which had been proposed by the bank, the customer would, on the face of it, have a misrepresentation claim.

Many banks have been found by regulators to have engaged in the manipulation of many benchmarks. Banks certainly cannot assume that the *PAG* decision will mark an end to claims.

Further, the Court of Appeal in *PAG* accepted the possibility of cross-contamination between benchmarks.

> *If, of course, a submitter in yen or Swiss francs had also made sterling submissions, that might render false the representation about sterling LIBOR but there is no evidence that any such submission occurred. Flaux J's concern about the risk of "cross-infection" might therefore become relevant in some cases as a matter of fact but we do not consider that that risk can extend the representation which we are prepared to imply beyond its proper sterling scope.*

The point here is that bank LIBOR submissions were not made in hermetically sealed units; different individuals might well 'sub' in for one another from time to time, and a rogue individual might well cross contaminate the benchmark to which the relevant transactions were pegged. So, as always, context is everything.

Finally the upholding of LIBOR representations will be important to customers who entered FX hedging products; surely a bank proposing such a transaction also represented that it was not manipulating the FX markets in the relevant currencies. The Forex Rigging scandal has proved to be no less pervasive than LIBOR, and while FX hedging transactions were less prevalent then IHRPs, the CA decision in *PAG* may impel some customers waiting in the wings into action.

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