Neutral Citation Number: [2012] EWHC 3093 (Comm)

Case No: 2012 FOLIO 1259

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2012

Before :

THE HON MR JUSTICE FLAUX

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Between :

Graiseley Properties Limited and others	**Claimant**
- and -	
Barclays Bank PLC	**Defendant**

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- -

Mr Tim Lord QC and Mr Farhaz Khan (instructed by **CYK Law**) for the **Claimants**

Mr Adrian Beltrami QC and Mr Richard Hanke (instructed by **Clifford Chance**) for the **Defendants**

Hearing date: 29th October 2012

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APPROVED JUDGMENT

THE HONOURABLE MR JUSTICE FLAUX

The Hon Mr Justice Flaux:

1. This is an application by the claimants in this case (which has been transferred from the Birmingham Mercantile Court to the Commercial Court as a potential test case concerning LIBOR) for permission to amend their particulars of claim to plead implied representations by the defendant and, in the alternative, implied terms. The implied representations are said to have induced the claimants to enter into the series of loan agreements and related hedging transactions. In the alternative, the claimants allege that similar terms are to be implied into those contracts.

2. So far as the implied representations are concerned, the claimants now allege that those implied representations were false and fraudulent and they seek to bring a claim against the defendant bank ("Barclays") in deceit, There was a claim for rescission for innocent misrepresentation in the original pleading, but the reason for the present proposed amendment is that, since the pleading was originally drafted and served, the various conclusions and findings of the regulatory authorities, both in this jurisdiction and in the United States of America against Barclays, have been published.

3. This matter concerns the setting of LIBOR and the effect of manipulation of LIBOR by Barclays. LIBOR is defined by the British Bankers' Association as:

> "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."

4. The recent report of the Treasury Select Committee quotes the finding of the Financial Services Authority ("FSA") as to the significance of LIBOR and the related Euro rate of EURIBOR:

> "Benchmark reference rates to indicate the interest rates that banks charge when lending to each other. They are fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts."

5. This case concerns, in effect, two such derivatives contracts which the claimants were obliged to enter into as a condition of Barclays granting the relevant loan facilities. It is not necessary for present purposes to set out in any great detail the findings of the various regulatory authorities. What has essentially been found, both in the United States and in the United Kingdom, is misconduct and wrongdoing on the part of Barclays in relation to its manipulation of LIBOR at various times between 2005 and 2009.

6. In its Final Notice dated 27 June 2012, the FSA identified two distinct phases of wrongdoing. The first concerned submissions from Barclays to the BBA from 2005 to 2008, which took into account requests by interest rate derivatives traders to the submitters (who were responsible for submitting the LIBOR rates to the BBA) which the FSA found were motivated by profit. Secondly, the FSA found

that during the financial crisis from about September 2007 until about May 2009, on instructions from senior management of Barclays, the submitters lowered their LIBOR submissions to the BBA, in response to negative media comments about the bank, what is described throughout the evidence before the Treasury Select Committee as "low-balling".

7. Similar findings were made in relation to these matters by both the Department of Justice in the United States and also by the US Commodities Futures Trading Commission, both of which issued reports on 27 June 2012 and both of which levied substantial fines against Barclays, as indeed, did the FSA. I should add that it is apparent from the material I have considered, including the recent preliminary findings of the House of Commons Treasury Select Committee, that what has been set out in the various regulators' findings and reports to date is by no means the complete picture and it appears likely that other matters will emerge in due course.

8. The specific implied representations relied upon by the claimants are set out in the draft amended pleading at paragraph 9 and they are as follows:

> "(1) On any given date up to and including the date of the Swap and the date of the Collar, LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 am on that date.
>
> (2) Barclays had no reason to believe that on any given date, LIBOR had represented, or might in the future represent, anything other than the interest rate defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 am on that date.
>
> (3) Barclays had not on any given date, up to and including the date of the Swap and the Collar, (a), made false or misleading LIBOR submissions to the BBA and/or (b), engaged in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA, viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties; and
>
> (4) Barclays did not intend in the future to
>
> (a),make false or misleading LIBOR submissions to the BBA and/or
>
> (b), engage in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA".

9. The pleading goes on again to refer to a rate that was being measured in part by the bank's own personal interest, if I can summarise it in that way. The pleading then sets out how the representations were made by the agents of the bank, that is to say for present purposes, those managers and staff in the local branches in the Black Country with whom the claimants dealt, both in documents, including drafts of the various agreements which referred on a number of occasions to LIBOR and to the setting of the so-called screen rate, a series of emails passing between the bank and the claimants, and meetings.

10. Then the pleading sets out in detail at paragraph 12 the respects in which the representations are said to be false and those track in large measure the detailed findings made by the regulatory authorities. There is then a plea in paragraph 12A of why those representations are alleged to be fraudulent and what is pleaded is that the relevant knowledge and/or recklessness is that Barclays was proposing to potential customers that they enter into financial transactions containing obligations measured by reference to LIBOR such that the LIBOR representations were being made, or might be made to the said customers, and that those representations were or might be false.

11. Then the claimants say that, prior to disclosure, the best particulars they can give of whose knowledge it was, or which individuals had the relevant knowledge, is a number of categories of managers and others within the bank, which again obviously tracks the conclusions reached by the regulatory authorities, specifically the findings made by the regulatory authorities about the involvement of senior management of the bank together with the involvement of the derivatives traders who made request to the submitters and also the involvement of the compliance department. There is then a specific plea that the claimants relied on the representations through their chief executive officer, Mr Hartland, and also that the bank intended the claimants to rely upon the representations and was well aware that the claimants or a class of persons which included the claimants would rely upon the representations.

12. The objections raised by the bank to the granting of permission to amend fall essentially into three categories. First, whether there is any basis for implication at all; secondly, whether or not it can be said that it must have been obvious to the people who are alleged to have had the relevant knowledge that the representations were being made and were false, and thirdly, there is an objection related to the issue of authority or authorisation to make the representations.

13. It is important to have in mind and, indeed, it is accepted by Mr Beltrami QC on behalf of the bank, that at this stage all the court is concerned with is whether these proposed amendments are sufficiently arguable to go forward to trial, in the sense that they have a real prospect of success: see Civil Procedure para 17.3.6. Accordingly, the court is concerned not with establishing the facts as they may or may not be established at trial, nor with whether or not, if certain evidence emerges or does not emerge, the claim will succeed, but just with whether, looking forward, this pleading is sufficiently arguable that it has a real prospect of success.

14. I should say at the outset that, having considered the various submissions on both sides, I have no doubt whatsoever that this pleading does satisfy that test and that

the points that the claimants raise are clearly and properly arguable and should be allowed to go forward to trial.

15. The principles according to which the Court decides whether any given representation has been made have been recently usefully summarised by Popplewell J in *Mabanga v Ophir Energy* [2012] 1589 (Comm) at [25] to [28]. It is by reference to those principles that Mr Beltrami QC on behalf of Barclays seeks to argue that the proposed amendments have no real prospect of success.

16. So far as the first objection is concerned, which is whether it is appropriate to imply the alleged representations at all, the United States Department of Justice found at paragraph 32 of its Statement of Facts (expressly accepted by Barclays, as is recorded by the Department of Justice), albeit in the context of the activities of derivatives traders, that certain of those traders and rate submitters who had engaged in efforts to manipulate LIBOR and EURIBOR submissions were well aware of the basic features of the derivative products tied to these benchmark interest rates. Accordingly, they understood that to the extent they increased their profits or decreased their losses in certain transactions from their efforts to manipulate rates, their counterparties would suffer corresponding adverse financial consequences with respect to those particular transactions.

17. In my judgment what holds for derivative traders as to their knowledge or understanding must at least arguably also hold for those senior management of Barclays who were also responsible for manipulation of LIBOR. In those circumstances, the attempt by the defendants to argue that these implied representations do not even reach the level of "real prospect of success" for the purpose of allowing the amendments is doomed to failure. Whether the implied representations were in fact made will depend upon a number of factual issues which can only be decided at trial. It seems to me that it cannot be said that Barclays has an unanswerable case that the implied representations were not made, so the matter is quintessentially a factual one for determination at trial.

18. Various points were taken by Mr Beltrami QC about the implied representations pleaded being too wide and for too long a period, but as I said during the course of argument, this is all essentially shadow boxing, because Barclays is well aware of the case that it has to meet. As Mr Lord QC pointed out in reply, so far as the temporal aspect of the representations is concerned, the fixing of LIBOR appears to have commenced some time in 2005, so that one is really focusing on a period of between two and three years between the time when fixing first began and the time when these two contracts were entered into in September 2007 and April 2008, not as Mr Beltrami suggested a wide open-ended period of time.

19. Mr Beltrami also took a point that because the series of contracts with which the claim is concerned are ones where the LIBOR rate was by reference simply to sterling LIBOR and not to dollar LIBOR or LIBOR in any other currency, any representation alleged, insofar as it refers to LIBOR generally, is far too wide and should be limited to sterling LIBOR. It seems to me that it is a wholly artificial exercise to seek effectively to divide up the various LIBOR fixings or manipulations into separate currencies. It is quite clear that there was fixing not only of sterling LIBOR but also of dollar LIBOR and of EURIBOR, and that, as I said during the course of argument, there is inevitably scope for cross-infection

here. It may be that in due course, when full disclosure has been provided, it will become apparent that one or other aspect of the LIBOR fixing assumes more significance, but it seems to me to be impossible to say that the representations that were impliedly being made should be limited in the way in which Mr Beltrami suggests. Clearly, in terms of whether there is a real prospect of success, it is fully arguable that these representations were implicitly made to the claimants before they entered the various agreements.

20. The second objection is the one of obviousness. The context in which this point arises is the well-established requirement that, in a deceit case, the representor should understand that he is making the implied representation and that it had the misleading sense alleged: see the summary of the relevant principles by Hamblen J in *Cassa di Risparmio della Republica di San Marino v Barclays Bank* [2011] EWHC 484 (Comm) at [215-233] particularly [221].

21. It seems to me that this objection is one which is wholly without merit. If it is the case, as set out in paragraph 32 of the Statement of Facts of the United States Department of Justice, that the derivative traders were well aware of the potential impact of what they were doing to manipulate the rates upon profits and losses under their derivative contracts and the extent to which counter-parties would suffer corresponding adverse financial consequences, as I have already said, it is surely seriously arguable that senior management within Barclays had the same degree and extent of knowledge.

22. What it really would require before the Court could refuse permission to amend on the basis of this objection is that the Court was satisfied that it was simply not arguable that senior management were aware that products were being sold by the bank to customers of the bank which contained references to LIBOR. However, any senior manager who had given the matter a moment's thought would surely have appreciated that customers who were dealing with the bank would assume and would be entitled to assume that LIBOR was being set in accordance with the BBA definition as an independent benchmark and was not being manipulated by Barclays or any other bank for its own personal interest or gain. Accordingly, it seems to me the suggestion that the claimants do not have an arguable case that these representations were obvious to the people within Barclays who are alleged to have been at fault here, is not a suggestion which has any force whatsoever.

23. So far as the third objection is concerned about authority or authorisation, again it seems to me that Mr Beltrami is seeking to divide up this issue artificially to a far greater extent than is appropriate in the circumstances. Mr Lord on behalf of the claimants relied in this context on the formulation of the relevant legal test in Bowstead & Reynolds on Agency at paragraph 185 in these terms:

> "The principal is liable if while not expressly authorising the agent to make the false representation he knew it to be untrue and was guilty of some positive wrongful conduct as by consciously permitting the agent to remain ignorant to the true facts so as to prevent the disclosure of the truth to the third party if the third party should ask the agent for information or in the hope that the agent would make some false representation. The agent's representation when made

> would of course require to be within the scope of his actual or apparent authority."

24. Mr Lord also submitted that in circumstances where it is quite apparent from the findings of the regulators that senior management within the organisation were responsible for or aware of manipulation of LIBOR rates, and were aware that particular products were being sold by the bank to customers which were referable to LIBOR rates, that the idea that the bank was not authorising those managers and employees who were responsible for negotiating such contracts with those terms in them with third parties such as the claimants, to enter into contracts on those terms, was really a point which was lacking merit, to put it at its lowest.

25. It seems to me again that it is fully arguable in the present case that the implied representations alleged were authorised by Barclays. Such authority or authorisation is arguable on two grounds. The first ground is that the bank as an entity has to take responsibility as a matter of law for those people who have any guilty knowledge and whose knowledge is to be imputed to the bank. The second ground is that there was arguably sufficient implied or ostensible authority given to those people within the bank who were responsible for issuing the relevant contracts and negotiating them with the claimants, to make the implied representations alleged.

26. Accordingly, it is fully arguable that in those circumstances there was, if not express authority or authorisation, clearly implied or ostensible authority to make the implied representations alleged. So it seems to me again that this third objection is not well founded.

27. Mr Beltrami then sought to raise points about the various aspects of the claimants' pleading insofar as they concerned the remedies sought, specifically remedies of rescission, repudiation and damages. As Mr Lord rightly points out those particular matters are not in truth, on proper analysis, part of the amendments for which he seeks permission but were part of the original pleading and have not been the subject of some separate application to strike out. In any event the issue as to what, if any, remedy is appropriate is one which will quintessentially turn upon the facts as found by the court at the end of the day at trial and are not appropriate to be the subject of some form of strike out or mini trial at this stage.

28. Finally, in relation to the amendments to plead implied terms, I consider that the proposed implied terms as set out in Mr Lord's draft pleadings do fall fairly and squarely within the test adumbrated by Lord Hoffmann in the Privy Council in *AG for Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. It also seems to me they fall within the test set out by Aikens LJ in *Crema v Cenkos Securities plc* [2011] 1 WLR 2066 at paragraph 38(5), where his Lordship says this:

> "If the reasonable addressee would understand the instrument against the other terms and the relevant background to mean something more ie that something is to happen in that particular event which is not expressly dealt with in the instruments terms then it is said that the court implies a term as to what will happen if the event in question occurs."

29. However one formulates the test for the implication of a term, whether one adopts the more modern approach favoured by Lord Hoffmann or whether one goes back to the old approach of asking the question whether it went without saying that the term should be implied, the issue is always one of what is the correct construction of the contract, taking account of what the reasonable person would consider were the terms which should be spelt out in the contract if they are not expressly set out in it. However the test is formulated, it is clearly arguable that these terms are to be implied into the relevant contracts.

30. It follows that in all the circumstances the claimants are entitled to the permission to amend which they seek.