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Misrepresentation claims against LIBOR panel banks to proceed

Introduction

In a judgment handed down on 8 November, the English Court of Appeal unanimously allowed claims against two LIBOR panel banks to be amended to include allegations of implied and fraudulent misrepresentations about the integrity of LIBOR, following the well-publicised regulatory findings on this issue.

In reaching its conclusion in one of the cases, the Court made potentially significant observations about the availability of misrepresentation claims against lenders in syndicated loan agreements.

While the implied misrepresentation claims have been allowed to proceed, their success is far from assured. Much will depend on whether the allegations of fraud made against the banks can be proved. Nevertheless, the decision is likely to encourage parties in disputes with LIBOR panel banks over amounts owed under transactions referable to LIBOR.

First instance decisions

In the first case, Graiseley Properties Ltd ("**Graiseley**") brought a mis-selling claim in respect of two swap contracts which it was obliged to enter into under the terms of a loan agreement with Barclays. The claim originally included an allegation of innocent misrepresentation against Barclays in relation to LIBOR manipulation but, following regulatory findings published in 2012, Graiseley applied to amend its claim to plead fraudulent misrepresentation or deceit.

In the second case, Unitech Global Ltd and Unitech Ltd (together the "**Unitech Parties**") applied to amend their defence and counterclaim to a claim by Deutsche Bank for repayment under a credit facility and an interest rate swap to include allegations of implied fraudulent misrepresentations relating to LIBOR manipulation.

At first instance, in the Graiseley case, Flaux J had granted Graiseley's application to amend its pleading so as to include the implied representations relating to LIBOR. Conversely, in the Unitech case, Cook J, declining to follow Flaux J, had refused the Unitech Parties permission to amend. In reaching this conclusion, Cooke J had pointed out that the Unitech credit facility agreement had been acceded to by way of novation, thus extinguishing the original agreement, creating a new contract and destroying the rights of the Unitech Parties to rescind the original agreement.

Decision of the Court of Appeal

Implied representations relating to LIBOR

The Court of Appeal unanimously allowed Graiseley and the Unitech Parties to amend their pleadings to include claims of implied misrepresentations relating to LIBOR.

In reaching this conclusion, the Court of Appeal dismissed the banks' submissions that the effect of allowing the implied representations was to impose an obligation "*to disclose one's own dishonesty*"; an obligation not recognised by English law. The Court regarded such submissions as "*inappropriate to an application for permission to amend*".

The Court instead found that:

> "*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*"

Noting in addition that:

> "*any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum*"

The Court was also unwilling to accept the banks' reliance on the disclaimer and entire agreement clauses in the relevant agreements, holding that such reliance was "*arguably misplaced*" when the allegation was one of fraud and that, in any event, the "*point cannot be decided in the banks' favour on a summary basis*".

Novation

In relation to Cooke J's findings on novation as a bar to rescission in the Unitech case, the Court of Appeal held that, in light of the apparent interchangeability of terms used in the credit facility agreement to describe the methods of accession, it was at least arguable that the terminology of novation "*was not being used in its strict legal sense*" and that rescission was therefore not barred on this basis.

It added that, even if the term novation was being used in its strict legal sense, there was at least an argument that there had been only a "*partial novation*" so that rescission would therefore still be available against those parties that had not acceded to the agreement by way of novation. While the Court of Appeal accepted that such a concept was not free from difficulty, it did not regard an application for permission to amend as "*the appropriate time at which all these problems should be addressed*".

Commentary

Implied representations relating to LIBOR

While the decision of the Court of Appeal will no doubt encourage parties in disputes with LIBOR panel banks over amounts owed under transactions referable to LIBOR, it is important to maintain a sense of perspective as to its likely implications in the long term.

The decision amounts to a limited finding that the pleas of implied misrepresentations relating to LIBOR are "*arguable*" in the two cases at hand. Arguability is a relatively low threshold and, whilst parties will now be able to plead allegations relating to the manipulation of LIBOR with more confidence, it is questionable whether such allegations will be successful at trial. In particular, those looking to advance such allegations will still need to overcome a host of potential difficulties, including, most notably, the effect of contractual disclaimers and the need to establish the requisite knowledge on behalf of the LIBOR panel bank in question.

Moreover, it remains open to both Barclays and Deutsche Bank to seek to appeal the Court of Appeal's decision to the Supreme Court.

Novation

The Court of Appeal's finding in relation to novation may also have potentially significant implications for the way in which accession clauses are drafted and, more generally, for the rights of borrowers and lenders under syndicated loan agreements.

The full text of the Court of Appeal's judgment is available here.

For further information on our expertise or on any of the issues raised in this briefing, please contact:

Gareth Hughes
Partner, Hong Kong

T: +852 2846 8963
E: gareth.hughes@ashurst.com

Angus Ross
Partner, Hong Kong

T: +852 2846 8909
E: angus.ross@ashurst.com