

LIBOR manipulation – a step closer to Bank liability?

A recent Court of Appeal decision represents a small preliminary victory for those raising arguments against banks in commercial litigation based on LIBOR manipulation. However, there is still some way to go before these issues are considered in detail in court. Those considering a challenge on these grounds should welcome this verdict, but treat it with caution.

On 27 June 2012 the FSA (as then called) published its final notice to Barclays Bank Plc imposing a fine of £59,500,000, at that point the largest ever imposed by the FSA, as a result of findings of misconduct relating to the setting of LIBOR and EURIBOR.

Concerns about the operation of LIBOR and related regulatory investigations have led to the possibility of arguments relating to the manipulation of LIBOR being raised in commercial litigation.

On 8 November 2013 the Court of Appeal issued its judgement in what are being viewed as two key test cases in this area, *Graieseley Properties Limited and others v Barclays Bank Plc* (the Guardian Care Homes Case), and *Deutsche Bank and others v Unitech Global Limited and others*.

Both cases involved attempts by the banks concerned to recover monies they claimed were due under loan/derivative agreements, including swap agreements, where sums payable were assessed by reference to LIBOR.

In both cases the customers were seeking permission to have their pleadings amended to allow them to raise arguments that the banks had made implied representations that they were not involved in the manipulation of LIBOR. (The cases had commenced before issues relating to the distortion and manipulation of LIBOR had become public knowledge, hence they had not originally been included in their defences.)

These implied representations were based largely on the fact that the banks concerned had proposed entry into agreements where payments were assessed by reference to LIBOR.

The Commercial Court had allowed these amendments in the Guardian Care Homes case, but not in Unitech. Both decisions were appealed, and on appeal, the Court of Appeal rejected the bank's appeal in Guardian Care Homes and allowed the Unitech appeal, meaning that in both instances, the customers had permission to amend.

Lord Justice Longmore, giving the leading judgment, referred to the legal test for determining whether implied representations had been made, namely that the Court needed to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.

He found the points put forward by the customers in both cases, were, at the least, arguable. While noting that some points were stronger than others, he avoided undertaking a detailed assessment of the merits of the arguments. Instead it was noted that it would be dangerous

to dismiss the arguments summarily without considering the factual context and hearing proper argument in Court.

This is a small victory for those seeking to challenge banks on LIBOR relates issues, but the decision needs to be considered with caution. In particular, the case should not be interpreted as meaning that the arguments relating to LIBOR will succeed at trial, merely that the Court deemed those arguments should be heard.

It will be interesting to see how these cases develop as they are likely to offer some indication of how willing the courts will be to imply representations about LIBOR and its integrity into financial contracts between banks and customers. If the court does uphold the arguments of the customers and finds that the agreements were entered into in reliance on implied representations, this will doubtless encourage other customers to raise similar issues.

However, claims relating to implied representations about LIBOR and its integrity are likely to be strongly resisted by banks. Furthermore, as the Courts have been at pains to point out, these cases are fact specific, so a defeat of the banks in one instance will not necessarily create the sort of precedent which will lead to a wave of successful LIBOR-related claims.

The Guardian Care Homes case is currently listed for trial in April 2014.

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