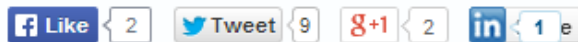


# LIBOR manipulation and small businesses

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**David Webster and Mary Hodgson** of law firm **Russell-Cooke** discuss the considerations **SMEs** should make in relation to **LIBOR** and banks.



LIBOR manipulation: what does it mean for SMEs?

Attention has focussed recently on whether LIBOR manipulation could provide customers with direct rights against banks. This has been fuelled in part by the current climate of heightened regulatory and legal scrutiny of banks, and increased media attention on bankers and their perceived involvement in the economic downturn.

This article sets out some of the key factors which SMEs should take into account when considering their current options in this area.

## What is LIBOR?

LIBOR represents the average rate charged when banks lend to one another on the London inter-bank market. Particularly since the Bank of England base rate dropped in 2009, LIBOR has become the most commonly-used basis for benchmarking interest rates. Historically LIBOR was based on information submitted daily by a panel of banks about the rates at which they believed they could borrow.

## FCA investigations

The FCA has published the results of investigations into panel banks and found evidence of misconduct, often involving the submission of inaccurate rate information to try and set LIBOR at a rate which would benefit banks rather than reflecting actual borrowing rates. (Similar investigations have been carried out in other jurisdictions, including the USA.) The FCA findings led to large fines being imposed on numbers of banks, most recently the £105 million fine levied on Rabobank in October 2013.

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## **LIBOR and litigation**

Any business with material exposure to financial arrangements benchmarked to LIBOR may well be monitoring developments in this area. Some key factors for SMEs to consider are:

### **Regulatory findings v individual rights**

The FCA's findings of misconduct in relation to LIBOR do not, in themselves, create enforceable rights for customers, who need to be able to put forward their own individual claim.

### **Attitude of banks**

The general perception at the moment is that banks are defending claims in this area robustly. There are no indications that claims relating to LIBOR manipulation will be treated like cases relating to mis-selling of swaps and other derivatives with an FCA redress scheme, or PPI claims where the general approach was that PPI cover had been mis-sold.

### **Current cases**

No case involving a LIBOR claim has yet gone to full trial. There are however cases currently progressing through the courts. Two of these are generally viewed as test cases, and on November 8th 2013 the Court Of Appeal issued a joint judgment in *The Guardian Care Homes* case and the *Deutsche Bank and Unitech Global* case.

Both involved attempts by the banks concerned to recover monies they claimed were due under loans/derivative agreements, where interest payable was assessed by reference to LIBOR. The Court of Appeal's decision made it clear that the customers should be allowed to amend their claims to include arguments that, for example, their bank made (implied) representations to them that it was not involved in LIBOR manipulation, so these could be made at trial.

While this is a small victory for those seeking to challenge banks, the judgment does not mean those arguments will ultimately succeed, only that they will be properly heard in court. The *Guardian Care Homes* case is currently listed for trial in April 2014.

## **Extent of loss**

Any claim brought would involve difficult issues of quantifying what losses customers have incurred as a result of the manipulation of LIBOR. A customer would also have to show that it was its bank's manipulation which caused the loss it suffered.

Claims which might have a greater prospect of success are those where customers can show that LIBOR rates during the relevant period caused a particular threshold to be met under their financing arrangements, with more material consequences than an increase in the cost of borrowing – for example, breach of a financial covenant in a facility agreement.

## **Making your case**

The legal arguments which have been made by customers to date have not been tested and are not straightforward. Even if the basic principles are accepted by the courts there may be significant evidential and legal hurdles for customers to overcome – for example, to prove that they relied on implied representations about LIBOR when deciding to enter into agreements.

Possibly the most important point to take from the judgment referred to above is that each case will be considered on its own facts. Even if a customer wins in a claim based on manipulation of LIBOR, it does not automatically follow that anyone with a financial instrument with an interest rate based on LIBOR will be entitled to compensation.

## **Limitation**

Businesses should be careful to ensure that any claim they might have is not lost as a result of limitation rules. Their application will depend on the type of claim brought. Limitation for breach of contract runs from the date of the breach, whereas in a tort claim (such as for negligence) limitation will run from the date loss was suffered. In both cases primary limitation will expire after six years, but the relevant dates are not always obvious and advice should always be taken on limitation as arguments can be complex.

## **Conclusion**

There is some way to go before there will be any clear judicial guidance on customer actions in this area. However, the possibility of a successful claim should not be disregarded, particularly for those businesses who suffered a material loss as a result of LIBOR rates during the relevant period.

It might be sensible to monitor developments for the time being rather than taking decisive action, and in the meantime to take steps to protect any claim which you might want to bring in the future (for example, by preserving and collecting relevant evidence). This note of caution is particularly relevant for those businesses who are not subject to any pressing

limitation issues – if a potential claim may be barred as a result of limitation rules you will need to move more quickly, but otherwise there is a real possibility that the costs of pursuing further action now could outweigh the benefits. The first half of 2014 is likely to give a much clearer picture of the chances of success in this area.