Graiseley Properties v Barclays Bank

Francesca Kaye and **Paolo Sidoli** offer their opinion

Many investors will be well aware of the LIBOR rate fixing scandal that has rocked US and UK banks. A number of LIBOR 'class action' lawsuits are already well advanced in the USA. On this side of the Atlantic, an increasing number of investors, including many in the property industry, are reviewing the performance of their funds and asset portfolios, which are highly sensitive to small changes in the LIBOR rates, with an eye to bringing their own claims against the implicated banks.

Those investors would be well-advised to follow closely the progress of a current court case, Graiseley Properties v Barclays Bank as it is the first LIBOR manipulation case to be issued in the UK and should be viewed as a 'test case' for investors with potential claims against their lenders.

The case concerns a loan agreement between Graiseley and Barclays which contained a condition for the company to enter into derivatives contracts as part of the loan.

In April 2012, Graiseley, which own and run the chain of 30 Guardian Care Homes across the UK, commenced proceedings against Barclays, seeking an injunction, a declaration that the loans be rescinded/declared void, and damages of up to £36m claiming it had misrepresented the position (albeit innocently) during negotiations by failing to explain and advise Grainsley on the effects of LIBOR rates on the contracts.

In October 2012, in light of the recent findings by US and UK regulators of misconduct and wrongdoing by the bank between 2005 and 2009, Graiseley sought permission to amend its case to plead implied false and fraudulent representations and a claim in deceit against Barclays. Graiseley now claims that Barclays knew and/or was reckless in its representations to customers when negotiating contracts containing references to LIBOR and it knew and/or was aware that Graiseley would rely on these representations.

Although Barclays objected to the proposed amendments, on 29 October 2012, Mr Justice Flaux allowed them and ordered directions for trial, concluding that whilst he was not required to establish the facts at this stage of the action he was satisfied that the proposed amendments were clearly and properly arguable, had a realistic prospect of success and should proceed to trial. In particular:

1. The Judge found that Barclays had a case to answer at trial as the recent regulatory findings concluded that derivative traders and staff who had manipulated LIBOR submissions were aware and understood that their counterparties would suffer as a result when LIBOR rates were adjusted.
2. He concluded that it was arguable that senior management within Barclays had the same degree and extent of knowledge as the derivative traders and staff.

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3. He also rejected Barclays contention that bank's staff did not have authority or authorisation to make the implied representations, finding that it was 'fully arguable' that Barclays had authorised the representations because (1) the bank as an entity had to take responsibility for those people in it with guilty knowledge; and (2) there was arguably sufficient authority given to those bank representatives negotiating with Graiseley to make the alleged representations.

The progress of this case during 2013 will be closely followed, as it is likely to provide considerable guidance as to the conduct of other LIBOR claims. Prospective claimants will be encouraged by this decision, as it provides a clear indication that the courts will be prepared to allow properly made-out claims of implied fraudulent misrepresentation and deceit to proceed. Other likely claims to be advanced in other cases will include breaches of fiduciary duty.

However, as the Court has made clear, liability will only be determined at trial. Whether this case and other LIBOR claims will succeed will ultimately depend upon whether claimants will be able to show that they were induced to enter into the loans and would not have done so if they had been informed differently. They will also need to establish the losses they have suffered as a result of the alleged manipulation of LIBOR.

A potentially problematic area will be the issue where claims are brought by a party which did not have a direct contractual relationship with the bank. It is also likely that banks will refer to the many waivers and disclaimers which are included in their agreements and other documents. Prospective litigants should bear in mind that, as many of the LIBOR allegations relate to the period 2005-2009, in due course banks are likely to argue that a number of claims will be time barred. The road to success for Claimants therefore remains long and far from certain.

Finally, whilst commentators predict that the banks will face exposure to damages and costs running into tens if not hundreds of millions of pounds, they are well resourced to litigate and will be fully committed to defending claims. Claimants with limited funds may need to consider alternative costs funding models, including Conditional Fee Agreements, Third Party Funding and After the Event Insurance to fund their cases. PIN

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