

Libor fixing scandal

The Libor fixing scandal has had a lot of publicity and may result in the banks who are implicated not merely paying fines to Regulators but also having to compensate customers and others affected by their activities. This is an unfolding story but we have put together the following thoughts which will be updated from time to time.

A. Potential Claimants

In principle, anyone who has entered into a contract or transaction by reference to LIBOR rates which turn out to have been based on inaccurate information from the reference banks would have a potential claim for any provable and ascertainable losses against those banks and also the other parties described. The most obvious categories of claimant would be:

1. **Borrowers** who paid an excessive rate of interest as a result of LIBOR being artificially high.
2. **Depositors** who received less interest than they should have done.
3. **Counterparties to Swaps and other Derivative Transactions** for which they paid a higher rate than would have been the case if LIBOR had been fixed properly or who have otherwise suffered financial loss as a result of such inaccuracies. Counterparties to interest rate swaps are the most likely category of claimant.

B. Potential claims

These will fall into two basic categories:

1. Contract

Where individuals have borrowed from or made deposits with a bank which is implicated in the scandal then one approach may be to claim against the relevant bank only (please see the section C below). But, where an individual has borrowed from another bank which is not a reference bank for LIBOR purposes or which is not implicated in the provision of false information, no claim would lie against that bank and any claim would probably have to be made against the banks who are implicated for tort or unlawful acts.

However, claims in contract would be unlikely to arise by reference to any explicit provision as opposed to by reference to an alleged implied term of the contract that in fixing LIBOR the relevant bank would act fairly. To some extent that obligation is bolstered by an overriding requirement of the UK Financial Services Authority that banks should treat their customers fairly but it will be necessary to demonstrate why such a term should be implied.

2. Unlawful Act (Tort)

Potential claimants would in principle be entitled to claim where unlawful behaviour on the part of banks has caused some loss. The criteria to be satisfied in order for the claim to be effective will depend on whether fraud can be proved or not, but it would seem quite likely that at least some of the banks knowingly provided misleading information to the reference panel. To the extent that banks have breached any statutory duties, this too will give rise to a claim.

C. Potential Defendants

1. Where a customer has borrowed from or made a deposit with a reference bank it may be wise, at least initially, to claim against that bank only if they were clearly implicated. This is because, to the extent that claims are brought in England, each defendant will be entitled, if it successfully defends its claim, to recover its own costs. So, reducing the number of defendants would seem a wise precaution, subject to limitation considerations.
2. Cases where the claim is based on unlawful acts, breach of statutory duty, or tort are more difficult and it is likely to be necessary to involve a multiplicity of defendants, thus increasing the cost jeopardy.
3. We consider that financial institutions which were not members of the LIBOR reference panel will only be capable of being sued if it can be demonstrated that they knew that the information which was being provided by reference banks was untrue.
4. There may be claims against the Reference Panel itself or the regulator for failure to discharge their duties with reasonable care. However, these claims will be much more difficult to prove because of the need to demonstrate negligence or failure to comply with a statutory obligation.

D. Measure of Damages

Please note that damages in English law are almost always compensatory in their nature and would make good losses rather than penalise the defendants for their illegal actions. Punitive damages would not be recoverable.

E. Other Considerations

1. The normal limitation period for claims in contract and for tort / unlawful acts (other than personal injury claims) is six years from the date of any breach of contract in the case of contract claims, or from the date of the relevant unlawful act in cases of unlawful acts, though there may be some exceptions. Since it would appear that inaccurate information was being provided as early as 2006, care should be taken to pursue claims as soon as possible, especially in view of the need usually to follow pre-action protocols, or to reach "standstill" agreements with potential defendants.
2. Although it is attractive for all but the largest claimants to be marshalled into groups in order to avoid multiplicity of claims and to share the costs burden including the contingent burden to pay the costs of any successful defence, this may be difficult to arrange in these cases.

3. Where a matter is pursued before the English courts the court has a discretion to award security, typically by requiring the claimant to pay money into the court or establish an approved form of bank guarantee, for any costs that could be awarded if the defendant is successful. It is quite common for that discretion to be exercised where either the claimant is impecunious or where the claimant is outside the EU.
4. There is potential for the Financial Services Authority, with the cooperation of the Financial Ombudsman Service, to establish schemes to compensate those affected. Please note that the Financial Ombudsman Service at present may only normally award up to £150,000 per claimant and that only individuals, micro-businesses (as defined by the EU) and, possibly, by concession some larger businesses, are likely to be eligible to claim under any such scheme or through the Financial Ombudsman.
5. Jurisdiction is also a relevant consideration as whilst claims against London-based banks most obviously fall to be determined in London, there will be other instances where claim in tort or for unlawful acts may, following the Brussels' Convention, have to be determined in another jurisdiction albeit possibly in accordance with English law.

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