



LITIGATION ALERT

Court of Appeal finds against banks in allowing amendments to pleadings based on LIBOR manipulations

On 8 November 2013, the Court of Appeal handed down its much anticipated judgment in two related appeals, *Graiseley Properties Limited and others -v- Barclays Bank Plc* and *Deutsche Bank and others -v- Unitech Global Limited and Unitech Limited* [2013] EWCA Civ 1372. In this judgment, the Court of Appeal has upheld an earlier Commercial Court ruling and overturned another conflicting first instance decision, by holding that the claimants in interest rate swaps mis-selling litigation are entitled to amend their pleadings to include allegations relating to LIBOR manipulation.

In the two sets of proceedings, the claimants assert claims that Barclays Bank Plc and Deutsche Bank ("**Banks**") mis-sold interest rate swaps (containing rates referenced to LIBOR) to them on the basis that they were suitable products when they were not. As a result of the 2012 regulatory investigation into the distortion or manipulation of LIBOR by a number of banks, the claimants in both cases subsequently applied to amend their pleadings to include allegations that the Banks breached implied representations relating to the integrity of LIBOR. This resulted in conflicting first instance decisions, with one Commercial Court judge allowing the amendments and another refusing to permit them.

The Court of Appeal has decided that these amendments are to be permitted, since, on an interlocutory basis, the implied representations are

arguable. Lord Justice Longmore considered that implied representations are necessarily fact specific and that it was therefore dangerous to dismiss them summarily in a factual vacuum. In particular, the Banks did propose the use of LIBOR in these transactions and it was therefore in the view of Court arguable that, at the very least, they were representing that their own participation in the setting of the rate was honest. Lord Justice Longmore commented that *the law should strive to uphold the reasonable expectations of honest men and women*' and stated that, to the extent that it could not do so, that would only be after a proper trial.

While this decision obviously does not indicate what the courts' eventual decision in relation to LIBOR manipulation claims will be following a full trial of the issues, for the moment it paves the way for more claims against banks based on allegations that LIBOR-related products were sold to customers when banks were aware that employees were attempting to manipulate LIBOR rates, resulting in losses to those customers. The reference in the decision to the law upholding *the reasonable expectations of honest men and women*' may also give an indication of an increasingly unsympathetic judicial attitude towards banks where claims involve allegations of misconduct by bank employees affecting customers.

Now that these claims have been allowed to proceed, the future progress of these cases will be closely followed by banks and potential claimants alike. Graiseley is due to go to trial in April 2014 and the judgment in that case will clearly have a significant impact on future LIBOR manipulation litigation.

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