P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

Recent benchmark-related litigation in England and US

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2017 P.R.I.M.E. Finance Annual Conference

23 & 24 January, Peace Palace, The Hague

PAG v RBS

- *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch)
- Mrs Justice Asplin – Financial List case
- Handed down 21 December 2016
- 38 hearing days over May, June, July and October 2016
- 181 pages of judgment, plus 5 page Annexe, 539 numbered paragraphs
- Proceedings brought by PAG on three principal bases: mis-selling, breach of good faith and LIBOR-related

Background and key questions

- RBS sold four interest rate swaps to PAG between 2004 and 2008 based on 3m GBP LIBOR
- Management of relationship transferred to Global Restructuring Group (GRG) at RBS in 2010
- Proceedings brought by PAG in September 2013
- Allegations:
  - Mis-selling of the swaps: misstatement, misrepresentation and breach of implied terms
  - Breach of implied term of good faith in transfer to and management by GRG
  - Breach of implied representations or implied terms due to alleged manipulation by RBS of LIBOR

LIBOR manipulation – the key questions

- Is mere fact that contract with LIBOR panel bank uses LIBOR sufficient to give rise to implied representations as to the setting of LIBOR?
- Accepted by Court of Appeal as "arguable" in *Graiseley Properties v Barclays Bank* [2013] EWCA Civ 1372
- That judgment led to a string of claims of which *PAG v RBS* was the first to go to trial
- Implied representation the key argument – rescission allows for avoidance of swap liabilities
- Implied term to same effect easier to establish, but difficulties in assessing loss arising from manipulation

Was there an implied representation?

- *IFE Fund v Goldmans Sachs International*
  - what would a reasonable person have inferred was being implicitly represented by the representor's words and conduct? [377]
- *Geest v Fyffes* – whether, having regard to conduct of a party, reasonable person in position of other party:
  - "*would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it*" [378]
- Per Mrs Justice Asplin:
  - *"in order for the assumption to have arisen in the mind of the reasonable representee, there must have been conduct on the part of the representor upon which the assumption is based*" [405]
  - The mere proffering of swaps referable to LIBOR was not sufficient conduct from which the alleged LIBOR representations could be inferred by the reasonable representee [407]

Even if there were implied representations, were they relied upon?

- PAG said that, had they known the truth about alleged LIBOR manipulation, they would not have entered into the swaps
- But is that sufficient?
  - *Raiffeisen Zentralbank Oesterreich AG v RBS:* If it were, claimant who gave no thought to representation, or did not understand it to have been made, might be entitled to recover
- Per Asplin J:
  - The alleged representations by RBS did not cross claimant's witnesses minds and therefore could not have been understood to have been made or to have been relied upon
  - Therefore not necessary to ask if they would have acted differently had they known the truth

Was there an implied term?

- *Marks & Spencer v BNP Paribas* (UKSC 2015) – was term so obvious that it would go without saying and without it the contract would lack contractual coherence?
- Term would be implied that parties would conduct themselves honestly when performing the contract
- Would be implied term as to the calculation of LIBOR
- But that term restricted to the conduct of RBS and to 3m GBP LIBOR
- No evidence that RBS involved in manipulation of 3m GBP LIBOR

US LIBOR-related antitrust litigation

- *In re Libor-based Financial Instruments Antitrust Litigation*
  - Case No. 1:11-md-02262, US District Court for the Southern District of New York, Judge Naomi Reice Buchwald - investor plaintiffs versus bank defendants – multidistrict litigation (MDL)
  - March 2013 – Judge Buchwald dismissed the claim on the basis that the plaintiffs had not experienced an antitrust injury
  - May 2016 – Second Circuit vacated Judge Buchwald's March 2013 order (Case Nos 13-3565, 13-3636 and 15-432) and remanded case to District Court
  - December 2016 – Judge Buchwald trimmed the MDL, narrower case on-going
- *Alaska Electrical Pension Fund v Bank of America*
  - 2014 – antitrust class action brought in SDNY against 7 banks for alleged manipulation of ISDAFIX
  - March 2016 – US District Judge Jesse M Furman ruled that institutional investors could continue to bring antitrust claims against bank defendants
  - May 2016 – case settled