

## BANKING SYNDICATE SUCCESSFULLY DEFENDS EURIBOR MISREPRESENTATION CLAIMS

The High Court, in *Marme Inversiones 2007 SL v Natwest Markets PLC & Ors* [2019] EWHC 366 (Comm), has rejected another claim involving allegations about the rigging of an IBOR benchmark. In dismissing the claim, the High Court has given detailed guidance on the application of the Court of Appeal's decision in *PAG v RBS* [2018] EWCA Civ 355 and confirmed the importance of the underlying facts in misrepresentation claims concerning sophisticated financial transactions.

The claimant (Marme) is a special purpose vehicle. In 2008, it borrowed heavily to purchase the Santander headquarters in Madrid. After getting into financial difficulties, it sought to rescind EURIBOR-linked interest rate swaps in 2014 on the grounds of misrepresentation, i.e. that RBS as the lead bank had misrepresented that EURIBOR was not being manipulated. In parallel, the defendant syndicate banks terminated the swaps and sought to recover termination payments thereunder.

Notwithstanding the European Commission's decision in relation to EURIBOR setting, the trial Judge determined that the swaps were enforceable on the grounds that there had been no misrepresentation and no reliance, and the termination amounts were due.

### EURIBOR representations

Marme alleged that five detailed representations regarding EURIBOR setting should be implied from its interactions with RBS during the negotiation of the finance transaction. The representations alleged included that RBS was not manipulating EURIBOR, and that it (and other banks) were not acting in a way as to "*undermine the integrity of EURIBOR*".

The judge confirmed the previous legal position that each implied representation case will depend on its facts. In this context, the judge commented on the "*several mutations*" of Marme's alleged representations in the pre-trial phase. He acknowledged that because implied representations arise from conduct (rather than words), there will always be an extent to which they are a "*lawyer's construct*", but he stressed that the evidence must support the conclusion that the implied representation was made. In respect of Marme, he found that because its representative did not actively consider the alleged representations when the transactions were entered into (the evidence

### Key issues

- Whether representations are made remains a question of fact.
- The Court has confirmed that to rely on a representation requires "*contemporaneous, conscious thought*" about the relevant representations.
- "*Tactical decisions*" to continue performing a contract will prevent a party from rescinding the contract.

was that Marme's representative had only assumed that EURIBOR was a "*true and honest rate*"), none of the representations alleged had been made.

While not alleged by Marme, consistent with the Court of Appeal decision in *PAG v RBS*, the judge did find (obiter) that it might be possible to imply a much narrower representation that "*RBS was not itself manipulating, and did not intend to manipulate or attempt to manipulate EURIBOR*". However, this had not been alleged, possibly because it would have been difficult to establish falsity (and, in fact, the judge commented that had this representation been alleged, he would have found that it was not false).

## **Reliance**

While the judge found that the alleged representations were not made, he considered whether, nevertheless, Marme had relied on them.

The judge confirmed that to establish reliance on a representation, the claimant must show that it gave "*contemporaneous, conscious thought*" to the fact that *some* relevant representations were being made (although it was not necessary for the claimant to have given actual thought to the precise formulation of any representation found).

Consistent with his findings on the representations, the judge held (again, obiter) that Marme did not rely on the representations (if made), because its representative had not considered them, or anything approximating them, when entering into the finance transaction.

## **Affirmation**

The banks alleged that Marme had affirmed the contract, and therefore lost its right to rescind, by making a payment under the swap in the period after the EC's EURIBOR decision and before Marme commenced the proceedings.

The judge confirmed that to affirm a contract, a party must be aware of its right to rescind. He went on to conclude that, even if there had been misrepresentation, Marme had affirmed the contract by admitting that it (1) was aware of the EC decision, (2) was aware of the right to rescind, and (3) had made a "*tactical decision*" to make the payment, rather than rescind contract - and even though proceedings were commenced shortly after the payment was made.

## **Conclusion**

While the judge was prepared to find that one (narrow) implied representation was made, following the similar approach taken by the Court of Appeal in *PAG v RBS*, he has confirmed that subjective, contemporaneous understanding by the claimant of the alleged representations is critical to deciding (a) the scope of any IBOR-related misrepresentations, and (b) whether they were relied on. In effect, the decision confirms that absent the claimant specifically considering IBOR setting conduct when transactions are entered, claims of this type are unlikely to be successful.

In respect of affirmation, the judge has sent a further, clear message that tactical decisions to continue paying under financing contracts, rather than immediately rescinding, will mean that the paying party loses a potentially valuable right.

In light of this decision, it remains the case that claimants face a high bar in IBOR-related misrepresentation cases.

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