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Litigation & Arbitration Group Client Alert:
All claims dismissed in the first major judgment involving the alleged manipulation of LIBOR

In the wake of the LIBOR scandal, many of the banks which were subject to regulatory actions have faced claims of mis-selling of financial instruments referenced to LIBOR. In *Graiseley Properties Ltd v Barclays Bank plc*[1] the Court of Appeal held that, in principle, a claim based on an implied misrepresentation that a bank was not attempting to manipulate LIBOR was arguable. The recent judgment in *Property Alliance Group* ("**PAG**") *v Royal Bank of Scotland plc* ("**RBS**")[2] is the first time that the formulation of those implied representations has been put to the test in a full trial.

In a judgment handed down on 21 December 2016, Asplin J dismissed all of PAG's claims against RBS, including claims based on alleged LIBOR-related misrepresentations and implied terms which were almost identical to those in *Graiseley*. However, of particular note, given the number of pending LIBOR-related mis-selling claims, are Asplin J's detailed *obiter* (non-binding) comments about the way in which the representations and implied terms could have been re-formulated and how hypothetical alternative facts might have affected the success of PAG's claims.

BACKGROUND

PAG brought proceedings against RBS in the English High Court claiming that it had been mis-sold four interest rate swaps by RBS between 2004 and 2008 (the "**Swaps**"). Each of those Swaps was referenced to the 3 month Pound Sterling ("**GBP**") LIBOR rate.

Whilst PAG's claims fell into three categories (all of which were ultimately dismissed), this note focusses solely on the LIBOR-related claims (the "**LIBOR Claims**").[3] In this

1 [2013] EWCA Civ 1372. The case subsequently settled prior to the litigation of the misrepresentation claims.

2 [2016] EWHC 3342 (Ch) (21 December 2016).

3 The other two categories of claims were referred to as the "Swaps Claims" and the "GRG Claims". The Swaps Claims: PAG claimed that RBS had mis-sold the Swaps on the basis that they could not properly be said to have been hedging instruments in that they failed to

respect, PAG claimed (i) rescission (i.e. unwinding the transaction) on the ground that RBS had made a number of misrepresentations about LIBOR and the way in which it was set (the "**LIBOR Misrepresentation Claims**"); and (ii) damages on the ground that RBS had breached a number of implied terms in each of the Swaps (the "**LIBOR Implied Terms Claims**").

THE LIBOR MISREPRESENTATION CLAIMS

PAG argued that there were five representations[4] which could be inferred by a reasonable representee in PAG's position[5] from RBS' words and conduct in proposing and entering into each of the Swaps.[6]

Despite a standard implied term that the parties to each of the Swaps would conduct themselves honestly when performing the contract, Asplin J came to the conclusion that, in the relevant factual context of the case, "*the mere proferring of the draft Swaps referable to the 3 month GBP LIBOR rate was* [not] *in itself sufficient conduct from which the LIBOR Representations could be inferred by the reasonable representee*".[7] This dismissed the LIBOR Misrepresentation Claims entirely.

However, helpfully, Asplin J went on to consider, *obiter*, the position if there *had* been sufficient conduct to found the implied representations: would a reasonable representee in PAG's position have drawn the inferences contained in the LIBOR Representations?

LIBOR Representation 1: "*On any given date up to and including the date of each of the Swaps, LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date*". Asplin J concluded that this formulation was too widely drawn and tech-

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protect PAG from its interest rate risk (and allegedly left PAG in a worse financial position than had it not entered the Swaps). On this basis, PAG claimed for rescission, damages arising out of RBS' representations, and breaches of contract in connection with the sale of the Swaps. The GRG Claims: PAG claimed damages for breach of contract arising out of its transfer from the RBS management team in Manchester to the RBS Global Restructuring Group (GRG) in London, and its subsequent management within GRG.

4 Asplin J noted that the formulation of the five representations had been "*borrowed*" from *Graiseley* and did not necessarily reflect PAG's own evidence (paragraph 419 of the Judgment).

5 Whether a representation has been made is assessed objectively, although the "*reasonable representee*" is assigned the position and the known characteristics of the actual representee (*MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957).

6 As set out in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm).

7 Paragraph 407 of the Judgment and, more generally, paragraphs 404-413.

nical to have been inferred by a reasonable representee. However, had there been sufficient conduct, Asplin J held that she "*would have found...that a reasonable representee would have inferred from the use of LIBOR as a benchmark that LIBOR in relation to the tenor and currency to which the transaction related was set at the date of the transaction and would be set throughout its term in accordance with the relevant definition, being the BBA definition*".[8]

LIBOR Representation 2: "*RBS had no reason to believe that on any given date LIBOR has represented anything other than the interest rate defined by the BBA, being the average rate at which an individual contributory panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date*". Again, Asplin J found that PAG's formulation was too broad in that it encompassed all dates in the past and all tenors and currencies to which LIBOR is applied. However, had there been sufficient conduct, Asplin J held that she "*would have found that a reasonable representee would have inferred that RBS had no reason to believe that LIBOR in relation to the tenor and currency to which each Swap related would be other than the interest rate as defined by the BBA during the life of each Swap*".[9]

LIBOR Representation 3: "*RBS had not made false or misleading LIBOR submissions to the BBA and/or had not engaged in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties)*". Asplin J found that this was "*essentially the same as Representation 1 and suffers from the same defects*" but could have been "*tailored in a similar way to LIBOR Representation 1*".[10]

LIBOR Representation 4: **"***RBS did not intend in the future and would not in the future: make false or misleading LIBOR submissions to the BBA; and/or engage in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties)*". Asplin J concluded that this amounted "*to a promise as to future conduct...not a statement of fact*" and, as such, would not have been inferred by a reasonable representee.[11]

[8] Paragraph 408 of the Judgment.
[9] Paragraph 409 of the Judgment.
[10] Paragraph 410 of the Judgment.
[11] Paragraph 411 of the Judgment.

LIBOR Representation 5:[12] "*LIBOR was a rate which represented or was a proxy for the cost of funds on the interbank market for panel banks such as RBS*".[13] Asplin J concluded that the "*alleged inference is highly technical and not necessarily accurate*", such that it would not have been inferred by the reasonable representee.[14]

Asplin J also stated, *obiter*, that, had they been made, the alleged representations would have all been false on the basis that RBS had admitted trader manipulation of submissions in LIBOR currencies other than GBP. However, the evidence of the relevant PAG witnesses demonstrated that they had no understanding of the "*extremely complex and intricate pleaded representations*" and, therefore, even if they had been made, PAG could not be said to have relied upon those representations.[15]

In the alternative, PAG had also alleged fraudulent false representation[16] and/or negligent misrepresentation,[17] both of which were dismissed by Asplin J. In relation to the claim based on fraud, Asplin J found that PAG's cross-examination of the relevant RBS witnesses failed to establish that they intended PAG to rely on the alleged LIBOR Representations.[18] In relation to the claim based on negligence, PAG's pleaded case was insufficient to make out one of the key components of negligent misrepresentation and, on that basis, this aspect of the claim also failed.[19]

THE LIBOR IMPLIED TERMS CLAIMS

[12] PAG alleged that LIBOR Representation 5 was made both expressly and impliedly by RBS via an email. These allegations were dismissed on the facts, based on the content of the email.

[13] Paragraph 375 of the Judgment.

[14] Paragraph 412 of the Judgment.

[15] Paragraph 419-420 of the Judgment.

[16] In order to prove fraud, PAG needed to establish the following in respect of each relevant individual: he knew that the LIBOR Representations were being made; he knew that the LIBOR Representations were being understood in the sense alleged, and thereby relied upon, by PAG; that it was intended that the LIBOR Representations be understood in that sense; and that he knew that the LIBOR Representations were false (paragraph 476 of the Judgment and *CRSM v Barclays* [2011] 1 CLC 701 at [221]).

[17] The negligence claim was advanced as an alleged breach of a common law duty of care and/or breach of section 2(1) Misrepresentation Act 1967.

[18] "*They were only asked to accept that a counterparty would assume the LIBOR Representations were being made which is insufficient for the purposes of a claim in fraud or deceit*" (paragraph 485 of the Judgment). Furthermore, although surprise was expressed at RBS' failure to call as witnesses certain senior executives who had been involved in key communications, the Judge declined to draw adverse inferences in the circumstances and, therefore, found that there was "*no evidence to connect the remaining senior executives to knowledge of alleged trader manipulation in relation to US$ LIBOR, or to establish that they knew that the specific LIBOR Representations were allegedly being made*" (paragraph 486 of the Judgment).

[19] Paragraph 487 of the Judgment.

In the alternative to the LIBOR Misrepresentation claim, PAG claimed damages as a result of alleged breaches of three alleged implied terms.[20] In order for these claims to succeed, PAG had to demonstrate that each implied term was necessary to give business efficacy to the Swaps contracts or that each proposed term was so obvious that its implication went without saying.[21]

LIBOR Implied Term 1: "*The floating rate payable by or to RBS under each of the Swaps would be calculated by reference to LIBOR as defined by the BBA i.e. the interest rate as defined by the BBA namely the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date*". Asplin J reached the conclusion that this term would have been "*implied into each of the Swaps if and to the extent that it was restricted to the conduct of RBS*"[22] as it was "*necessary to give business efficacy to each of the transactions*".[23] However, Asplin J determined that, given there was insufficient evidence to establish trader manipulation of GBP LIBOR within RBS, RBS was not in breach of LIBOR Implied Term 1.

LIBOR Implied Term 2: "*If RBS had reason to believe that on a given date LIBOR represented or might represent anything other than the interest rate defined by the BBA (i.e. the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date), it would not withhold or conceal that information from PAG*". The Judge determined that it was not necessary to imply such a term to give business efficacy to the Swaps.[24]

LIBOR Implied Term 3: "*RBS would not make false or misleading LIBOR submissions to the BBA and/or engage in any practice of attempting to manipulate LIBOR such that it deviated from the rate as defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties)*". Asplin J formed the view that this alleged term failed the implication test as it was very widely framed and overly vague.[25]

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[20] The LIBOR Implied Terms are set out at paragraph 400 of the Judgment.

[21] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] UKSC 72.

[22] The Judge agreed with RBS' submission that the conduct of unknown Panel Banks would not have been within the contemplation of the parties.

[23] Asplin J concluded, contrary to RBS' submission, that the wording *"floating rate payable by or to RBS"* was a reference to the rate applicable to the Swaps themselves and, therefore, there was no need for 3M GBP LIBOR to have been referenced expressly. (Paragraph 414 of the Judgment).

[24] Paragraph 414 of the Judgment.

[25] Paragraph 414 of the Judgment.

ADDITIONAL KEY POINTS

In forming the above conclusions, Asplin J also considered the following issues:

RBS Trader Manipulation in GBP LIBOR: The Judge did not consider the evidence to be sufficient to prove that trader positions were taken into account in RBS' GBP LIBOR submissions.[26] In reaching this decision, Asplin J accepted that discussions with derivatives traders in a general sense was a legitimate tool for the LIBOR submitter to use in determining the appropriate LIBOR submission to make on a particular day.[27] Asplin J also concluded that it was not appropriate to draw adverse inferences from the fact that the submitters were seated on the same trading floor with derivatives traders at the time.[28] Furthermore, although regulators had previously identified[29] (and RBS had admitted to) inappropriate behaviour in relation to LIBOR currencies other than GBP within RBS, Asplin J ruled that it was not appropriate, in the circumstances, to seek to rely upon an inference drawn from conduct in relation to those other currencies in order to establish the same inappropriate behaviour as regards GBP LIBOR.[30]

Lowballing:[31] The Court rejected PAG's allegation that RBS engaged in lowballing on the basis of the factual and expert evidence in the case.[32]

Financial Crisis Manipulation: Asplin J did not find that RBS had engaged in so-called financial crisis manipulation of LIBOR submissions. PAG's argument that, in circumstances where there was no bank willing to lend in a particular currency and tenor, a member of the relevant panel was obliged to make no LIBOR submission that day, was

[26] Paragraphs 454-456 of the Judgment.

[27] Paragraph 453 of the Judgment.

[28] *Ibid.*

[29] On 6 February 2013, the UK Financial Services Authority (as the Financial Conduct Authority was then known) published a Final Notice recording findings that RBS had "*undermined the integrity of LIBOR*" as a result of misconduct that had occurred in relation to RBS' Japanese yen, Swiss franc and US Dollar LIBOR submissions between January 2006 and March 2012. Similar findings were made by US regulators. No adverse findings in relation to GBP LIBOR were mentioned by any regulator. However, in light of an earlier decision by the court in respect of PAG's claim (PAG v RBS [2015] EWHC 1557 (Ch)), RBS was not permitted to rely on the absence of regulator findings in relation to GBP LIBOR and, as such, the evidence relating to alleged misconduct in GBP LIBOR was heard in full in the current proceedings.

[30] Paragraph 457 of the Judgment.

[31] "Lowballing" is the term used to describe the practice of making LIBOR submissions at an artificially low level, particularly where this is done in order to make a submission appear lower relative to other Panel Banks' submissions, thereby signalling greater financial strength relative to those other banks.

[32] Paragraph 463 of the Judgment. Asplin J commented that she found the evidence of PAG's expert to be unreliable in nature. It also became apparent that the two parties' experts had approached the evidence in very different ways.

rejected as being irreconcilable with the relevant BBA guidance.[33] Furthermore, PAG's argument that RBS was obliged to make a LIBOR submission the same as the rate at which it had borrowed in the relevant currency/tenor on a particular day was rejected as being contrary to the relevant BBA Guidance.[34]

CONCLUSION

Despite the clear emphasis placed on the specific facts of the case, this Judgment is significant as an indication of how the courts are likely to approach LIBOR-related cases. In particular, Asplin J's findings in relation to financial crisis manipulation (particularly the affirmation of the BBA's guidance and consequent rejection of PAG's assertions regarding the way in which LIBOR submissions should have been made) and trader manipulation (particularly the absence of adverse findings in relation to conversations between traders and submitters and the refusal to allow misconduct in one LIBOR currency to be used to establish misconduct in another) may prove helpful for future defendant banks.

Perhaps even more important are Asplin J's *obiter* comments regarding the formulation of the LIBOR Representations and her suggested re-formulations of Representations 1-3. These comments may prove informative to future claimants and defendants alike, not least RBS itself as it approaches another trial of a different claim, based on similar allegations in relation to LIBOR-related misrepresentations, with Asplin J as the presiding judge.[35] It remains to be seen whether, in different factual circumstances, Asplin J's conclusions as to the merits of the various claims will result in a different outcome. Either way, the proceedings are likely to be watched closely by all parties.

[33] Paragraph 314 of the Judgment. Paragraph 2 of the BBA Terms of Reference states that, "[i]*n the event that a given period has no market offer then the contributing Bank is required to use its market knowledge to supply an appropriate rate that is, as far as is possible, a fair and accurate reflection of that bank's opinion of its cost of funds*". Paragraph 6 states that "[c]*ontributor banks must undertake to provide rates on every London business day*".

[34] The BBA guidelines state as follows: "*if one morning a bank funds at considerably below (or for that matter, above) its most recent quoted LIBOR submission it does not follow that the bank should change its LIBOR to this rate for the day*". It was noted that the turmoil in the financial markets meant that market conditions from day to day became extremely variable, such that the published LIBOR rate on a particular day was a less reliable guide to future lending conditions (and bank borrowing costs) than it had previously been.

[35] *Hockin and others v Royal Bank of Scotland plc and another* (unreported), 3 November 2016, (Chancery Division). Asplin J adjourned the trial of this claim pending the judgment of *PAG v RBS* on the basis that the PAG judgment could affect whether particular issues were live or agreed. *Stuart Wall v RBS plc* (CL-2013-000310 and CL-2015-000778) is another case before the Commercial Court which raises similar issues.

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