

25 February 2019

Landmark benchmark manipulation claim fails

Marme v Natwest Markets & Others

The High Court today (25 February 2019) handed down judgment in the case of *Marme Inversiones v Natwest Markets plc & Others* ([2019] EWHC 366 (Comm)), dismissing Marme's misrepresentation claims regarding the EURIBOR benchmark, in which Marme had sought rescission of interest rate swaps with five banks, and granting the Defendants' requests for declaratory relief in relation to the validity of the termination of those swaps. Although there has been a raft of cases involving allegations of implied misrepresentation relating to benchmark manipulation, this is only the second case (after *Property Alliance Group Ltd v Royal Bank of Scotland (PAG)*¹) in which a final judgment following trial has been handed down.

SPEED READ

- The EURIBOR Representations could not be implied because there were no clear words or conduct from which they could be said to arise, they were uncertain and Marme had not thought they were made at the time. They were of an entirely different order to the limited implied representation found by the Court of Appeal to have been implied in *PAG*.
- Even if the EURIBOR Representations could be implied, as Marme was not aware of the EURIBOR Representations at the time that they were allegedly made, Marme could never have relied on them in entering into the Swaps.
- Marme would not have been able to rescind in any event because it had affirmed the contract and also due to the fact that it could not rescind the Swaps without also rescinding the associated loan.
- Damages would not have been available as Marme was unable to show that, had it known the truth about the alleged EURIBOR manipulation, it would have been able to negotiate a different deal.
- Natwest had not been held out as having authority to act as the agent of the other banks but, even if it had that apparent authority, this would not have encompassed the making of the EURIBOR Representations. In any event, Marme did not establish that it relied upon any alleged holding out.

¹ *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] 1 WLR 3529

Background

These high-value, complex and long-running proceedings concerned one of Europe's largest ever property deals whereby Marme purchased the real estate and buildings comprising the headquarters of the Santander Group known as the Ciudad Financiera.

Marme's acquisition of the Ciudad Financiera was financed in part by a €1.575 billion loan from a syndicate of eight lenders, including the five Defendants (Natwest Markets plc, Hamburg Commercial Bank AG (formerly HSH Nordbank AG), Bayerische Landesbank, ING Bank NV and Caixabank SA), entered into a few days before the collapse of Lehman Brothers in September 2008 (the **Senior Loan**). The interest rate payable under the Senior Loan was set by reference to the Euro Interbank Offered Rate (**EURIBOR**) and was hedged under five interest rate swaps entered into between Marme and each of the Defendants (the **Swaps**).

Marme sought rescission of the Swaps and/or damages of up to €996 million on the alleged basis that Natwest, fraudulently or otherwise, made certain implied representations regarding EURIBOR (the **EURIBOR Representations**), both on its own behalf and as agent for the other Defendants (the **Non-Natwest Banks**), that were false. In respect of its allegations as to the falsity of the EURIBOR Representations, Marme relied exclusively on the conduct of one ex-Natwest employee, Mr Phillippe Moryoussef, who was convicted (in his absence) in July 2018 of conspiracy to defraud in respect of EURIBOR.

As well as defending Marme's claim, the Defendants sought declarations as to Marme's liability to each of them under the Swaps, following their early termination in accordance with the terms of their respective ISDA Master Agreements after Marme's payment default.

Judgment

In its judgment today dismissing Marme's claim and upholding the Defendants' declaratory counterclaims, the Court made the following key findings:

Alleged implied representations not made

The Court held that the EURIBOR Representations could not be implied because:

- There were no clear words or specific clear conduct identified from which the wide-ranging EURIBOR Representations could be said to arise. The broader and more complex the alleged representations, the more active and specific the conduct giving rise to the implication must be.
- Although Marme sought to rely on the Court of Appeal's decision in *PAG*, this provided no support for its case due to the differences with the implied representation formulated there. For example, Marme's EURIBOR Representations extended: (i) to the conduct of banks other than Natwest, (ii) to the past, and (iii) beyond actual manipulation to attempted manipulation. The Court would have found a much narrower implied representation (based on that found in *PAG*) from Natwest's conduct in 'going along' with the Swaps. However, it noted that such a representation was not alleged.

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- There was a distinct lack of certainty (and associated lack of obviousness) as to what the EURIBOR Representations entailed. The Court stated that the more ambiguous or uncertain the representation the less likely that it would be implied.
 - Marme had not considered that the EURIBOR Representations were being made at the time. Instead, Marme's witness had thought that EURIBOR was a 'true and honest' rate but had not been thinking about how EURIBOR was set or the possibility that it might be manipulated.

Falsity

The Court found that, if the EURIBOR Representations had been implied, they would have been falsified because the communications involving Mr Moryoussef whilst at Barclays and from his first few months at Natwest showed him engaged in attempted manipulation/manipulation of EURIBOR.

The Court noted, however, that there would have been no falsity in respect of the narrower representation that it would have implied (as set out above) as there was no evidence that Natwest itself was manipulating or attempting to manipulate EURIBOR.

No reliance

The Court found that Marme's case also failed because, even if the EURIBOR Representations could be said to have been made, Marme would not have relied on them in entering into the Swaps for the following reasons:

- Marme was not aware of the EURIBOR Representations at the time that they were allegedly made. Marme's witness had made certain assumptions about EURIBOR but the EURIBOR Representations (or something approximating them) were not 'actively present' to his mind. The Court rejected Marme's submission that, in an implied representation case, a representation could be regarded as having been present in the representee's mind even if the representee did not give the representation any contemporaneous conscious thought.
- There was no causal link between the EURIBOR Representations and Marme entering into the Swaps, not only because it was not aware of them, but also because there was no evidence that Marme would have acted differently had those representations not been made.

Rescission was barred

It was held that, even if contrary to its findings the EURIBOR Representations had been made, falsified and relied upon, the remedy of rescission would have been barred because:

- Marme had affirmed the Swaps on the basis that Marme's witness, a former solicitor, believed in early 2014 that Marme had the right to rescind but made the tactical decision to go ahead and make the payments due under the Swaps in February 2014 anyway; and
- Marme had sought to rescind the Swaps but not the associated Senior Loan, which engaged the *De Molestina*² rule against partial rescission, which prevents a claimant from seeking to rescind a contract which forms an inseparable part of a wider transaction in relation to which rescission was not sought.

² *De Molestina v Ponton* [2001] CLC 1412.

No entitlement to damages

Marme alleged that, had it known the truth regarding Natwest's alleged involvement in the manipulation of EURIBOR, it would have entered into the transaction on terms more advantageous to Marme. Therefore, if it was not entitled to rescind the Swaps, it should still have been able to recover damages on the basis that it would have entered into the transaction without the Swaps or, alternatively, would have negotiated a reduction in the credit spread applicable to each Swap.

The Judge noted that the correct question to ask was not "*what would have happened if Marme had known the truth?*" but "*what would have happened had the EURIBOR Representations not been made?*", and that Marme therefore technically needed to prove that, if the EURIBOR Representations had not been made, the truth would have been discovered, in order to establish the requisite causation for its damages case. However, he chose not to base his decision on this point.

It was held that Marme was not entitled to damages as it had failed to show that, on the basis of the evidence before the Court, even if it had known the truth about the alleged EURIBOR manipulation, this would have given it sufficient additional bargaining power to force the Defendants to agree to either of the alternative transactions. In reaching this conclusion, the Judge noted that it was not sufficient from a causation perspective for Marme to show that it *might* have been able to do so.

No agency relationship between Natwest and the Non-Natwest Banks

The Court held that the case against the Non-Natwest Banks also failed because there was no agency relationship between Natwest and the Non-Natwest Banks for the following reasons:

- There was no relevant 'holding out' of Natwest by the Non-Natwest Banks as having the power to represent them, which would have been required for Natwest to have the 'apparent authority' to do so. Natwest's role as joint Mandated Lead Arranger on the Senior Loan, in discussing the terms of the Swaps (in particular the credit spread) with Marme and establishing the market mid-rate and steps for the Swaps on an execution call not involving the Non-Natwest Banks, did not mean that it was acting as agent for the Non-Natwest Banks. Instead, the Court categorised Natwest's role as a 'middleman' or conduit of information. The Court referred to *UBS v KWL*³ and the proposition that the Court "*should not impose an agency analysis upon a relationship which may better be analysed in other terms*" particularly where the person alleged to be an agent had its own interest in the transaction as principal.
- The making of the EURIBOR Representations would not have been within the scope of the apparent authority if any had been created. There was no reason why the Non-Natwest Banks should be taken as holding Natwest out as having the authority to make representations regarding something about which they would have no knowledge, namely Natwest's own knowledge of or involvement in EURIBOR manipulation.
- Marme did not rely upon any alleged holding-out of Natwest as having authority to make the EURIBOR Representations in entering into the Swaps. On his evidence, Marme's witness would still have entered into the Swaps if he had known that Natwest was not speaking for or making representations on behalf of the Non-Natwest Banks.

³ *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567.

Defendants entitled to declaratory relief

Marme's defence to the Defendants' claims for declarations failed for the reasons set out above, apart from a subsidiary defence against Natwest's declaration claim only, which was that Marme had accepted Natwest's repudiatory breach of certain implied terms regarding the integrity of EURIBOR in its Swap with Natwest before the bank served its termination notice.

However, this defence also failed at every stage. The Judge was not persuaded that the relevant terms were implied as they were far too wide and imprecise, or that they would have been breached even if they were implied. Furthermore, even if such terms could be implied and had been breached, Marme had affirmed the contract for the reasons set out above.

Accordingly, the Court did not need to reach a determination on a further argument by Natwest based on the terms of the ISDA Master Agreement, but the judge noted that he would have been inclined to conclude that those terms did not oust the right to allege a repudiatory breach but did require the aggrieved party to follow the termination procedure in the ISDA Master Agreement.

At the consequential hearing, the Judge granted the Defendants indemnity costs on the basis of certain provisions of the ISDA Master Agreements and the Senior Loan, and refused permission for Marme to appeal.

Conclusion

This decision has clarified a number of points regarding claims for misrepresentation against financial institutions in the context of allegations of benchmark rate manipulation. It is notable that, in reaching its conclusion that the EURIBOR Representations had not been made, the Court distinguished them from the narrow representation that was established in the Court of Appeal decision in *PAG*, on the basis that they extended: (i) to the conduct of banks other than Natwest, (ii) to the past, and (iii) beyond actual manipulation to attempted manipulation. It is perhaps less surprising that the Court also found in this case that a much narrower representation would have been implied along the lines of the one identified by the Court of Appeal in *PAG*, namely that Natwest was not itself manipulating and did not intend to manipulate or attempt to manipulate EURIBOR.

Another notable point is that the Court agreed with the view expressed by Asplin J in *PAG* (the Court of Appeal in that case did not deal with this issue) that in cases of implied representation, it was still necessary to show that the claimant was aware that the representation had been made. This may yet prove to be the biggest barrier to claims of this sort succeeding.

It will also be of some relief to entities involved in arranging syndicated financing and coordinating interest rate hedging that the Court was reluctant to find that such roles involved acting as an agent, particularly in circumstances where the relationship could be better analysed in other terms.

The Non-Natwest Banks were represented by Allen & Overy Partner Andrew Denny, Senior Associate Kate Gee, and Associates Rosie Hoskins, Becky Valori and Georgina Thomson, instructing Timothy Howe QC and Adam Sher of Fountain Court Chambers.

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