LEEDS CITY COUNCIL & LONDON BOROUGH OF NEWHAM V BARCLAYS BANK PLC & BARCLAYS BANK UK PLC [2021] EWHC 363 (COMM)

I. BACKGROUND

Between 2006-2008 Barclays Bank PLC and Barclays Bank UK PLC (the ***Defendants***) provided long term loans (the ***Loans***) to Leeds City Council and other local authorities (the ***Leeds Claimants***) and the London Borough of Newham (***Newham***) (together, with the Leeds Claimants, the ***Claimants***). LIBOR was used as the reference rate for the purposes of setting the interest rates and calculating the breakage costs of the Loans.

In 2012, systemic manipulation of the LIBOR benchmark rate was uncovered. The Claimants submit that the Defendants made representations regarding LIBOR which induced them to enter into the Loans. The representations pleaded were extensive (see [18] and [19]) but were summarised by Cockerill J as follows: [9]

1. That the LIBOR rates were (or so far as the Defendants knew) being set honestly and properly; and

2. That the Defendants were not (and had no intention of) engaging in any improper conduct in connection with its participation in the LIBOR panel.

   (the ***Alleged Representations***)

The Claimants bring an action for rescission and restitution of the Loans (or, in the case of one claimant, in the alternative for damages) for fraudulent misrepresentation.

II. THE APPLICATIONS

The Defendants seek strike out/ summary judgment of the claims.[1] In an Order dated 15 January 2020 Butcher J ordered the applications (the ***Applications***) against the Leeds Claimants and Newham be heard together.

The Defendants contend the claims are bound to fail for two reasons:

1. The Claimants cannot show they relied on the Alleged Representations when entering into the Loans (the ***Reliance Issue***). [12]

2. The Claimants have affirmed the contracts for the Loans (the ***Affirmation Issue***) and so have lost the right to rescind. [30]

The Applications proceeded on the basis that the facts pleaded by the Claimants with respect to the Alleged Representations are true; namely that (i) they were made by the Defendants; (ii) they were false; and (iii) that the Defendants knew they were false.

The question for the Court was whether the facts, taken at their highest, were sufficient in law to prove reliance in an action for misrepresentation.

[1] The Reliance Issue was a strikeout application and the Affirmation Issue was a summary judgment application. [4]

III. THE PARTIES SUBMISSIONS

(a) The Reliance Issue

There was a disagreement between the parties as to the correct legal test for reliance in the context of an action for misrepresentation.

(i) The Defendants' submissions

The Defendants submitted that "reliance" in an action for misrepresentation has two components: (i) an awareness/ understanding requirement;[2] and (ii) a causation/ inducement requirement.[3]

The Defendant submitted that the question of awareness is anterior to the question of causation and that the Claimants had made an error in conflating these discrete requirements.

The Defendants relied on the recent decision of Picken J in *Marme Inversiones 2007 v Natwest Markets plc* [2019] EWHC 366 (Comm) where claimants brought an action for the rescission of loans for misrepresentations similar to the Alleged Representations. Picken J commented obiter that "*a claimant in the position of Marme […] should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made*".

The Defendants submitted that Picken J was reiterating settled law and that "*contemporaneous conscious thought*" was one of many expressions used by the Courts to denote that there must have been some "*present*" and "*active appreciation*" of the representation by the representee. If a Claimant is not *aware* of a representation, they cannot be said to have been *induced* to act upon it. The Defendants referred to this as the "***Awareness Requirement***".

The Defendants contended that the Awareness Requirement cannot be satisfied by (i) an assumption by the representee; (ii) an analysis of what the representee would have done had it known the truth (which Cockerill J termed "*the counterfactual of truth test*"); (iii) awareness of the facts from which a representation is said to be implied; (iv) subconscious influence; or (v) by the presumption of inducement in fraud cases (which logically only operates following the fulfilment of the Awareness Requirement). [37(vii)]

(ii) The Claimants' submissions

In contrast, the Claimants submitted that the two components to reliance outlined by the Defendants *cannot* be separated: Awareness should not be conceptualised as an

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[2] Cockerill J held considered that these were "*two slightly distinct concepts*". In some cases, where the representation relied upon is "*susceptible of more than one meaning, the requirement necessary to bridge this logical gap between the ambivalent representation and the necessary component of reliance will relate not just to the making of the representation, but also to the sense of it […] Elsewhere however the representation may not be susceptible of multiple meanings. In those circumstances the step which forms the logical bridge between the representation and reliance is merely the awareness of the representation as something which was made*." [70]

[3] There was no difference in how these terms were used by the parties.

independent precondition that has to be satisfied before the Court can move on to the analysis of inducement.

The Claimants submitted that the Defendants' interpretation of *Marme* was incorrect or, if it was correct, Picken J had erred in his obiter comments and they should be disregarded. [26]

The Defendants' interpretation of *Marme* would "*require a misrepresentee at the time of contracting to have consciously asked himself the question, 'is the representor making an implied representation to me and, if so, what are the terms of that representation?', or else he could never establish reliance*". [40]

Instead, the Claimants submitted that it was "*sufficient for them to establish that […] they were influenced or affected by the LIBOR Representations, in the sense that the[y] operated on their minds, whether consciously or subconsciously*" ([26]). Numerous cases did not impose a requirement for the presence of "*contemporaneous conscious thought*" (see [44]).

Furthermore, the Claimants submitted that a distinction should be drawn between cases cited by the Defendants which (they asserted) concerned representations by *words* and those they had cited (particularly *DPP v Ray* [1974] AC 370) which represented the Courts' approach to cases where representations had been made by *conduct*.

(b) The Affirmation Issue

The Defendants submitted that even if the Claimants were able to prove misrepresentations had been made, they were not entitled to rescission because they had affirmed the Loans.

The Defendants contended that the following conduct amounted to affirmation: (i) against all the Claimants, the continued payment of interest charges; and (ii) against Newham and two of the Leeds Claimants, on entering into restructuring agreements varying the terms of the Loans.

IV. THE REASONING OF THE COURT

(a) The Reliance Issue

The primary issue between the parties was whether, to prove reliance, a representee had first to prove an "awareness" or "understanding" of the representation (i.e. the Awareness Requirement). Cockerill J described this as the "*question of the bridge between the making of the representation and inducement*" [57] and considered that it was "*of particular importance when considering implied representations.*" [67]

In determining this question, Cockerill J accepted that she should "*pay very careful mind to the cases which have already considered LIBOR rigging allegations.*" [75]

After considering the parties' submissions and the case law, Cockerill J found the state of the law to be as follows:

1. Inducement/ reliance is an element to the cause of action for misrepresentation. It constitutes the *causal link* between the conduct of the defendant and the conduct of the claimant. It is a question of fact in each case. [144]

2. As part of the element of inducement/ reliance, there is "*some requirement of awareness*" and that this is "*established by the authorities*". [146] It is "*immaterial*" whether the Awareness Requirement is regarded as a separate element, or as an element of inducement. [71]

3. The Awareness Requirement is the same in cases involving representations by conduct and those involving representations by express words (rejecting the Claimants' argument that the authorities could be divided into separate categories). [132]

4. Where awareness is in issue, in some cases the question will be "*what the claimant consciously thought*", while in others it may be better expressed by a focus on "*active presence*" in the representee's mind. [146]

5. The "*contemporaneous conscious thought*" formulation of the test articulated in *Marme* was reactive to the particular facts of that case. Cockerill J preferred the formulation of whether the representation could be said to have been "*actively present*" to the representee's mind (*BV Nederlandse Industrie v Rembrandt Enterprises* [2019] EWCA Civ 596 [32]) and considered it more helpful to apply that formulation to the facts of this case. [153]

6. An "assumption" by the claimant will not suffice to constitute "awareness". However, in the simplest representation by conduct cases, the representee's awareness may appear similar to an assumption: "*The dividing line between giving contemporaneous conscious thought to the conduct and contemporaneous conscious thought to the representation may – in some cases – be thin to non-existent […] for example, in the case of a bidder at an auction raising a paddle, representing a willingness and ability to pay a certain sum. In such a case a requirement for separate or distinct understanding or thought to the representations would be artificial*." [147] However, this principle should not be inferred in more complex cases where "*the conduct does not 'speak for itself' in the same way so as to permit quasi-automatic understanding which may appear similar to an assumption*". [148]

7. Showing that a representee was "*influenced or affected*" by representations subconsciously (however this may be done) is insufficient to establish reliance in a case of this sort. *PAG v RBS* [2016] EWHC 3342 (Ch) and *Marme* indicate that "*more is needed than an assertion of subconscious operation*". [157]-[158]

8. Assuming awareness/ understanding can be proved, the relevant test for inducement is what would have happened if the statement had not been made at all (and not if the representor had told the truth). Nonetheless, the counterfactual position of what the representee would have done if told the truth "*may well result in evidence which is of use in establishing the answer to what would have happened if the representation had not been made*". [73]

In light of these findings, Cockerill J concluded that "*the Bank is broadly speaking correct in the test which I need to apply in the present case*." [151]

However, Cockerill J also noted obiter that if *PAG* and *Marme* had not found "*awareness*" to be required with respect to representations which were "*effectively identical*" to the Alleged Representations, she would have been "*tempted to say that the*

question of what feeds into the equation on understanding depends on the precise facts as to the representation, and the answer may be one which requires conscious thought or some less stringent element of awareness." [149]

Nonetheless, applying the law as articulated, Cockerill J considered that the Leeds Claimants' submissions that:

1. Inducement is made out where the decision-maker "*would not have taken [a] course of action if they had known the true position*" relied on the incorrect counterfactual of truth test. [154]

2. "*[W]here an implied representation by a dishonest party has the effect of reinforcing an assumption by [an] (honest) counterparty […] inducement is made out*" was predicated on the false premise that an "assumption" by the representee suffices for "awareness". [156]

3. Reliance is established if the representee was "*influenced or affected*" by the Alleged Representations "*in the sense that the[y] operated on their minds, whether consciously or unconsciously*" was incorrect given the assertion of "*subconscious operation*" was a "*bare assertion*" which is "*effectively a reiteration of the assumption analysis*". [157]

As such, Cockerill J considered the "*Leeds Claimants' pleaded case, even if proved, has no real prospect of success, and that it falls to be struck out*." [158]

With respect to Newham, Cockerill J noted that "*there is no assertion that any natural person actively or consciously (or in any way) understood at the time that representations were being made*" and that Newham relies on the "*presumption of inducement*" and "*the counterfactual of truth*" which were irrelevant to the question of Awareness. Consequently, Newham's claims should also be struck out. [161]

(b) The Affirmation Issue

In light of Cockerill J's findings in relation to the Reliance Issue, the Affirmation Issue did not arise. However, Cockerill J nevertheless addressed this issue and explained that she had formed the "*firm view*" that, had this issue arisen, she would not have granted Barclays' application on this ground, and that the Affirmation Issue was unsuitable for summary judgment (essentially for the same reasons as those given by the Court of Appeal in *The Law Debenture Trust Corporation Plc v Ukraine* [2018] EWCA Civ 2026). [194]

The Affirmation Issue raised factual issues as to the knowledge of each of the Councils. The parties agreed that affirmation requires "*informed election*". This has two components: (i) the Claimants must have known of the *facts* giving rise to the right to rescind; and (ii) the Claimants must have had knowledge of their *legal right* to rescind. [164]-[165] Cockerill J expressed scepticism with respect to the Claimants' arguments regarding the first component and the Defendants' arguments regarding the second component.

Cockerill J considered that the Claimants' submission that they "*did not have knowledge of the relevant facts until months after the Court of Appeal decision in [PAG v RBS [2018] EWCA Civ 355] [did] not appear realistic*" [198] and that it was "*more*

likely than not that the Bank would […] succeed in establishing the requisite knowledge [of the facts]". [200]

However, Cockerill J also noted that, given the claims were "*novel and not straightforward*" [202], it did not follow that the Claimants had knowledge of their legal right to rescind. She was unpersuaded by the Defendants' submission that "*wherever there is an in-house lawyer relevant advice will (at the summary judgment/ strike out stage) be inferred to have been taken unless the party waives privilege in relation to its legal advice at that preliminary stage.*" [207] As such, she was "*unwilling to make the inference on a summary basis that the existence of […] in house legal advisers means that the Claimants were or should have been advised as to their rights*". [209]

Cockerill J therefore concluded that the Affirmation Issue was arguable and not suitable for summary determination.