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Owner of Santander Headquarters failed in claim for rescission of swaps based on implied representations re EURIBOR manipulation by RBS NatWest

In its recent decision on the long-running, complex case of Marme Inversiones 2007 SL vs NatWest Markets & Others [2019] EWHC 366 (Comm) the High Court dismissed misrepresentation claims made by Marme against five defendant banks, including NatWest Markets plc (then known as RBS plc "RBS NatWest"), regarding the EURIBOR benchmark. This case is the latest in a line of cases where parties have sought to rescind onerous derivative transactions under which they owe large close-out amounts (in this case approximately €710 million plus interest) on the basis of misrepresentations made by their bank counterparty arising from benchmark manipulation. The claimant failed on all counts and, amongst other things, was refused the right to rescind the swaps.

Marme claimed

1) RBS NatWest (as lead bank of the five swap banks) had impliedly represented that it had not been and would not be manipulating EURIBOR (the "EURIBOR Representations"); (2) that RBS NatWest made the representations as agent for the other four swap banks (the "Non-RBS Banks"); (3) that those representations were untrue and (4) that Marme had relied on those representations when entering into hedging swaps and was therefore entitled to rescind those swaps or get damages for the close-out amount due under the swaps.

To bring a successful claim for rescission based on misrepresentations a claimant must show (1) that representations were made, (2) they were false and (3) that the claimant relied upon those representations in entering into the contract. In this case the judge concluded that the purported EURIBOR Representations were not in fact made because there was no clear words or clear conduct sufficient to imply such wide and ambiguous representations (the EURIBOR Representations covered past conduct, attempted manipulation and conduct of other banks). Having done so the judge did not need to go further however in his very helpful, and long (230 pages!), a written judgment he gave some guidance on each of the other limbs of the claim.

- The judge indicated that he would have found, had he needed to, that a narrower representation had been implied i.e. that RBS NatWest was not seeking to manipulate EURIBOR, but on the facts the court found that such a limited representation was not breached in this case.
- The claimant also failed to show the reliance required for a successful

claim as the key witness for Marme was not aware EURIBOR could be manipulated and had assumed it was honestly set and as such the EURIBOR Representations could not have induced Marme to enter into the Swaps.

- Moreover, the claimant had, by making payments under the swaps at a time when it had knowledge of the conduct on which it based its claim, affirmed the contracts. Accordingly, the rescission claim failed.
- The judge determined that merely by acting as mandated lead arranger and hedge co-ordinator RBS NatWest had not become an agent for the Non-RBS Banks for the purposes of making any implied representations.
- Marme claimed that RBS NatWest had carried out a repudiatory breach of an implied *term* of the contract which allowed it to terminate at common law and thereby avoid the ISDA close-out mechanism. The judge agreed a narrow implied *term* would be included in the contract (along the lines of the narrow *representation* he would have been prepared to imply) but said there was no breach of contract as the implied term was narrow and on the facts was not breached. In any event, he indicated his view that whilst a party retains the common law right to terminate an ISDA Master Agreement for repudiatory breach (by virtue of Section 9 (Cumulative Remedies)) nevertheless such a party must then terminate using the ISDA close-out mechanism which Marme failed to do.

Background of the case

This case arose out of events which led to the recent convictions of two individuals involved in rate fixing, one of which, Mr Moryoussef, was an ex-employee of the defendant NatWest Markets plc (then known as RBS plc "RBS NatWest"). In September 2008 Marme Inversiones 2007 SL ("Marme"), borrowed €1.575 billion from a syndicate of eight banks including RBS NatWest and the other four defendants (being referred to as the "Non-RBS Banks"). The loan was to part finance a sale and leaseback arrangement of Santander's Headquarters in Madrid. At the time the deal was said to be Europe's largest real estate deal. The loan was hedged by five of the eight syndicate banks namely, RBS NatWest Markets and the Non-RBS Banks. RBS NatWest acted as mandated lead arranger for the loan. The hedges were fixed/floating interest rate swaps based on EURIBOR (the "Swaps"). Unfortunately, the Swaps were entered into just days before the Lehman Brothers collapse in September 2008 and the financial crisis which followed meant that Marme was unable to repay the loan when it fell due in September 2013 and it was also unable to refinance the deal. Marme went into voluntary insolvency in Spain and subsequently failed to pay the next payments under the Swaps. When the Defendants[1] sent non-payment notices Marme claimed rescission of the Swaps. The Defendants them terminated the Swaps and the combined termination amounts of the Swaps claimed by the Defendants from Marme amounted to approximately €710 million plus default interest.

[1] Defendants (1) NatWest Markets PLC, (2) HSH Nordbank AG, (3) Bayerische Landesbank, (4) ING Bank NV, (5) Caixabank SA

Highlights of the Decision

Purported implied misrepresentations about EURIBOR were not made.

On the facts the judge concluded that the EURIBOR Representations were not in fact made. He referred to settled case law that for representations to be implied there must be clear words or clear conduct. He emphasised that whilst some representations may be implied in a commercial relationship involving a benchmark a court will be reluctant to imply extensive representations in the absence of clear unambiguous words. On the facts of this case the judge was clear that the purported representations were ambiguous and too wide as they extended to conduct going back two years in the past, extended beyond actual to attempted manipulation and purported to cover conduct of other banks.

Whilst not strictly necessary for the decision, the judge went on to confirm that, had he been asked, he would have concluded that the only implied representation which was made was that none of the senior employees at RBS NatWest who were either submitters or connected with the transaction were actually manipulating, or attempting to manipulate, EURIBOR in any material way. In this, he followed the leading case Property Alliance Group Ltd v Royal Bank of Scotland[2] [2018] 1 WLR 3529 which determined that a bank merely by proposing a swap based on a benchmark was enough to imply that the bank would not manipulate that benchmark.

No falsity.

Interestingly the Judge noted that even if Marme had included the more limited implied representation mentioned in a paragraph above it would have made no difference to the outcome of the case since, on the facts, such an implied representation would not have been untrue.

RBS NatWest did not act as an agent for the Non-RBS Banks in making the EURIBOR Representations.

The basis of Marme's case against the Non-RBS Banks was that RBS NatWest acted as an agent with ostensible authority to make the alleged representations on behalf of the Non-RBS Banks. Significantly Marme did not allege, however, that RBS NatWest had authority (actual or apparent) to *contract* on behalf of the Non-RBS Banks, nor did Marme contend that RBS NatWest had actual authority to make representations on their behalf. Marme argued that RBS NatWest by acting as mandated lead arranger under the loan and as hedge co-ordinator under the Swaps (i.e. the party on the call with Marme to fix the mid-price under the Swaps) had apparent authority to make the EURIBOR Representations on behalf of the Non-RBS Banks. The judge referred to UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567[3] in concluded

[2] Previously the leading case was Property Alliance Group Ltd v Royal Bank of Scotland [2018] 1 WLR 3529 – in which the Court of Appeal found that, in proposing to enter in to a swap based on LIBOR, RBS had made an implied representation that it was not seeking to manipulate LIBOR and had no intention of doing so in the future ("PAG case").

[3] UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567. The judge concluded at paragraph 415. that this case provided authority for two propositions. "The first is that the Court should not feel constrained to find that there is an agency relationship when the facts do not support such a conclusion. Reliance on specific and limited acts which might be capable of being characterised in terms of agency but which, viewed in the round and taken together with other features which are either present or absent, do not justify a conclusion that there is an agency relationship ought not to result in such a finding.".. " Secondly, UBS v KWL is authority for the proposition that, whilst the fact that there is no fiduciary relationship and no ability to affect legal relations are

that merely by fulfilling the roles of a mandated lead arranger under the loan or hedge co-ordinator RBS NatWest was not acting as agent for the other banks for the purposes of making the alleged representations.

Claim for rescission failed.

To bring a successful claim for rescission based upon a misrepresentation a party must show that a representation was made, that it was false and that the party relied upon that representation. In this case Marme failed at the first hurdle as the judge found that the purported representations had not been made. Even if the representations had been made the judge found it clear that he would have concluded nonetheless that rescission was not available.

- **No reliance:** The judge decided that Marme had not relied on the representations to induce it to enter into the Swaps. In coming to this decision the judge highlighted the fact that in order to establish reliance (1) a claimant must establish that it was aware of the representation at the time that it was made and, (2) the claimant must show a causal connection between the making of the representation and its decision to enter into the contract. Neither of these limbs were met since Marme's key witness at trial did not indicate that he had understood any of the EURIBOR Representations to have been made. Furthermore, at the relevant stage it was not publicly known that manipulation of EURIBOR was a possibility and he had assumed that EURIBOR had been set in a true and honest way and was a true and honest rate. As such the judge felt that even if the EURIBOR Representations had been made they could not have induced Marme to enter the Swaps since they were not "actively present to his mind".

- **Marme had affirmed the Swaps:** The judge also agreed with the Defendants (whilst not strictly necessary having found no representations were made) that Marme had affirmed the Swaps which would have, in any event, prevented it from rescinding them. This was due to the fact that Marme must have known about the matters set out in an EU Commission press release[4] (in which RBS and others received a fine for irregularities with respect to EURIBOR) before deciding to make payments under the Swap two months later. i.e. Marme had a choice to rescind but chose instead to make payments under the Swap thus affirming them.

- **Rule against partial rescission.** Moreover, the judge stated that Marme, in seeking to rescind solely the Swaps but not the loan, was seeking a partial rescission which was not permissible. The judge was clear that the senior loan and the hedging Swaps were clearly an indivisible bargain and structurally interdependent. The bar on partial rescission applies not only to inseverable parts of a single contract but also to contracts which form part of an indivisible bargain. The underlying principle being that a party

not critical to a conclusion that there is an agency relationship, they are, nonetheless, factors which point away from such a conclusion."

[4] http://europa.eu/rapid/press-release_IP-13-1208_en.htm

seeking rescission should not be allowed to pick and choose which parts of the transaction to perform since that would involve rewriting the parties' bargain.[5]

Implied Term, repudiatory breach and the ISDA Close-out process.

Whilst the purported implied *representations* were not found in this case it was recognised that in these cases (see PAG case footnote 2) there will at least be an implied *term* in the contract that a party will not manipulate the benchmark. As an alternative argument against RBS NatWest, Marme tried to argue that RBS NatWest had carried out a repudiatory breach of that implied *term* allowing Marme to terminate swap at common law and thereby avoid the ISDA close-out process[6]. To do this they relied on Section 9(d) (Remedies Cumulative)[7] of the ISDA Master Agreement to show that their rights to terminate at common law for repudiatory breach still existed and then sought to avoid the ISDA close-out mechanism altogether. On the facts the judge said there was no breach of contract in this case because the only implied term was narrow, and it had not been breached. As such he did not have to decide the point. However, he did indicate that, had he had to decide, he would have said that whilst a party still has the right to terminate for repudiatory breach and bring the ISDA Master Agreement to an end, it must do so using the ISDA close-out mechanism.

Conclusion

This case gives some comfort and guidance to the market on these complex issues. In particular, the market will be relieved (1) that the judge in this case did not find an agency had arisen so as to imply representations by the other hedging banks and (2) about the limited scope of implied representations and implied terms in this case. Moreover, it may be that going forward claimants in benchmark manipulation cases will find it harder to make a case based on implied representations given that the claimant needs to have been aware of the representation at the relevant time. The market is also likely to welcome the judge's view that if a claimant seeks repudiatory breach at common law (as it is entitled to do) it is obliged in his view to use the ISDA Master Agreement close-out provisions.

This does raise an interesting issue of what would happen in the case where a party claims repudiatory breach based on an anticipatory breach of contract. On this point the two most common forms of the ISDA Master Agreement differ. The 2002 ISDA Master Agreement contemplates anticipatory breach leading to an Event of Default whereas the 1992 ISDA Master Agreement does not. The judge's comment raises the question of what the position would be in the event a party claimed repudiatory breach at common law based upon anticipatory breach of a 1992 ISDA Master Agreement? If we follow the judge's logic in this case the party would have the right to terminate for anticipatory breach (since it is not excluded) but there is no clear cut Event of Default provision to push the party to use the ISDA close-out mechanism. A question perhaps for another day!

[5] See Judgment Para 338.
[6] See also Deutsche Bank v Sebastian Holdings [2013] EWHC 3463 (Comm)
[7] Section 9(d) Remedies Cumulative. Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are not exclusive of any rights, powers, remedies and privileges provided by law.

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