Neutral Citation Number: [2021] EWHC 363 (Comm)

Case No: FL-2018-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 22/02/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) LEEDS CITY COUNCIL **(2) GREATER MANCHESTER COMBINED AUTHORITY** **(3) NEWCASTLE CITY COUNCIL** **(4) NORTH EAST LINCOLNSHIRE COUNCIL** **(5) NOTTINGHAM CITY COUNCIL** **(6) OLDHAM COUNCIL** **(7) SHEFFIELD COUNCIL**	**Claimants**

- and –

(1) BARCLAYS BANK PLC **(2) BARCLAYS BANK UK PLC**	**Defendants**

-and -

Case No: FL-2018-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

LONDON BOROUGH OF NEWHAM	**Claimant**
- and –	
(1) BARCLAYS BANK PLC **(2) BARCLAYS BANK UK PLC**	**Defendants**

- -
- -

Tim Lord Q.C. and Kyle Lawson (instructed by **Hausfeld & Co LLP**) for the **Claimants** in Claim FL-2018-000009
Raymond Cox Q.C. and Chloe Carpenter Q.C. (instructed by **Collyer Bristow LLP**) for the **London Borough of Newham**
Adrian Beltrami Q.C. and Adam Sher (instructed by **Clifford Chance LLP)** for the **Defendants**

Hearing dates: 18, 19, 20 January 2021
Draft Judgment sent to parties: 18 February 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE COCKERILL DBE

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 22 February 2021 at 09:30 AM"

Mrs Justice Cockerill :

Introduction

1. The underlying claims in these two actions are for rescission of certain loans which are said to be affected by the LIBOR rigging affair of 2012 on the grounds of fraudulent misrepresentation or (in one case) in the alternative for damages for misrepresentation. Both claims were issued against Barclays Bank plc. In due course it transpired that the correct entity may be Barclays Bank UK plc, or that both should be defendants. The parties very sensibly resolved this issue between them without recourse to the Court, and the claims proceed against both Barclays entities (the "Bank"). The Claimants in both actions are local authorities. Although in the first action there are a number of claimant authorities I will refer to the respective Claimants as "Leeds" and "Newham".

2. The Bank seeks to strike out the claims against it. It contends that the claims against it are bound to fail for two reasons. The first is because the Claimants cannot show that they relied on the representations which they allege were made (the "Reliance Issue"). At first sight, it might seem surprising that a strikeout application can be brought on such a basis. In truth however, the difference between the parties is on a point of law, namely the correct test for reliance. The application therefore proceeds on the basis that the facts pleaded by the Claimants are *in fact* true. The question is whether those facts are *in law* insufficient to prove reliance in a misrepresentation action. If the Bank is right, this disposes of both actions absolutely.

3. The second reason relied on by the Bank is what has been called the "Affirmation Issue". It arises only if the Bank is wrong on the first issue, and if it succeeds it would dispose of most of the claim. The Bank contends that if I accept as correct the legal principles that it says govern affirmation of contracts by a misrepresentee, then even if the Claimants succeed in proving misrepresentation, none of them have any real prospect of defeating the Bank's contention that they affirmed the relevant contracts. If the Bank is right on this issue then that disposes of the claims for rescission, though not Newham's claims for damages.

4. Strictly speaking, the Reliance Issue is a strikeout application (since the Bank says that the Claimants did not in their pleading assert facts amounting in law to a complete cause of action), and the Affirmation Issue is a summary judgment application (since the Bank contends that the inferences which the Court can make from the evidence already available mean that it will definitely succeed on this issue). However, none of the parties suggested that there is any material distinction in this case.

5. By order of Butcher J dated 15 January 2020, the applications in both claims were listed to be heard together; and so the parties found themselves in one joint hearing before me. The applications were fought with great determination, skill and courtesy over a three day remote hearing. The hearing bundles total nearly 2,200 pages, while the combined authorities bundle contains 110 authorities over nearly 4,700 pages.

Summary of the background

6. Between September 2006 and November 2008, each Claimant obtained from the Bank various long-term LOBO Loans for terms between 60 and 70 years (the "Loans"). LOBO is an acronym of Lender Option – Borrower Option; in essence, every now and

then the Bank may at its option change the interest rate payable, but if it does so, the borrower may at its option repay the loan early rather than pay the higher interest. The Loans were governed by different contracts, and their specific terms (including the term of the loan, the starting interest rate, whether the rate was fixed or variable, the methods of setting the interest rate and calculating early redemption fees, etc.) varied. Some were also restructured in or around 2017. What all the Loans had in common was that LIBOR was used as the reference rate for the purposes of setting the relevant interest rate and/or as part of the methodology for calculating breakage costs.

7. LIBOR is an acronym for the London Interbank Offered Rate, a set of benchmark rates whose purpose is to reflect the cost of inter-bank borrowing on the London financial market. It is published for a number of currencies and maturity periods. In simple terms, it is supposed to reflect the rate at which an established bank could obtain an unsecured loan from another bank in a particular currency for a particular period. For many reasons, it has been of fundamental importance to global financial markets, not least because it assists in the analysis of the overall health of the banking sector, as well as being widely used by financial institutions for purposes such as setting rates for their products relative to it.

8. As is probably well known to any reader, LIBOR is calculated by surveying major banks every day for their assessment of the rate at which they consider they could borrow on the open market. In 2012 the LIBOR rigging scandal erupted. It was discovered that a number of banks on the survey panel were engaged in manipulating the various LIBOR benchmarks: rather than submit their genuine assessment of the rate at which they thought they could borrow, they submitted rates that served their own purposes, e.g. assisting their trading divisions which held LIBOR-tied positions on the markets. The scandal led to fines, prosecutions and reforms on both sides of the Atlantic.

9. The Claimants contend that the Loans are tainted by a number of alleged representations concerning LIBOR that the Bank is said to have made by offering the Loans to the Claimants (the "Alleged Representations"). They are to the effect that LIBOR rates were (at any rate so far as the Bank knew) being set honestly and properly, and that the Bank was not (and had no intention of) engaging in any improper conduct in connection with its participation in the LIBOR panel. It is common ground (and public knowledge) that the Bank did in fact engage in LIBOR manipulation, albeit the precise nature and extent of the Bank's involvement in it is very much in issue.

10. While the Bank vigorously contests many aspects of the claims (including the allegation that it made the various Alleged Representations at all), for the purposes of its strikeout applications I must take the Claimants' factual case at its highest. Accordingly, the Bank accepts that its applications should be determined on the assumed basis that:

    i) Each of the Alleged Representations was in fact made.

    ii) Each of the Alleged Representations was false.

    iii) The Bank made each of the Alleged Representations fraudulently.

11. Further, since the Affirmation Issue only arises if the Claimants have otherwise valid causes of action in misrepresentation, the Bank accepts that in determining that issue I should assume against it that such complete causes of action have been established.

How the two issues arise

The Reliance Issue

12. The Bank formulated this issue in its skeleton argument thus:

> "Barclays contends that the Claimants cannot satisfy a central legal requirement concerning reliance – *viz.* that the claimant in a misrepresentation case must establish that it actively/consciously appreciated at the time that the alleged representation was being made to it."

13. This is the crux of the Reliance Issue: the Bank says that (1) a necessary element of reliance is "awareness" of the representation being made; and that (2) none of the Claimants allege such "awareness" in the sense in which the law requires them to prove it. An important point here is that the Claimants do not say that they can satisfy that awareness requirement in the terms put forward by the Bank. Their position is that they do not need to do so, because the Bank misunderstands and misstates the correct legal test – or at the very least, that the Bank has not persuaded the Court to the requisite standard at the interlocutory stage that the test is what it says it is. This perhaps explains why, were the Bank's applications to succeed, the Claimants do not invite me to permit them to cure any defects in their cases by further amendments. The Claimants stand by their pleaded case.

14. The Claim Form in the Newham Action was issued on 22 June 2018. It alleges claims:

> "for fraudulent, alternatively negligent, misrepresentations at common law, alternatively for fraudulent, alternatively negligent, misrepresentations under section 2 of the Misrepresentation Act 1967."

15. Newham seeks rescission of the Loans (with consequent restitution of all sums paid to the Bank), a declaration, damages, as well as interest and costs.

16. The Claim Form in the Leeds Action was issued a few days later, on 26 June 2018. It was then amended before service. The Amended Claim Form, dated 23 October 2018, alleges claims:

> "(1) for deceit and/or fraudulent misrepresentation (including claims based on ~~express and/or~~ implied representations by the Defendant about LIBOR and the matter in which it would be set); and/or
>
> ~~(2) for negligence; and/or~~
>
> ~~(3) under the Misrepresentation Act 1967; and/or~~
>
> ~~(4) for breach of contract (including claims based on express and/or implied terms relating to LIBOR and the manner in which it would be set); and/or~~

(5) for restitution."

17. The remedies the Leeds Claimants claimed in the original Claim Form were declarations, rescission, restitution, damages and interest, as well as the traditional catch-all claim to "*such further or other relief as the court may consider just*". On amendment, the prayer for damages was removed.

18. The Alleged Representations in the Newham Claim are set out at paragraph 15 of Newham's Particulars of Claim as follows:

> "15. The Defendant advised and/or recommended and/or proposed the relevant loans and/or the parties entered into the relevant loans pursuant to which, as pleaded above, the Claimants' obligations were set by reference to 6 month GBP LIBOR. Further, each relevant loan was (where it was a novation of an amendment to or cancellation of a previous loan) inseparably connected to the previous loan. In the premises, on and/or prior to the entry by the Claimant into each of the relevant loans the Defendant expressly, by its conduct and/or impliedly represented to the Claimant that:
>
> (1) As at the date of each of the relevant loans, LIBOR represented the interest rate as defined by the BBA (being the average rate at which an individual contributor panel bank could borrow funds for a specified period by asking for and accepting interbank offers in reasonable market size just prior to 11am on that date) so far as Barclays was aware; and
>
> (2) Prior to the date of the relevant loans, LIBOR represented the interest rate as defined by the BBA, so far as Barclays was aware; and
>
> (3) Barclays had no reason to believe that on any given date LIBOR had represented or might in the future represent anything other than the interest rate defined by the BBA; and
>
> (4) LIBOR was a rate which represented or was a proxy for the cost of funds on the interbank market for panel banks such as Barclays; and
>
> (5) Barclays had not on any given date up to and including the date of each of the relevant loans:
>
> (a) Made false or misleading LIBOR submissions to the BBA; and/or
>
> (b) 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); and
>
> (6) In the alternative to (5), that at the date of the relevant loans Barclays itself was not manipulating GBP LIBOR; and
>
> (7) Barclays did not intend in the future to:

(a) Make false or misleading LIBOR submissions to the BBA; and/or

(b) 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); and

(8) In the alternative to (7), that at the date of the relevant loans Barclays itself did not intend in the future to manipulate GBP LIBOR; and

(9) So far as Barclays was aware, no other panel bank had on any given date up to and including the date of each of the relevant loans:

(a) Made false or misleading LIBOR submissions to the BBA; and/or

(b) 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); and

(10) Where the relevant loan was a novation of, an amendment to or cancellation of a previous loan, the relevant loan would replace/ amend/ cancel a valid and enforceable previous loan and not a voidable previous loan.

16. In particular, the Defendant's employees and agents (acting within the scope of their actual or apparent authority) made the LIBOR representations to the Claimant. The Defendant communicated with the Claimant in relation to the proposal that the Claimant should enter into the relevant loans based on a GBP LIBOR rate. It was inherent in those communications about the intended loans based on a GBP LIBOR rate that the Defendant made the implied representations and/or representations by conduct referred to above. Pending disclosure, the best particulars that the Claimant can give are that the LIBOR representations were made in:

(1) the draft loan instruments prepared by the Defendant for each of the relevant loans;

(2) each loan instrument entered into by the Claimant with the Defendant in which the Defendant proposed and required loans with an interest rate payable by reference to GBP LIBOR;

(3) emails and other documents from the Defendant in which it proposed and/or advised and/or sold and/or recommended and/or described and/or referred to each of the relevant loans (and other potential loans) and/or each of the loan instruments;

> (4) meetings and telephone calls with the Defendant in which the Defendant proposed and/or sold and/or advised and/or recommended and/or described any of the relevant loans or other potential loans or any of the loan instruments; and
>
> (5) emails and other documents from the Defendant to the Claimant in which the Defendant referred to LIBOR rates and the Defendant:
>
> (a) purported to give an explanation to the Claimant as to why LIBOR rates were setting at the rate they were setting; or
>
> (b) purported to predict the future path of LIBOR.
>
> The Claimant refers, by way of example, to the email from Samantha Biddick of the Defendant to the Claimant dated 17 August 2007 at 9.42 and the email from Samantha Biddick of the Defendant to the Claimant dated 10 September 2007 at 11.26. It was inherent in such communications that LIBOR was being set, to the best of the Defendant's knowledge, by the Defendant and by other banks honestly and that the Defendant intended to make honest LIBOR submissions in the future.
>
> 17. Further, the LIBOR representations were not corrected by the Defendant and remained in effect at all material times."

19. The Leeds Claimants put the Alleged Representations somewhat more pithily:

> "17. In the course of proposing and/or transacting each of the LOBO Loans and, in particular, in putting forward transactions which were referenced to LIBOR, Barclays impliedly represented to each of the Claimants that:
>
> (1) Barclays was not itself manipulating LIBOR (or GBP LIBOR) and that it did not intend to do so in the future (**"LIBOR Representation 1"**); and/or
>
> (2) Barclays had no reason to believe that LIBOR (or GBP LIBOR) was being manipulated or that it would be manipulated in the future (**"LIBOR Representation 2"**).
>
> 18. The LIBOR Representations were not corrected by Barclays and remained in effect at the time of and/or were repeated by Barclays upon entering into each subsequent LOBO Loan."

20. As for reliance, Newham pleads at paragraph 19:

> "19. The Claimant relied on the LIBOR representations, and each of them, when entering into each of the relevant loans and the LIBOR representations induced the Claimant to enter into each of the relevant loans."

21. On 25 February, before the Bank served its defence, a judgment was given by Picken J in *Marme Inversiones 2007 v Natwest Markets plc* [2019] EWHC 366 (Comm). That was a claim for rescission of loans brought by a borrower against a bank on the basis of misrepresentations similar to the Alleged Representations. The claim failed because no representations were proved, but Picken J went on to consider whether reliance would have been made out if he had found that misrepresentations had been made. At [186] of the judgment he said this:

> " these authorities support the proposition that a claimant in the position of Marme in the present case should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made …"

22. This led to paragraph 17 of the Bank's Amended Defence, which lies at the heart of the Reliance Issue:

> "It is denied that any natural person at Newham was aware (in the sense of giving contemporaneous and conscious thought to the matter) that the alleged LIBOR Representations (or any of them) had been made at the time of entering into the LOBO Loans or the Fixed Rate Loans."

The Bank has referred to this as the Awareness Requirement.

23. At paragraph 15.3 of its Amended Reply, Newham sets out its stall on reliance thus:

> "15.3. The Claimant relies on the following in support of its case on reliance:
>
> (1) The Court must ask: what would have happened if the representation(s) had not been made.
>
> (2) There is a presumption of inducement in cases of fraud. The Defendant bears the burden of proof in seeking to displace the presumption of inducement. The Defendant will be unable to displace the presumption of inducement in this case.
>
> (3) LIBOR was an important benchmark to the Claimant, both in terms of the relevant loans and more generally in that the Claimant followed the path of LIBOR and the predicted path of LIBOR because LIBOR was used by the Claimant as a benchmark for forecasting, as a measure of the short term cost of borrowing and as a benchmark when the Claimant was investing.
>
> (4) The Claimant, as a public body, was at all relevant times only willing to deal with a reliable counterparty which was acting honestly and in good faith.
>
> (5) If those considering and/or making the decision on the proposed transactions at the Claimant in 2007/2008 including John Turnbull, Stephen Wild and Alison Mackie, had been told by the Defendant, prior to entry into the 10 LOBOs in 2007/2008 or the amendments thereto in

2007/2008, that the Defendant was manipulating LIBOR then they would have decided that the Claimant should not to enter into the relevant loans or into any transaction with the Defendant.

(6) If those considering and/or making the decision on the proposed transactions at the Claimant in 2007/2008 including John Turnbull, Stephen Wild and Alison Mackie, had been told by the Defendant, prior to the Claimant agreeing to the amendments of any of the relevant loans in 200712008, that the previous loan was or may be invalid and/or voidable, then they would have decided that the Claimant should not enter into the amended loan or any transaction with the Defendant.

(7) If those considering and then recommending to Cabinet the proposed amendments in 2016/2017 (including Stephen Wild and Alison Mackie) had been told by the Defendant, prior to the Claimant agreeing to the amendments in 2017, that the previous loan was or may be invalid and/or voidable, then they would not have recommended that the Claimant enter into the amended loan or any transaction with the Defendant.

(8) What the Claimant would have done if told the truth is not the test of reliance/ inducement, but it is relevant evidence towards establishing reliance/ inducement.

(9) In this case, given representations 15(1) to 15(9) were inherent in the conduct of the Defendant in putting forward the LIBOR linked loans, it would not have been possible for the Defendant in good faith to put forward each loan/amended loan in 2007/2008 without at the same time expressly informing the Claimant that the Defendant disclaimed any such representations, such as by stating that 'Barclays is not telling you whether or not it is manipulating LIBOR, or intends to do so, or is acting honestly and in good faith in putting forward LIBOR linked loans, you will have to make up your own mind'.

(10) In this case those considering and/or making the decision on the proposed transactions at the Claimant in 2007/2008 (including John Turnbull, Stephen Wild and Alison Mackie) each:

(a) Knew that relevant loans were referable to LIBOR; and

(b) Would not have entered into the relevant loans if the Defendant had made the statement at sub-paragraph (9) above.

(11) Further, in this case, given representation 15(10) was inherent in amending a LIBOR linked loan, representation 15(10) could only not be made on or prior to each amended loan if the Defendant had, prior to entry into each amended loan, made a statement which disclaimed any such representations, such as 'Barclays is not telling you whether or not the loan you are considering amending is valid and enforceable or invalid and unenforceable for LIBOR misrepresentation, you will have to make up your own mind'.

(12) In this case those considering and/or making the decision on the proposed amended transactions at the Claimant in 2007/2008 (including John Turnbull, Stephen Wild and Alison Mackie) each would not have entered into the amended loans if the Defendant had made the statement at sub-paragraph (11) above.

(13) Further in this case those considering and then recommending to Cabinet the proposed amended transactions in 2016/2017 (including Stephen Wild and Alison Mackie) would not have recommended the amended loans in 2017 if the Defendant had made the statement at subparagraph (11) above.

(14) Those considering and/or making the decision on the proposed loans and proposed amended loans at the Claimant in 2007/2008 (including John Turnbull, Stephen Wild and Alison Mackie) each expected and believed the Defendant was acting honestly and in good faith in putting forward the LIBOR linked loans and proposed amended loans.

(15) Further, those considering and then recommending to Cabinet the proposed amendments in 2016/2017 (including Stephen Wild and Alison Mackie) each expected and believed the Defendant was acting honestly and in good faith in putting forward the proposed amended loans.

(16) To the extent that it is necessary to prove conscious and/or active reliance rather than an assumption, it is averred that the matters pleaded above prove active reliance.

(17) Further, those considering and/or making the decision on the proposed transactions and amended transactions at the Claimant in 2007/2008 (including John Turnbull, Stephen Wild and Alison Mackie) also each:

(a) Believed that the Defendant was acting honestly and in good faith in putting forward the LIBOR linked loans and that LIBOR was not being manipulated; and

(b) In the case of an amended loan, assumed the previous loan that was being amended was valid and binding and not invalid and unenforceable; and

(c) Would not have entered into the relevant loans if the Defendant had made the statement at sub-paragraph (9) or (11) above and/or if they had known that the Defendant was manipulating LIBOR and/or if they had known that in the case of an amended loan it was amending a loan that was not valid and binding but voidable for misrepresentation.

(18) Further, those considering and then recommending to Cabinet the proposed amendments in 2016/2017 (including Stephen Wild and Alison Mackie):

> (a) Believed that the previous loan that was being amended was valid and binding and not invalid and unenforceable; and
>
> (b) Would not have entered into the amendments if the Defendant had made the statement at sub-paragraph (11) above and/or if they had known that the amendments were amending a loan that was not valid and binding but voidable for misrepresentation.
>
> (19) It is averred that the aforesaid is in any event sufficient to prove reliance by the Claimant and to the extent that Picken J decided in *Marme Inversiones 2007 SL v NatWest Market PLC* [2019] EWHC 366 (Comm) that assumption is insufficient to prove reliance he was wrong and should not be followed."

24. Similarly to the Newham Action, in the Leeds Action the Bank also denies that the Leeds Claimants understood that the Alleged Representations were being made. Paragraph 38(1) of its Amended Defence is substantially the same as the corresponding paragraph in the Bank's Amended Defence to the Newham Claim.

25. The Leeds Claimants did file a Reply, but not on this point. However, the Leeds Claimants filed a Response to an earlier RFI. The exchange of request and response went as follows:

> "Under paragraph 30
>
> Of: '*... the Claimants relied on and/or were induced by each of the LIBOR Representations in entering into each of the LOBO Loans*'
>
> Request:
>
> 3. Please clarify whether, in respect of each Claimant, it is alleged that a natural person or persons actively and/or consciously understood the alleged LIBOR Representations (or any of them) had been made at the time at which the LIBOR Representations are alleged to have been made.
>
> Response:
>
> 3. The Claimants' case as to reliance/inducement is adequately pleaded … for the avoidance of doubt:
>
> (1) …;
>
> (2) inducement is established by showing that the representee was influenced or affected by the misrepresentation;
>
> (3) further, there is a presumption of inducement where a representee has entered into a contract with the representor after a material misrepresentation was made to the representee by the representor. …;
>
> (4) inducement is made out where, as here, the relevant natural persons who authorised each of the Claimants to enter into each of the LOBO

> Loans (as identified at Schedule 1 hereto) would not have taken this course of action if they had known the true position. This further supports the presumption of inducement and also shows that the Claimants were influenced by Barclays' misrepresentations;
>
> (5) insofar as any additional mental element is required (which is denied), it is in any event satisfied on the facts. The matters set out above show that the representations were actively present to the mind of the individuals identified in Schedule 1. Further, the very fact that they did not query the matter in itself demonstrates that the relevant representations were influencing or affecting their minds. For the avoidance of doubt, where an implied representation by a dishonest party has the effect of reinforcing an assumption by the (honest) counterparty that the contractual benchmark is honest and is not being manipulated, inducement is made out."

26. Unsatisfied with this response, the Bank served a second RFI. The Response shows the following exchange:

> "Under paragraph 30 of the Particulars of Claim and Response 3 of the First RFI Response
>
> Of: […]
>
> Requests
>
> 1. Please clarify whether or not it is alleged as a matter of fact that the natural persons identified at Schedule 1 of the First RFI Response consciously understood the alleged LIBOR Representations (or any of them) had been made at the time at which the LIBOR Representations are alleged to have been made. For the avoidance of doubt, 'consciously understood' (the phrase used in Request 3 of the First RFI but not addressed in Response 3 of the First RFI Response) is to be distinguished from unconscious or subconscious 'assumption' and involves a person giving contemporaneous conscious thought to the LIBOR Representations alleged.
>
> …
>
> **Responses:**
>
> 1. It appears that there is a dispute between the parties as to the correct legal test for reliance and/or inducement in relation to a representation made impliedly or by conduct (such as in this case):
>
> (1) The Claimants acknowledge that, in **Marme Inversiones 2007 SL v Natwest Markets Plc** [2019] EWHC 366 (Comm), Picken J held at [286] that, …
>
> (2) If that is the correct legal test, then it is not alleged that any of the Claimants gave any '*contemporaneous conscious thought*' to the fact

> that the LIBOR Representations were being made by Barclays, in the sense of actively asking themselves at the time Barclays was proposing and/or transacting each of the LOBO Loans whether Barclays was making any representations to them about LIBOR.
>
> (3) However, for the avoidance of any doubt:
>
> (a) It is denied (if it is alleged) that it would be necessary, as a matter of law, for any of the Claimants to establish that this was the case. To the contrary, the Claimants' position is that it would be sufficient for them to establish that (as honest contracting parties) they were *influenced* or *affected* by the LIBOR Representations, in the sense that the LIBOR Representations operated on their minds, whether consciously or subconsciously. It *is* alleged that this was the case. To hold otherwise would be to licence a rogue's charter.
>
> (b) If and to the extent that Picken J intended to apply a different and/or more onerous test in the **Marme Inversiones** case, then the Claimants will respectfully submit that Picken J was wrong to so hold, and that the decision in the **Marme lnversiones** case should not be followed in this respect.
>
> (c) In the premises, the relevance of Request 1 is denied."

27. There were also exchanges of RFIs and Responses relevant to the Affirmation Issue; I shall deal with those in relation to that issue.

28. In the summer of 2019, the Bank issued the applications: in the Leeds Claim on 15 August, and in the Newham Claim on 19 September.

29. The reasoning behind the Bank's strikeout applications on the Reliance Issue is that there need not be a trial of the facts, because in their statements of case the Claimants do not assert that they can satisfy the Awareness Requirement. Therefore, says the Bank, they are unable to prove that they relied on the Alleged Representations.

The Affirmation Issue

30. In its Defences the Bank pleads that, even if the Claimants are otherwise able to prove misrepresentation, they are unable to claim the remedy of rescission because each of them has affirmed the relevant Loans.

31. The Bank relies on two classes of conduct occurring after the Bank says the Claimants were (or must be taken to have been) aware of their right to rescission:

    i) Against all Claimants, on the continued payment of interest charges; and

    ii) Against Newham and two of the Leeds Claimants (namely the Greater Manchester Combined Authority and the Newcastle City Council), on entering into restructuring agreements varying the terms of the Loans.

32. The Claimants deny both that their conduct was affirmatory, and that they had sufficient knowledge for an effective election of remedy. In addition, at paragraph 24.3 of its

Amended Reply, Newham asserts that the Bank is estopped from denying that Newham has a right to rescission.

Summary of the parties' submissions

33. It is for the Bank, as the applicant, to persuade the Court that the claims should not proceed to trial.

Reliance Issue

34. The Bank's argument is, as its Leading Counsel put it in his introductory remarks, that:

> "Reliance is an essential element of the cause of action in misrepresentation. And awareness is an essential component of reliance. Awareness cannot be established unless the claimant has a present active understanding that the communication is being made."

35. As I indicated above in the context of the witness statement in support of the application, the Bank relied for that proposition on the decision of Picken J in *Marme*.

36. It is the requirement for "contemporaneous conscious thought" which occupied a large part of the hearing. As the Bank accepted, Picken J's formulation was *obiter*, because he had already found that the representations alleged were not made, and he went on to consider reliance assuming that they were. However, the Bank was clear that its position was that Picken J was doing no more than stating settled law, and that "contemporaneous conscious thought" was simply one of the many ways to label the same idea, namely that the representee must have some active appreciation of the representation being made to him.

37. The Bank summarised its case by reference to eight propositions:

    i) First, the question of reliance in misrepresentation has two components: the awareness (or understanding) requirement and the causation (or inducement) requirement, both of which a claimant must satisfy. It was submitted that the problem with the Claimants' pleadings was that they conflated one with the other, seeking to jump straight into the question of inducement (where in fraud cases there is a presumption), but glossing over the issue of awareness which logically must come first.

    ii) Second, to satisfy the awareness requirement, the claimant must be able to plead and prove that he understood the representation at the time when it was being made.

    iii) Third, while the awareness requirement was described in detail by Picken J at paragraphs 279 and 286 of *Marme*, the Court in that case was simply applying the law as previously stated in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), *Foster v Action Aviation Ltd* [2013] EWHC 2439 (Comm), *Leni Gas & Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm), *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) ("*PAG*"), as well as later in *Deutsche Bank AG v Unitech Global Ltd* [2019] EWHC 969 (Comm).

iv) Fourth, all these cases say the same thing. They refer to, as put by the Bank in its submissions, "*an act of appreciation that a message is being communicated*". Understanding, awareness, appreciation, etc. are merely different labels for the same concept.

v) Fifth, the awareness requirement is not merely derived from those cases, but in fact follows as a necessary component of the cause of action. That can be traced all the way back to the classic House of Lords decision in *Smith v Chadwick* (1884) 9 App Cas (HL) 187 which is authority for the proposition that the representee must understand the representation in the sense in which it was false. That, says the Bank, cannot be satisfied if the representee is unaware that the representation is being made.

vi) Sixth, it makes no difference whether the representation is express, implied, by conduct, or a combination.

vii) Seventh – and that is perhaps the most important element of the Bank's submission – that awareness requirement is not satisfied by an assumption, by counterfactual causation, by awareness of the facts from which a representation is said to be implied, by subconscious influence, or by the presumption of inducement in fraud cases.

viii) Eighth, these propositions simply reflect the orthodox application of the law of misrepresentation. The claim, as I have been reminded by the Bank, is not advanced by reference to breach of duty of disclosure (however arising) and if the Claimants are to succeed, they must make good all elements of misrepresentation.

38. It is convenient to deal with the Claimants' submissions in response largely under one umbrella, because the Leeds Claimants and Newham expressly adopted each other's submissions in their skeleton arguments. At the hearing, the Leeds Claimants took the lead on the submissions on the Reliance Issue, and Newham followed with supplementary points and a slight difference in emphasis.

39. The Claimants brought a wide-ranging attack on the substance of the Bank's application, but also submitted that neither issue was suitable for summary determination in any event. It is perhaps fair to say that the "mini-trial" submission was pressed much more strongly in respect of the Affirmation Issue, but it was nevertheless a point squarely taken in respect of the Reliance Issue as well.

40. Moving on to the substantive issues, the overarching proposition advanced by the Claimants is that the Bank is wrong in its interpretation of *Marme*, which interpretation 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. This, say the Claimants, would amount to the Court sanctioning a "rogue's charter" and letting misrepresentors get away with wrongdoing.

41. The Claimants point out that *Marme* is the only case in which the expression "contemporaneous conscious thought" was used. In essence, they suggest that there are two possibilities. The first is that "contemporaneous conscious thought" is a somewhat

unfortunate phrase for the requirement that the misrepresentation operates on the representee's mind, knowingly or not, that it takes the Bank no further than other authorities, which do not use the phrase and, contrary to the Bank's submissions, do not support the "awareness requirement" as the Bank understands it. The second is that it means what the Bank says it means. If that is the case the Claimants say that it is contrary to previous authority and wrong. The reason for this, it was submitted, was because a number of authorities said to be relevant did not appear to have been put before the Court in *Marme* (although those that were not cited specifically in *Marme*, were cited before Asplin J or the Court of Appeal – or indeed both – in *PAG*).

42. The Claimants relied extensively on *DPP v Ray* [1974] AC 370, a criminal appeal in the House of Lords. In that case the defendant, a student, went to a Chinese restaurant with some friends. He intended to pay (with money to be lent to him by one of his companions), but changed his mind after eating and absconded while the waiter was not in the room. The defendant was convicted by magistrates of dishonestly obtaining a pecuniary advantage by deception contrary to section 16(1) of the Theft Act 1968. The Divisional Court quashed his conviction (on arguments as to whether a meal was a pecuniary advantage and as to the question of intention), but the majority in the House of Lords restored it, placing considerable emphasis on the effect of the deception. The Claimants submitted that whilst a criminal case, *DPP v Ray* was an important authority for the present purposes. They submitted that it was recognised as an important authority in the civil context by the Court of Appeal, as well as both Chitty on Contracts and Clerk & Lindsell on Torts.

43. The Claimants submitted that this analysis has been endorsed by the Court of Appeal in a commercial banking context. They relied in particular on two cases: *Graiseley Properties Ltd v Barclays Bank plc* [2013] EWCA Civ 1372, and the Court of Appeal judgment in *PAG*.

44. The Claimants also relied on a number of well-known commercial cases which, the Claimants submitted, supported the proposition that reliance could be subconscious: *Spice Girls Ltd v Aprilia World Service BV* [2000] EMLR 478 and [2002] EWCA Civ 15, *MAN Nützfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep 264, *Lindsay v O'Loughnane* [2012] BCC 153, *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), and *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm).

45. It was submitted that all these cases are irreconcilable with the Bank's interpretation of *Marme*, and that in none of them could the claimants have succeeded if there existed a requirement for "contemporaneous conscious thought" (at any rate as the Bank submits it should be understood). The distinction, it was submitted, was that this body of case law represents the courts' approach to cases where representations are by conduct, whereas the cases cited by the Bank concerned representations by words.

46. Leeds submitted that the following general propositions stated the law accurately.

    i) First, what matters is the causal link between the conduct of the defendant and the conduct of the claimant, and that was the wholesale, uniform test for inducement.

ii) Second, that is a question of fact in each case.

iii) Third, there are many ways in which that question of fact can be resolved, as referred to by different judges. Sometimes the question will be what the claimant consciously thought, but in other cases it may be whether the necessary connection is established by the defendant's conduct giving rise to a particular state of mind of the claimant.

iv) The touchstone, it was submitted, was whether the claimant was influenced by the representation.

47. The Claimants also argued that Picken J's formulation on any analysis went too far, relying on *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596 and *Zurich Insurance Co v Hayward* [2016] UKSC 48.

48. In summary, the Claimants submitted that the Bank had put all its eggs in the basket of "contemporaneous conscious thought" being the litmus test, and that approach is simply wrong. It is central to the Claimants' case that awareness cannot be forensically separated from inducement: in essence the submission was that in some cases it will be a more prominent element of the analysis and in some cases less so, but it is not an independent precondition that has to be satisfied on its own merits before the Court can move on to the analysis of inducement. It is going to be a part of the Court's consideration, but the Bank's approach of compartmentalising it would render the exercise too mechanistic and inflexible.

The Reliance Issue

Discussion

Introduction

49. As will be apparent from the summary which I have already given, on the question of reliance this was a case where each side effectively argued that the right answer lay in a particular line of authority and that the other side had approached the case incorrectly. To the extent necessary to do so they then urged me to find that the cases in the opposing line of authority were wrongly decided.

50. Before passing on to an in-depth analysis of the authorities in the light of the arguments which were addressed to me, a few prefatory remarks may be helpful.

51. Misrepresentation is capable of occurring in a huge range of factual circumstances of varying complexity. The cases to which I have been referred are all grappling with expressing an essentially factually grounded conclusion or series of conclusions against that background. Thus the cases refer to express representations, implied representations and representations by words or conduct or both. There is a very close correlation between representations in words and express representations. So virtually all express representations will be by words (though for example one might misrepresent one's identity by a non-verbal response to a question). However, once one gets beyond express representations the picture becomes cloudy. Implied representations may comprise words, conduct or (quite frequently) a melange of the two. They may do so in circumstances of widely varying factual complexity.

52. There is of course, regardless of circumstances, a similarity in the exercise which the Court has to perform at a macro level. All the cases return to this statement from *IFE Fund SA v Goldman Sachs International* by Toulson J at [50]:

> "50. In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."

53. The difference in complexity of different representations may also have an impact both on how the representation is spelled out and how it is received (and understood). Thus in *DPP v Ray* the representation was simple, though probably compounded of both words and conduct – by entering the Wing Wah restaurant and placing an order for prawn chop suey and rice, Mr Ray represented that he intended to pay the 47 pence which the meal cost. In the LIBOR rigging cases of which this is one, the representation arises (or here is said to arise) from a web of dealings, where conduct is the immediate context, but that conduct arises against the background of a web of prior communications written and oral.

54. The result is that judges dealing with cases with highly divergent factual backgrounds may express themselves somewhat differently because of the nature of the question as it arises in the circumstances of the case before them. They are also not often purporting to lay down tests of general application. I have concluded that in these circumstances it is important (i) not to leap to the conclusion that they mean a different thing by reason of every shade of difference of expression and (ii) not to leap to the conclusion that they are setting out a test intended to be of entirely literal application in all the differently circumstanced cases of misrepresentation which may arise.

55. Ultimately I have concluded that while the two lines of authority are not quite "apples and oranges", they are lines which arise in sufficiently different contexts that the decision between them is not binary. The approach which I conclude is correct can allow all of them to co-exist, without the need to conclude that they are either completely inapt to this argument or wrongly decided.

56. However this conclusion required a good deal of "unpacking". To do so it is necessary first to deal with some of the arguments which are in play and their genesis.

The arguments in play

57. The first is the question of the bridge between the making of the representation and inducement. That is the "understanding" requirement which lies at the heart of the dispute before me. This is seen in various forms in the authorities. It was put perhaps most clearly and exhaustively by Christopher Clarke J in *Raiffeisen* when he broke the constituent parts of the cause of action down thus:

> "80. In order to succeed in its claim RZB must show:

> (a) that RBS made representations to it;
>
> (b) that it understood that those representations were being made;
>
> (c) that such representations were false;
>
> (d) that it was induced by those representations, or one or more of them, to subscribe to the Syndication Agreement and thus to lend RBSFT £10 million;
>
> (e) that RBS intended that such representations should induce RZB to enter into the contract;
>
> (f) that RZB is not precluded by the terms of certain provisions in the IM and the Confidentiality Agreement and elsewhere ('the Relevant Provisions') from advancing its claim."

58. The point about understanding is reiterated and expanded at [87] by reference to *Arkwright v Newbold* (1881) 17 Ch D. 301 and *Smith v Chadwick.* The judge then followed that structure including at [113] a separate section about the key witness's understanding of what was being represented and concluding at [119] that he did not understand the relevant representations to be made. The point was plainly significant in the case, and specifically addressed. The judge plainly thought long and hard about the point noting that the evidence in some places "*goes some way towards suggesting that he understood the representations pleaded to have been made*". But overall he concluded that the evidence: "*does not, in my judgment, establish that he understood that RBS was actually making those representations.*"

59. It is clear from the evidence cited that the judge saw that understanding as being distinct from an assumption. For example at [114] he quoted a passage of cross examination where the question of understanding was asked in terms which expressly drew a dichotomy between understanding and assumption and then at [118] he quoted from his own questioning, where he asked whether something had been assumed or been told. This case is the clearest manifestation of that element prior to *Marme,* where Picken J developed the theme by reference to a wider body of authority.

60. This element is seen elsewhere in slightly different forms referencing the mind of the representee. Following a review of the authorities Longmore LJ in *BV Nederlandse Industrie* put it at [32] as follows:

> "In light of these authorities it seems to me that the law at the end of the 19th century had assimilated the requirement for inducement in the tort of deceit and in actions for rescission for fraudulent misrepresentation and could be stated as being that the representee had to prove he had been materially 'influenced' by the representations in the sense that it was 'actively present to his mind'."

61. In *Zurich v Hayward* Lord Clarke looked at the authorities dealing with the effect on the mind:

> "… in *Pan Atlantic* Lord Goff, accepted at 517C and 517E respectively that in gauging materiality it suffices if the misrepresentation (or non-disclosure) had 'an impact on the mind' or an 'influence on the judgment'. In the same case Lord Mustill adopted references to inducement not being established where the misrepresentation (at 545E) 'did not influence the judgment', (at 546C) 'did not influence the mind' or (at 551C) 'had no effect on the decision'."

62. That Hamblen J agreed with this requirement is clear from a suite of cases. One can see this in:

i) *Brown v InnovatorOne plc* [2012] EWHC 1321 (Comm) at [882] (and at [904]: " it was incumbent upon them to prove that such representations were understood to have been made since otherwise there could be no reliance")

ii) *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [224]:

> "As further observed in *Raiffeisen*, at [87], the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it; and that, having that understanding, he relied on it. Analytically, this is probably not a separate requirement of a misrepresentation claim but rather is part of what the claimant needs to show in order to prove inducement."

iii) *Foster v Action Aviation* at [101]:

> "Unless one understands that a representation is being made, it is difficult to see how it can be said to have been relied upon. Mr Foster's evidence was that had he known at the time that the factory had financial issues he would not have signed the contract. However, the case is one of positive representation, not non-disclosure. He gives no evidence that he understood that the Defendants were representing to him or telling him that the factory had no financial issues, still less that they were making the more specific representations set out in the pleading. I am accordingly not satisfied that inducement has been sufficiently proved."

63. The existence of the requirement finds still further support in *Leni Gas & Oil v Malta Oil* where Males J observed :

a) at [15]: "*…a claimant must show that it understood that the representation alleged was being made to it. Without such an understanding, there can be no question of any reliance on the representation*";

b) at [164]: "*Even if Dr Higgs had dishonestly intended to lead Mr Ritson to believe that the farm-out process had not begun in earnest or that there had been no serious negotiations, LGO must prove that Mr Ritson did understand that this was what he was being told.*"

64. There is a degree of unclarity about whether this element of presence or absence of awareness is to be regarded as a separate element (as per the Bank following Christopher Clarke J), or as an element in inducement (as the Claimants say, following Hamblen J) or even, as Hamblen J's judgment in *Foster v Action Aviation* at [93, 98] may suggest, at the stage of concluding whether a representation has been made (noting that ""*one would generally expect it to be reasonably apparent to both representor and representee that the implied representation alleged was being made*" *and therefore for there to be evidence from the representee that that was his understanding*").

65. But wherever one puts the understanding/awareness factor there certainly is a body of case law which provides powerful support for the argument that proof of understanding of the representation is a constituent part of a case in misrepresentation; a distinction which marks a critical boundary between a claim for misrepresentation (generally actionable) and non-disclosure (actionable only in situations of utmost good faith or where specifically contracted for).

66. I should mention specifically at this point the question of assumption, it being part of the Claimants' case that assumption can, in certain circumstances (in particular combined with proof of what the claimant would have done if told the truth), be sufficient. The authorities to which I have referred, which posit a test of understanding/awareness, seem to indicate that there is no scope for reliance on an assumption where there is an issue as to whether the representation was ever actively present to the representee's mind. If this is right it poses a grave difficulty for the Claimants' case.

67. In my judgment the existence of the awareness requirement is, as Christopher Clarke J and Jacobs J (in *Vald. Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) at [87]), have both noted, of particular importance when considering implied representations. One might add that it is all the more so in situations where it is possible that assumption will operate before or at the same time as any representation which is established. In such circumstances the court is presented with a difficulty: if there is an assumption, and there is also a representation, how is the court to ascertain if the action of the representee was caused by the assumption or by the representation? Naturally the court should not be too ready (if it has been established that there was a fraudulent implied representation) to accept that claimant was induced by the assumption, not the representation. But at the same time, if the representation was not understood to have been made, or was not understood in the sense relevant for the complaint (but rather in some other sense), then inducement logically cannot be made out. Where a case rests on misrepresentation rather than non-disclosure, this means the claim must fail.

68. I should perhaps clarify the position as regards the distinction between understanding and awareness. I refer repeatedly to the two slightly distinct concepts together, separated only by a /. That is not to say that I regard those two words as interchangeable. I do not. However what is required may be one or the other depending on circumstances. 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. That is what the cases in the *Arkwright v Newbold* and *Smith v Chadwick* line are primarily focussing on. Thus in *Arkwright* (one of the Victorian prospectus cases, which failed (inter alia) because the claimant

had not alleged that he understood the representation in the relevant sense) Cotton LJ said this, at 324*:*

> "In my opinion it would not be right in an action of deceit to give a plaintiff relief on the grounds that a particular statement according to the construction put on it by the court is false and that the plaintiff does not venture to swear that he understood the statement in the sense that the court puts on it."

69. Or as Cartwright puts it, at paragraph 3-06 of *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019):

> "It is possible that, even when tested objectively, a statement could equally well be understood in different senses: it is simply ambiguous. It will then be for the representee to establish the meaning of the words which he actually understood; it is not enough for him simply to claim that one of the meanings was actionable, or to leave it to the court to decide the "ordinary" meaning."

70. Elsewhere however – say with a representation as to honesty – 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. If there is no awareness of the making of the representation, logically it cannot operate. For example, suppose a very clear representation was made just at the moment when a meeting participant's wifi dropped out momentarily; or if a pneumatic drill started up outside her window so that she could not hear anything but that noise for the crucial 30 seconds. If however there is an awareness, the court then has to try to unpick, based on other evidence (such as evidence as to what the representee would have done in other circumstances) whether, taken in the round, inducement is made out.

71. By way of parenthesis I note here that this distinction may possibly provide a sensible basis for distinguishing between the stages at which one considers the issue. There is a logic to looking at the question at the first stage when the issue is the existential question of whether the representation has been received, because that question essentially completes the consideration of whether there is a representation which is capable of functioning. There is a quasi-philosophical issue: does the representation even exist if we do not hear it? One can also see that when a representation has definitely been made and received, but the question which arises is in what sense it has been understood, the inquiry is more closely related to the stage of inducement. Although there was a faint suggestion that this question mattered (essentially because the latter analysis opens the door to the operation of the presumption of inducement) I have formed the clear view that, for reasons to which I shall come, the stage at which the question is considered is immaterial.

72. The next element is the question of those "other circumstances". This involves the relevant test for inducement and the relevance of what would have happened if the representor had told the truth. Ultimately it was common ground that the relevant test for inducement is based on what would have happened if the statement had not been made at all (to which one might refer as "the counterfactual of non-existence"). That is the overarching question which the court needs to answer.

73. There remains however a debate about whether, given that fact, there is still a relevance for the question: "*What would have happened if you had been told the truth?*" - to which I shall refer as "the counterfactual of truth". What the authorities establish is that this question, though sometimes described as irrelevant or impermissible, 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. In some circumstances that will be powerful evidence; but in other circumstances (for example if the representee is completely unaware that any representation was made at all) it will not be.

74. As Christopher Clarke J said in *Raiffeisen*:

> "182. A claimant who gives credible evidence that, if he had been told the truth (there is no celebrity next door), he would not have entered into the contract is likely to establish that if the misrepresentation had not been made he would not have contracted and that it was thus an effective cause of his doing so, since such evidence is likely to establish both the importance to him of what he was told and its effect on his mind ….
>
> 185. Per contra, a claimant who says that even if he had been told the whole truth it would have made no difference to his readiness to enter into the contract will be likely to fail to establish that he was induced to enter into the contract by the misrepresentation in question. There is an inherent contradiction in someone saying that a representation was an inducing cause and accepting that, if the truth had been told, he would have contracted on the same terms anyway….
>
> 187. It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. And it may not be sufficient, either. If it were, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover."

The LIBOR rigging cases

75. With this introduction I should now consider specifically the LIBOR rigging cases themselves. I am persuaded that Mr Beltrami must be right to this extent at least: that I need to pay very careful mind to the cases which have already considered LIBOR rigging allegations, and that I should be cautious about departing too far from them.

76. Those cases are *Graiseley*, *PAG*, and *Marme*. Taking them in chronological order, in *Graiseley v Barclays* Flaux J gave permission for amendments to plead misrepresentations arising out of LIBOR rigging allegations. In two *Deutsche Bank* cases Cooke J declined to follow Flaux J and refused permission to make amendments but gave permission to appeal. The combined appeal was heard on an expedited basis by Longmore, Underhill and Rix LJJ. At [22] Longmore LJ, upholding Flaux J's decision, stated: "*I consider that any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum.*"

77. Longmore LJ also drew an analogy between the situation which gave rise to the relevant transactions and the *Ray* case thus:

> "It was also submitted that doing nothing cannot amount to an implied representation. But it is (arguably) the case that the banks did not do nothing in that they proposed transactions which were to be governed by LIBOR. That is conduct just as much as a customer's conduct in sitting down in a restaurant amounts to a representation that he is able to pay for his meal, see *DPP v Ray* [1974] AC 370, 379D per Lord Reid."

78. That analogy of course underpins the Claimants' arguments here. However in my judgment the case offers limited help because the focus was very much on whether any representation could be spelled out of the facts. Here of course I proceed on the basis that all the pleaded representations will be found, (albeit that at present/at first instance it must be more than likely that those representations would be limited to those found in *PAG* – as is actually reflected in the Leeds formulation). What it does do is flag that an approach must be adopted which can embrace representations of all varieties: verbal, written, by conduct or hybrid.

79. In *PAG* it was alleged that had it been known that any alleged manipulation of LIBOR was going on, PAG would not have entered into certain swaps which were LIBOR-based. There was a claim for rescission on the ground that RBS made a number of misrepresentations, including fraudulent misrepresentations about LIBOR and the way in which it was set, similar to those considered in *Graiseley*.

80. The counsel team who appeared before me for Leeds also represented the claimant in *PAG*. One can see from the judgment that there was a similarity in the legal case advanced. Thus at [380]:

> "[Mr Lord] submits that … matters may be implicitly communicated by conduct and sub-consciously understood, even if they were not consciously considered at the time. He also relies upon *Spice Girls Ltd v Aprilia World Service BV* [2002] EMLR 27 in which it was held that when making an agreement to publicise a product, a band had impliedly represented that they had no reason to believe that one of their number had an existing intention to leave the band during the term of the agreement"

81. The judge rejected the implied representations contended for, but went on to consider reliance contingently. Accordingly it is fair to say that the battle royal which was waged before me on precisely this point was absent; but the point was to some extent "in play". Having referred to the presumption of inducement and also to the judgment of Christopher Clarke J in *Raiffeisen*, in particular to reliance by the bank on paragraph [187], the judge did not deal explicitly with the test. Instead at [419] she stated:

> "It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them. …. At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper manner. In my judgment, therefore, they gave no thought to the

> LIBOR Representations in the form pleaded and did not rely upon them."

82. The way that this was dealt with – ie. by a specific invocation of understanding rather than the argument which was made in the case about counterfactual causation – does provide further ballast for the contention that understanding is a requisite part of a case in misrepresentation. It also decides fairly and squarely that where evidence goes no further than to say that the key people assumed that LIBOR would be set in a straightforward and proper manner, that will not be enough.

83. While *PAG* went to the Court of Appeal of course, it was decided there on the question of falsity – in the passage following from [143] the Court of Appeal rejected the appeal against Asplin J's finding that there was no evidence of manipulation by RBS of either sterling or dollar LIBOR. It concluded at [159] that there was no need to consider the judge's finding on reliance. The salient part of the Court of Appeal's judgment therefore concerns the making of implied representations.

84. In a joint judgment, Sir Terence Etherton MR, Longmore LJ, and Newey LJ said as follows:

> "125… the law relating to misrepresentation fulfils a different function from the law relating to implied terms. The former deals with the present not the future and gives potential remedies which may be more appropriate than a claim for damages. A party to a contract containing a swap needs to be certain of the counterparty's honesty at the beginning of the deal not just in the future but throughout its course. If a claimant has suffered no loss, that may be relevant to remedy but should not exclude a right to rely on misrepresentation if any misrepresentation has occurred.
>
> 126. All this does not mean that the court should be too ready to find an implied representation … On any view it is by no means impossible that a representation can, in theory, be made by conduct alone.
>
> 127. The facts of those cases are, of course, a long way from a typical swaps case….
>
> 128. In *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 the defendant had promised to use reasonable endeavours to obtain a bank's agreement to substitute itself for the claimant as a guarantor of its subsidiary's obligations under charterparties and in any event to indemnify the claimant in respect of its liability under the guarantees it had given. When the claimant sued for breach of these obligations, the defendant alleged that the claimant had failed to disclose that the claimant had confirmed to the shipowners that its subsidiary would remain its subsidiary for the duration of the charters. In fact the subsidiary had been disposed of and was no longer the subsidiary of the claimant. … The judge said … 'In evaluating the effect of the beneficiary's conduct a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist

> and that, had it existed, he would in all the circumstances necessarily have been informed of it.' …
>
> 132. The present case appears to be the first in which Colman J's test has been considered by the Court of Appeal. We do think it is a helpful test, in relation to the existence of an implied representation, to consider whether a reasonable representee would naturally assume that the true state of facts did not exist and that, if it did, he would necessarily have been informed of it. To that extent we would approve the dicta of Colman J in *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 but that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied.
>
> 133. In the present case there were lengthy discussions between PAG and RBS before the swaps were concluded as set out by the judge in the earlier part of her judgment…. RBS was undoubtedly proposing the swap transactions with their reference to LIBOR as transactions which PAG could and should consider as fulfilment of the obligations contained in the loan contracts. In these circumstances we are satisfied that RBS did make some representation to the effect that RBS itself was not manipulating and did not intend to manipulate LIBOR. Such a comparatively elementary representation would probably be inferred from a mere proposal of the swap transaction but we need not go as far as that on the facts of this case in the light of the lengthy previous discussions. In this sense the case is comparable to the *UBS* case [2014] EWHC 3615 (Comm) in which a not dissimilar representation was implied from what Depfa had been told by UBS and the fact that the relevant transaction was put forward to Depfa by UBS. It is true that UBS had also told Depfa that it had done due diligence on KWL but we do not consider that fact to have been decisive on its own in the mind of Males J in that case."

85. This passage is obviously not critical to the central point, but it flags a number of issues to which I will revert in the course of analysis.

Marme

86. The case which was specifically invoked by the Bank was of course the *Marme* case.

87. *Marme* arose from fairly similar facts to the present actions. It concerned five alleged implied representations said to have been made by the first defendant in that action (RBS) and which concerned RBS's involvement in, and knowledge of, alleged EURIBOR (as opposed to LIBOR) manipulation. The person who was alleged to have manipulated EURIBOR was a Mr Moryoussef; it was common ground that he had done so when previously employed by Barclays, but that he had done so when at RBS was hotly contested.

88. The representations relied on were as to RBS's involvement in such manipulation, its knowledge of other banks so doing (1-4) and its honest actions and intentions (5).

89. Picken J concluded that none of the five representations alleged could be implied, albeit that he also indicated that (had Marme argued for it) he would have been prepared to find a narrower representation based upon that found by the Court of Appeal in *PAG*.

90. The case was therefore decided on an early point – namely that none of the pleaded representations had been made. Picken J nonetheless went on to consider the position on the remaining elements of the misrepresentation claim. For obvious reasons the next stage – falsity – proceeded on the basis that the pleaded representations had been made. He then concluded that falsity would have been established.

91. At [251] he went on to consider fraud on the hypothetical that the representations had been made and were false. The conclusion was that there was fraud, on the part of the one individual. Finally he considered the question of reliance, on the basis of the assumption that the representations had been made and the finding that if so they were false and on the basis that it did not matter whether or not they were also fraudulent (both possibilities being considered).

92. At [279] Picken J introduced the concept thus:

> "There are two aspects to this issue since, in the first place, a claimant must establish that it was aware of the representation at the time that it was made and, secondly, the claimant must show a causal connection between the making of the representation and its decision to enter into the contract which ensued from the making of the representation."

93. Picken J then considered the awareness requirement (between [281]-[288]). From [281] to [284] he surveyed the authorities which I have summarised above introducing them with the statement: "*That there is the awareness requirement is made clear in a number of authorities and textbooks*".

94. Marme argued (in an argument which bore relation to the way this case was argued, at least in writing) that special considerations applied to implied representations and in particular to those where the *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 "helpful test" was made out. Marme argued that in such cases an assumption was sufficient to satisfy the requirement for the representation to be present in the representee's mind, even if the representee did not give any "conscious thought" to the existence of the representation. Before him there was no authority cited to support such a distinction and Picken J accepted a submission by reference to the express representation case of *Arkwright v Newbold* which is the leading authority for the proposition that where an express representation is ambiguous the representee must establish that he understood it in the relevant sense which supports the misrepresentation case.

95. Picken J concluded, after hearing full argument, that a claimant in the position of Marme (i.e. one who alleged reliance on implied representations) was required to establish that it had "*given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised*" (at [286]). To conclude otherwise would impermissibly collapse the "long established and clear" distinction between representation (including implied representation) and actionable non-disclosure.

96. He then passed on to consider the evidence and noted that at most it could be said that the relevant person had assumed that EURIBOR was an honest and true rate and had no reason to think otherwise. He concluded that it was not sufficient to satisfy the awareness requirement for the representee to have assumed a state of affairs, even if he had no reason to think the position was otherwise absent being told.

> "Since Mr Maud did not give conscious thought to the point, he cannot have had the necessary awareness to mean that reliance has been made out in this case. In truth, Mr Maud simply did not turn his mind to the point at the time.".

97. This, he said, was similar to the situation in *PAG*. Similarly he said:

> "I find myself in the present case reaching the conclusion that, since Mr Maud merely made certain assumptions concerning EURIBOR without giving any thought to the EURIBOR Representations, reliance has likewise not been established by Marme. Mr Maud did not understand any of the alleged EURIBOR Representations to have been made to him at the time, and so it follows that those representations (or something approximating to them) were not, and cannot, have been 'actively present to his mind'."

98. This echoes, but is not entirely identical to, the finding in *PAG*. Picken J also went on to consider issues arising under the causation aspect including the "presumption of inducement" which (it was common ground) applied where a representation was material, and was particularly strong where the representation was fraudulent. However it is clear that Picken J considered that questions of presumption did not arise at all unless the awareness requirement had been satisfied; and he also noted (citing *Barton v County NatWest Ltd* [1999] Lloyd's Rep Bank 408) that the presumption would be rebutted if the representee "*never knew of the statement until after he had entered into the contract*" (i.e. if the awareness requirement was not satisfied).

99. Then there are two more recent cases which reference *Marme*. I deal with them only for completeness, because I do not consider that they materially assist in the analysis.

100. The first is *Deutsche Bank v Unitech Ltd*, a decision of Robin Knowles J. This was in part a LIBOR-related implied representation case. On its face it appears to be of considerable relevance because applying *Marme*, the judge dismissed Unitech's counterclaim for implied misrepresentations on the grounds that it had failed to adduce any evidence to establish that it was "aware" and "actually understood" that the representations pleaded had been made. However Unitech did not attend the hearing and made no submissions on the issues. It must therefore be regarded as of very limited assistance.

101. The second case is *Vald Nielsen Holding v Baldorino*, in which Jacobs J mentioned the understanding requirement, citing *Raiffeisen* at [87] and stating "*This requirement is of particular significance in the case of implied representations*". However the point was not in issue and therefore again there is no great support to be drawn from it.

Preliminary conclusions

102. This review leads to a preliminary conclusion that both the authorities generally and those specifically in the context of the interest rate rigging cases indicate that for a misrepresentation to be actionable, the representee must be aware of it – he must understand it in the sense in which he later complains of it; it must be "actively present to his mind". That is, in my judgement, what Picken J was referring to in *Marme*. One can see when reading the judgment that the phraseology used of contemporaneous consciousness is one which evolved out of the genesis of the case – it is plain that cross-examination was put on the basis of consciousness and then reflected in the submissions addressed to the judge (see [144], [185], [286]). (Though it is possible that that way of putting things to the witnesses itself owed something to the way Males J considered the question at [666] in the *UBS* case.)

103. It is also clear that it is a meaningful way of interrogating the question which arose on the evidence in that case. There is no sense or indication that Picken J was urged to or intended to move beyond the ambit of previous authority. His finding is confined to Mr Maud not understanding any of the representations to have been made to him at the time, and is cross checked against the well-established "actively present" test. The use of the phrase "contemporaneous conscious thought" is a phrase used to denote a contrast to assumption (similar to that drawn by Christopher Clarke J in *Raiffeisen*), and also to deal with the lack of need for the precise formulation to have been apprehended. It follows that the hypothesis on which I was invited to find that Picken J's decision was wrong does not arise.

The Claimants' analysis considered

104. I will next test this preliminary conclusion against the arguments which were deployed by the Claimants.

105. Turning to *DPP v Ray*[1], as I have noted above, much emphasis was placed on this case by the Claimants and it therefore repays some detailed consideration.

106. The case involved a split decision. The majority were Lord McDermott, Lord Morris, and Lord Pearson. The question to the Divisional Court had been broad – whether on the true construction of the Theft Act the defendant has been rightly convicted? (p 383E). Lord McDermott set out at 381H the "two questions for consideration": (1) do the facts justify a finding that the respondent practised a deception? and (2) if he did, was his evasion of the debt obtained by that deception? Pausing here, this deals with one point raised by the Bank, namely that the case was not about reliance, but about whether there had been any deception at all. I agree with the Claimants that both questions were in issue; albeit in a very different context and the question of causation/reliance was hardly front and centre of the decision.

107. At p. 382G,-383A Lord McDermott explained first why "*the change of mind produced a deception*":

> "I do not base this conclusion merely on the change of mind that had occurred for that in itself was not manifest at the time and did not amount to 'conduct' on the part of the respondent. But it did falsify the representation which had already been made because that initial

[1] Also sometimes referred to as *Ray v Sempers* reflecting its title in the Divisional Court.

> representation must, in my view, be regarded not as something then spent and past but as a continuing representation which remained alive and operative and had already resulted in the respondent and his defaulting companions being taken on trust and treated as ordinary, honest customers…
>
> Holding for these reasons that the respondent practised a deception, I turn to what I have referred to as the second question. Was the respondent's evasion of the debt obtained by that deception? I think the material before the justices was enough to show that it was. The obvious effect of the deception was that the respondent and his associates were treated as they had been previously, that is to say as ordinary, honest customers whose conduct did not excite suspicion or call for precautions. In consequence the waiter was off his guard and vanished into the kitchen."

108. The Claimants submitted that the situation was analogous to the present case in that the misrepresentation operated through the waiter taking matters on trust (here: assumption or taking it on trust that the Bank was not manipulating LIBOR) and treating the customers as ordinary honest customers. The Claimants pointed out that there was no suggestion that the waiter needed to consciously ask himself whether the customers are going to pay. They submitted that on Lord McDermott's approach, "*the operative nature of this deception was in causing the waiter to be off his guard, effectively to be lulled into a false sense of security*", and that this test was equally made out on the facts of the present case.

109. I was also taken to the speech of Lord Morris at p. 385G-386A which placed a good deal of emphasis on the effect on the waiter's mind, using at one place the phrase "*it continued to operate on the mind of the waiter*." While obviously what was in issue in *Ray* was the question of obtaining advantage by deception, the Claimants submitted that I should give considerable weight to this approach in part because the concept of "obtaining" was "*synonymous or analogous with inducement in the civil law context for this sort of representation*".

110. The Claimants submitted that one sees all the critical elements of their analysis in the case in that:

i) First, the waiter made an assumption, based on the conduct of the customer, that the customer was an "ordinary, honest customer" who would not behave dishonestly by running away without paying.

ii) Second, the waiter was influenced, by that assumption and that implied representation "operated on the mind of the waiter", such that he relied on it, and was induced by it, and was deceived.

iii) Third, the fact the implied representation operated on the mind of the waiter could be tested by asking what the waiter would have done if he had known the truth: he would never have served him or would have taken steps to prevent him from leaving the restaurant without paying for his meal.

111. In essence therefore this case forms the foundation of the argument that there are two competing lines of authority, one which pertains to verbal misrepresentations, and another which pertains to representations by conduct. I entirely accept that there is relevant material in this judgment – indeed as was noted by Mr Beltrami QC in closing, the case is cited in a number of the judgments on which the Bank relied, such as *PAG*. I do not however accept the submission that it forms the basis for a conclusion that there are two distinct rules and that assumption suffices in the case of representations by conduct such that there is no requirement of awareness. In essence it seemed to me that the Claimants' argument in relation to *Ray* was overstretched. Here and elsewhere in the argument the Claimants ignore a number of not unimportant facts.

112. *Ray* was obviously a very different case from the present. Firstly its facts were markedly different, and it arose in the context of a criminal offence which, while it has crossovers to the civil claim in misrepresentation, is juridically distinct. Secondly, while reliance was technically in issue, it was in issue with a markedly different focus – it was a case about timeline; given that the representation was made at the outset and was true at the time, was there a reliance which could be found by the time the representation became untrue? Thirdly (and in part as a result) it does not deal with the question of an awareness requirement.

113. I am also unpersuaded that *Ray* should be taken to be a case which says anything which is really inconsistent with the awareness requirement. Their Lordships were plainly not focussing on this issue, as I have just noted. However one can perfectly well see how, if that point had been in issue, the dicta of Lord Morris as to operation on the mind lead to an analysis which is not at all dissimilar to that seen in the cases which talk in terms of "active presence" to the representee's mind. The waiter, in deciding to convey the order to the kitchen, has done so because he has actively, albeit almost automatically, processed the question "*is this customer good for the money?*". It is not, of course, unheard of for someone in the waiter's position to refuse to serve a customer if quasi-automatic consideration of the representation produces a negative answer to this question[2]. This indicates that what is happening is more than an assumption.

114. The next case to be considered is the *Spice Girls* case. That was a case where the representation found at first instance was a representation by conduct, namely that participation in a publicity shoot for Aprilia's scooters had carried with it a representation by conduct that the Spice Girls did not know, and had no reasonable ground to believe, that any of the group had an existing declared intention to leave the group before that date (when in fact Ginger Spice/Ms Halliwell had already indicated an intention to leave the band).

115. Reliance was placed by the Claimants on the following passage in the judgment of Arden J, which it was said supported the conclusion that no contemporaneous conscious thought was needed:

> "In certain limited circumstances, reliance can be inferred. In *Smith v. Chadwick* (1884) 9 A.C. 187, Lord Blackburn stated:

[2] See for example the famous Rodeo Drive shopping scene in the movie "Pretty Woman": "I don't think we have anything for you. You are obviously in the wrong place."

> I think if it is proved that the defendants with a view to induce the plaintiff to enter a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.
>
> Ms Fuzzi and Mr Bravazzo both gave evidence that Aprilia would not have entered into the agreement if it had been known that Ms Halliwell had declared an existing intention to leave the group …, and I have no doubt that AWS would have consulted Aprilia's marketing department if it had been told of Ms Halliwell's intentions. Before the agreement was made, Aprilia incurred expenditure on the commercial shoot. …. Given that Aprilia had to sign the agreement to get the right to use the commercial shoot (and that there was no other reason for it to sign the agreement except to get the rights thereunder), it seems to me that the court can infer that indirectly it was induced to enter the contract by the representation made to it when it made the shoot."

116. The Claimants submitted that the effect of the Court of Appeal's judgment was that Arden J's judgment was upheld "*in relation to her findings on the representation by conduct*" (albeit that the Court of Appeal would have found for Aprilia more widely), and therefore the principle that no contemporaneous conscious thought by the representee is required to be proved was endorsed. Reliance was placed on the following passage at [67]:

> "In the circumstances no one at AWS gave any consideration at the time to what representations were to be implied into the statements and conduct of the Spice Girls. But this is not a case in which the representations were ambiguous, so that the problem exemplified in *E. A. Grimstead & Son Ltd v. McGarrigan* does not arise. There is no reason to think that AWS did not understand the representations in the sense alleged. The judge so inferred with regard to the other representations to which we have referred."

117. It is true that there is no mention of an awareness requirement in this case. But again the context, both in terms of backdrop, and the issues, was strikingly different to the present case. The backdrop of course speaks for itself. As for the issues, there was no question about whether the defendant was aware that representations had been made; the issues were about spelling out a representation at all (particularly given the potential for ambiguity), and then about inducement on the facts. It is not the case that the awareness issue was live, and was rejected. What there was was a question of the requisite evidence where representations may be ambiguous – the necessity of understanding in the relevant sense, as set out in *Smith v Chadwick*. Absent any suggestion that the awareness issue was live, and given the related *Smith v Chadwick* context, I am not minded to see the Court of Appeal's reference to absence of consideration or awareness as importing anything of significance. And there being no issue as to awareness, the inference from the counterfactual of truth is not significant.

118. Nor (I note for completeness) is it the case that this can be regarded easily as a case of pure representation by conduct. What Arden J found was a representation by conduct, but the Court of Appeal held that she was wrong to do so. For them the whole picture

was more complex and nuanced. It found express and implied representations in a key fax and then noted at [63]:

> "Whilst it is necessary to give each episode separate consideration it is also necessary to have regard to their cumulative effect. This is not a case of an isolated representation made at an early stage of ongoing negotiations. It is the case of a series of continuing representations made throughout the two months' negotiations leading to the Agreement. Later representations gave added force to the earlier ones; earlier representations gave focus to the later ones."

119. The next case relied on was *MAN Nützfahrzeuge AG v Freightliner Ltd*, where the Court was prepared to find implied representations that a company's accounts had been prepared honestly and could be relied upon to provide a true and fair picture of its financial position.

120. However I do not think that this case takes matters much further in the context of the fact that the case was one which was on no analysis one of representation by conduct alone – the complaint arose out of statements made both expressly and implicitly as to the financial condition of the company. Further, again the question of awareness was never raised. The focus in the case was on other parts of the analysis, namely causation. It is fair to say that Mr Lord himself placed little emphasis on this case.

121. Similar points arise in relation to *Lindsay v O'Loughnane*, *Parabola Investments v Browallia Cal*, and *UBS AG v Kommunale Wasserwerke Leipzig GmbH*. It was submitted that all these cases are irreconcilable with the Bank's interpretation of *Marme*, and that in none of them could the claimants have succeeded if there existed a requirement for "contemporaneous conscious thought" (at any rate as the Bank submits it should be understood).

122. As to *Lindsay*, where Flaux J referred to an "*irreducible minimum of misrepresentation*", the Claimants said that it provided support for the proposition that (whatever the criticisms of the formulation of the representations pleaded) there is an implied representation as to LIBOR pregnant in the Bank putting forward a LIBOR transaction. That may be the case; but that does not assist on the question at the heart of this dispute. In that case there was again no question of awareness; with the issue being one at the next stage, of whether the claimant would have pursued the transaction regardless. Indeed, as to awareness, there appears to be a positive finding at [112] that the representation was understood in the relevant sense. Again too, the representations were ones by express words as well as by conduct.

123. In relation to *Parabola* the Claimants submitted that support could be obtained from that judgment for testing the question of inducement by reference to the counterfactual of truth and also for that counterfactual as evidence of something being "actively present". That submission was made in reliance on the passage at [106]:

> "…where the evidence is that, had the claimant known the true position, he would have acted differently, that in itself demonstrates that the fraudulent misrepresentation, which by definition does not reveal the true position, "was actively present to the mind" of the victim of the fraud to a sufficient extent to establish inducement."

124. However while Flaux J certainly found the counterfactual of truth relevant to inducement on the facts of that case, the equation to awareness from his expression in this paragraph seems to me to be a reading too far. This too was a case of express and implied representations – there were daily and weekly representations as to profitability, and representations as to the amount in certain accounts, including a specific representation that at one point an account stood at a specific figure (with taped calls being relied on). The real issue was not awareness, but the factual side of inducement/causation – really as to whether the representee would have acted differently, given that he pressed on even when given warnings as to the difficulty of market conditions. The reference to "actively present" needs to be read by reference to activity, rather than awareness. As the surrounding passages show, it is addressed to an argument that Hobhouse LJ in *Downs v Chappell* [1997] 1 WLR 426 had definitively closed the door on the counterfactual of truth being relevant to inducement. This can be seen further at [108] where the factual distinctions are drawn out.

125. That analysis is consistent with the fact, highlighted by Mr Beltrami in reply, that this case is one which is specifically cited by Christopher Clarke J in *Raiffeisen* in the context of causation; plainly therefore he did not see it as undermining his thinking on awareness, or as even being relevant to that question.

126. As to *UBS*, which was relied on in the context of the relevance of the counterfactual of truth, this was a case where it is certainly hard to characterise the case as being one of representation by conduct only, so as to assist the distinction which the Claimants seek to draw. There had been dishonesty on the part of certain individuals, and UBS represented that the reason for needing an intermediary was because its own credit lines were full, which carried with it an implied representation as to honesty and as to the absence of knowledge of "taint". On those representations there appears to have been no issue as to awareness. And while certainly Males J uses the counterfactual of truth, he does not do so in terms which suggest that the counterfactual offers more than evidence of reliance. Further there is at least a strong hint as to an awareness requirement in the dictum of Males J at [666] in relation to one of the representations which were not found to have been made. Here he said: "*there is no evidence (or at any rate none that I accept) that KWL was conscious of any such representation having been made to it.*"

127. The final authority which I should mention in this context is the *IFE* case, which was relied on by the Claimants in this context, and conceded by the Bank to be the most troublesome authority for its argument. In that case, aside from the general statement of principle which I have already cited, Toulson J said this in relation to a similar argument:

> "Inducement
>
> 78. … it is essential for a misrepresentation to have legal effect that it should have operated on the mind of the representee. It follows that if a representation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, the representee has no remedy.

> 79. In Horsfall v Thomas (1862) 1 H&C 90, a seller delivered to a buyer a gun which was in a dangerous condition. The buyer alleged that the defect had been hidden at the time of the sale. The buyer's claim failed because he had not examined the gun before buying it, and therefore if there was a fraudulent concealment of the defect it had no influence on him. Mr Howard submitted that the same principle applied in this case, because Mr Mitjavile accepted that he did not understand that Goldman Sachs was making any representation. Therefore, if there was a misrepresentation by the non-disclosure of the May reports, it did not operate on Mr Mitjavile's mind.
>
> 80. Mr Nash submitted that although Mr Mitjavile agreed that he did not understand that Goldman Sachs was making any representation to him, to take that piece of his evidence on its own would be an over simplification of his mental state. Mr Mitjavile also said that he believed the arranger had an overall commercial responsibility, if it knew or had a strong hint of the 'the real state of things', to let the market know, and that if it failed in that responsibility IFE would look to the court to decide the legal question of responsibility. Mr Nash further submitted that the misrepresentation did operate on the minds of IFE's decision makers, because if the May reports had been disclosed IFE would not have gone ahead with its investment.
>
> 81. It is not necessary and I do not propose to lengthen this judgment by exploring those legal arguments, particularly since I am conscious of the artificiality of doing so in the context of my finding that there was no implied representation as alleged by IFE."

128. It was submitted that where the first instance decision left unresolved the question of the precise nature of awareness required, it was resolved in the Court of Appeal ([2007] 2 Lloyd's Rep 449), where at [28] Waller LJ said this:

> "Third, if by virtue of establishing all the ingredients of a misrepresentation IFE would otherwise succeed in their case under that Act, I am very doubtful whether GSI would succeed simply on the issue of inducement by reference to Mr Mitjavile's evidence. It is true he said he did not rely on any representation and that may be relevant to whether there was misrepresentation, but if there was a misrepresentation what one would then have to ask is what would have occurred if the misrepresentation had not been corrected. On that issue the judge accepted Mr Mitjavile's evidence that disclosure of the reports would have led to non-completion."

129. On the basis of this passage, the Claimants submitted that the question is in reality one of causation. It was said that the Court of Appeal in this passage explains the mechanics of how reliance will operate in cases of representations of honesty implied from conduct, namely that the dishonest misrepresentor is going to have to correct the misleading impression that it has brought about by its conduct, or else the representee will have relied on it.

130. However while the question comes most close to the surface in that case, I do not consider that the question was decided. The passage in question is plainly *obiter*; the question of awareness did not have to be grappled with because of a conclusion earlier on that the representations had not been made. I certainly do not find it of much assistance in circumstances where:

    i) It is not entirely clear that the understanding/awareness issue was properly in focus on the appeal;

    ii) It is clear that the case was again one of mixed express and implied representations – involving *inter alia* the handing over of a document whose contents effectively formed part of the representation. I accept the submission that it cannot therefore form part of a chain of authorities establishing a special rule for representations by conduct;

    iii) The case has been cited in the LIBOR cases without it ever being suggested (by a succession of talented legal teams – including Leeds' own team) that the awareness requirement was decided not to exist in that case.

131. For the reasons I have given I do not find in the authorities relied on by the Claimants provide the basis for an argument that representations by conduct are subject to separate rules. I also note, at this point, that had this been the case one might perhaps have expected to find it at least hinted at in the textbooks. However there was no reference to any such authority, and so far as one can see that is because there is no such suggestion. See for example Chitty paragraph 7-019: "*it is sometimes hard to distinguish misrepresentation by conduct from implied misrepresentation, but it is usually unnecessary to do so.*" Similarly in the *IFE* judgment itself, which is perhaps the most cited summary, there is no suggestion of a distinction between express or implied representations in this regard.

132. That absence of material identifying this proposition is perhaps unsurprising. Why, as a matter of logic, should a representation by conduct be different from a representation by express words? Any representation, whether expressed in words, implied from words, or implied from conduct, is a representation which ultimately – directly or indirectly – involves words. That is because there must be some articulation of the representation; and that is done by stating it in words. With an express representation the articulation is direct. It is obviously the express words which are used. With an implied representation, the relevant representation has to be articulated indirectly, either from being spelled out from words or from being spelled out from conduct (or both). As Cartwright says at 3-06: "*It is therefore necessary, in analysing a claim for misrepresentation, to identify the false statement for which the defendant is responsible, and which was communicated to the representee*". The point is that in each case the court must be satisfied that there is a representation, articulated in words, which forms the basis of the cause of action.

133. Further the factual basis for the distinction, even if it were logically or legally sound, is absent. As noted above in the course of my review, the authorities relied on do not present as a list of cases about representation by conduct. Most of them concern representations compounded out of words and conduct.

134. Further, even if there were such a rule it would not be apt to this case, because it is not a case of pure conduct, analogous to *Ray* or perhaps the auction analogy which I give below. The pleaded case in both actions appears to be compounded of words and conduct. In the Leeds action the representation is said to be implied but "*in the course of proposing/transacting*"; which suggests at least an element of words. The Further Information then goes on to rely on express representations as to setting of the LOBO loans by reference to LIBOR. In Newham's case the pleading is clearly by reference to words and conduct and covers the gamut of express, implied and conduct.

135. Even if this were (as it is not) a case of representation only by conduct, the problem remains. This is because, if one goes back to the LIBOR type cases with which I started, on the Claimants' logic, these would have to be express representation cases, factually distinct from the present case. But in fact they are cases where the representations were, as here, said to be wholly or partly by conduct. Again this is unsurprising, given that those cases arise out of very much the same factual backdrop to this present case.

136. The next point with which I should deal is the Claimants' case on continuing representations. The Claimants submitted that even if the Bank is correct about the initial misrepresentation, there is no answer to their alternative case based on the Bank's failure to correct it. It was submitted that this basis was unaffected by the "awareness requirement" because any correction that the Bank would have had to give would necessarily have to be by way of an express statement. As Mr Lord put it, the Bank would have to say, "*Contrary to what you may have thought, we have in fact been dishonestly manipulating LIBOR, the contractual benchmark*." Therefore the question of any awareness of the representation would not arise, because the test for inducement would be what would the Claimants have done had such correction been made.

137. Recognising the challenge presented to this submission by the distinction between misrepresentation and non-disclosure cases, the Claimants submitted that the observations of Foxton J in *SK Shipping Europe plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [185] were wrong, in that he there appeared to exclude a relevance for the counterfactual of truth and in his approach to continuing representations at [188].

138. I was not persuaded that this was of any assistance to the Claimants – or that Foxton J was wrong in either regard in *SK Shipping*. As for the counterfactual of truth point, I do not read Foxton J as excluding the counterfactual of truth as a relevant factor in an appropriate case. He merely states (entirely correctly and uncontroversially) to what question the evidence so derived has to be directed: the counterfactual of non-existence.

139. As for the latter point on Foxton J's judgment, an allegation of continuing breach is not some sort of philosophers' stone which can take a misrepresentation claim and turn it into a non-disclosure claim. There is no authority which supports this approach. As Foxton J explains, the function of a continuing misrepresentation case is that it can result in a misrepresentation becoming actionable some time after it is made if there is a gap between making of the representation and reliance. That may result in its being capable of being relied on more than once, or (as in *Ray*) it may become false at a later date. Further, as Mr Beltrami noted, if this were a good point, it would have been a good point in *PAG* and *Marme*.

140. Another point which did not play much role in the oral submissions, but with which I should deal, is the question of presumption of inducement. I agree with Picken J in *Marme* that while the presumption of inducement can be relevant in cases where awareness can be established it cannot "trump" that requirement, which logically precedes it – and conceptually depends on it. Without the representation having been made and understood there can be no basis for an assumption as to its effects.

141. I should also deal with the submissions advanced by Mr Cox QC for Newham. Those submissions majored on the theme that there is only one aspect to inducement and were primarily addressed to the question of whether, despite the cases to which I have referred above, there really was any requirement of awareness, or whether it was not necessary to establish more than a state of mind as a result of the conduct in question which then causes the act of reliance. It was also submitted that the difference between awareness or understanding (as referred to by the Bank) and the "state of mind" approach had been insufficiently explained by the Bank.

142. I can deal with this quite shortly. First, it is premised on the false separation out of representation by conduct, which I have already indicated that I do not find persuasive. Moving on from that, although presented by both Newham and the Bank as being a radically different case, there appeared to me to be at bottom elements of common ground with the Bank. Thus, although submitting that "*there is just one question in law, and it is whether or not the representation was in fact influenced by the claimant*", Mr Cox accepted that the claimant does need to have a state of mind which is caused by the defendant's conduct. However he submitted that it would be sufficient that contemporaneous conscious thought be given to the conduct out of which the representation is spelt.

143. Ultimately it seemed to me that there was something in the argument advanced by Mr Cox, though I do not accept the idea of causation as the touchstone – in the sense of being the all-purpose diagnostic test, particularly in those fairly unusual cases where awareness or ambiguity rear their heads. That argument would appear to be firmly closed off by *Raiffeisen* and the other cases to which I have referred above.

Conclusions

144. I would tend to accept the submission that, in terms of building blocks, the third element of a cause of action in misrepresentation, inducement, is all about the causal link between the conduct of the defendant and the conduct of the claimant. I also accept that this question is a question of fact in each case.

145. In my judgment the authorities – including the authorities relied on by the Claimants – tend to show that based on the facts of different cases it may (or may not) be necessary to break that building block down into smaller parts (assumption, the counterfactual of truth and so forth) and that in different cases those smaller parts will be thrown into greater relief. That does not mean however that each expression of the workings of that part becomes an essential component of inducement in each case.

146. That there is some requirement of awareness I am, as I have indicated, persuaded is established by the authorities. Often that requirement will not be in issue; but that does not mean that it is not a requirement; just that in some cases that it is so obvious that the parties do not bother to argue about it. And when that requirement is in issue, in

some cases the question will be what the claimant consciously thought, but in other cases it may be better expressed by a focus on active presence.

147. I am of the opinion that there will however be cases where the element of awareness will come very close to something which might loosely (and without careful analysis) be characterised as assumption and which is most obviously derived from conduct. As I remarked to Mr Beltrami in closing, 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. In some cases what Mr Cox referred to as specific conduct may precisely and inevitably equate to a representation, without any room for ambiguity. That may be the case, for example, in the simplest of representation by conduct cases. Thus, 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.

148. Mr Beltrami's resistance to this approach (which does come close to the formulations both of assumption and subconsciousness which were advanced for the Claimants) is founded on two related things. The first is that this case is not so stark in its facts, such that those facts provide an easy basis for inference of any representation. Further (and this may be only partly a different point) here the nature of the facts is some way distant from the representations which are ultimately spelt out; the conduct does not "speak for itself" in the same way so as to permit of the quasi-automatic understanding which may look like assumption. He is rightly keen that I should not infer a principle out of a situation which is overly simplistic which would then prove inapt in more complex cases. He is of course right about this; but the principle operates in reverse. I should be equally cautious about expressing a principle which works well in the complex cases but which is unrealistic in more pedestrian situations.

149. The second thing on which his resistance is founded is the fact that awareness has been found to be required in the cases of *Marme* and *PAG*, which relate to alleged representations which are effectively identical. This, it seems to me, is key in the present case. Were it not for this I would certainly be 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. From there it would be but a short step to acceding to the submissions made as to the unsuitability of determining these issues at the strike out/summary judgment stage.

150. However I do not operate in a vacuum; far from it. I have two cases where the representations found or assumed to be found were essentially the same as the representations to be assumed in this case; and where the judges involved have said in one form or another that awareness is required. To reiterate:

    i) In *PAG* the context was LIBOR representations said to derive from the making of swaps transactions, the representations were very close to identical to those asserted by Newham and wider than those asserted by Leeds; no representations were found to have been made at first instance, but on the assumption that they were all made, it was held that the absence of any thought being given to the representations (the high point of the evidence being assumption of honesty/straightforward rate setting) was fatal.

ii) In *Marme*, which concerned EURIBOR representations, the Court rejected the complex set of representations alleged by the claimant, holding that the only representation that could have been possibly implied was one analogous to the one found in *PAG* (ie that the defendants were not manipulating and did not intend to manipulate EURIBOR), because no such specific basis from which to sensibly imply such complex representations could be found. Nevertheless, if there had been such representations, reliance would have required some contemporaneous conscious thought being given to them and the evidence that at best the relevant person had assumed that the rate was honest, and did not understand the representations to have been made was not enough.

151. I do therefore conclude that the Bank is broadly speaking correct in the test which I need to apply in the present case and further that proceeding on the basis of assumption in the present case would be wrong in law.

152. I should add that I have given some thought to the question of whether I should regard the present case as distinguishable from *PAG* and *Marme* because in those cases the judges were operating on the basis of firm findings as to representations and/or that such representations as were in play were limited, whereas I must operate on the hypothetical that all pleaded representations are established. I have however concluded that this makes no difference. Firstly both first instance judges were considering reliance on the basis that the pleaded representations (similar to those pleaded here) had been made. Their position was analogous therefore to mine. Secondly the differences in the representations are not of the nature which would make it easier to establish reliance. They are not, on any analysis, representations which "speak for themselves".

153. However, as noted above, I do see the precise "contemporaneous conscious thought" expression of the test as one which was reactive to the particular facts of the case, and the course of evidence. I will therefore consider what the position is if one applies the understanding/"actively present" test, rather than the exact "contemporaneous conscious thought" test to the facts of this case.

154. In the case of the Leeds Claimants, there is an acceptance that the contemporaneous conscious thought test cannot be met. Their pleaded case is that "*inducement is made out*" where the decision-maker "*would not have taken this course of action if they had known the true position*". That of course posits the counterfactual of truth test which I have rejected.

155. That approach is reinforced in their response to the RFI on this point which is structured thus:

i) Inducement is established by proving that the representee was influenced/affected;

ii) Presumption of inducement;

iii) Individuals named would not have authorised the LOBO loans if they had known of the true position.

156. So far as understanding is concerned the Leeds Claimants have then pleaded that the matters listed above "*show that the representations were actively present to the mind*"

of the relevant individuals. It is then added "for the avoidance of doubt" that "*where an implied representation by a dishonest party has the effect of reinforcing an assumption by the (honest) counterparty that the contractual benchmark is honest and is not being manipulated, inducement is made out*". This adds in the assumption approach, which I have also rejected. It begs the question however of how it is to be said that any such assumption was reinforced; or in other words that any representation was operative. This is where awareness becomes key. There is no pleading of fact which addresses this.

157. The Leeds Claimants have also pleaded that it would be sufficient to establish reliance if a representee was "influenced or affected" by the pleaded LIBOR Representations, "*in the sense that the LIBOR Representations operated on their minds, whether consciously or subconsciously. It is alleged that this was the case. To hold otherwise would be to licence a rogue's charter*". However the Leeds Claimants do not go on to plead any conscious operation on anyone's mind; and indeed it would seem that to do so would be inconsistent with the repudiation of the "conscious thought" test. That leaves the question of subconscious operation. Again that is a bare assertion. It is not pleaded by reference to any person or with any particulars, which itself would probably make it insufficient to carry the weight of the case. It would therefore seem to be effectively a reiteration of the assumption analysis.

158. Further I am persuaded that *PAG* and *Marme* indicate clearly that in a case of this sort more is needed than an assertion of subconscious operation. It follows that the Leeds Claimants' pleaded case, even if proved, has no real prospect of success, and that it falls to be struck out.

159. As for Newham, it does not expressly accept that it cannot satisfy the "conscious thought" requirement, though that point seemed to be implicitly accepted.

160. Barclays sought clarification of Newham's case on reliance; and in particular whether it alleged that anyone "*actively and/or consciously understood*" the alleged implied representations had been made.

161. Newham claimed that "additional particulars" were provided in Newham's Amended Reply at paragraph 15, which I have reproduced above. As can be seen, that pleading is lengthy. There is no assertion that any natural person actively or consciously (or in any way) understood at the time that representations were being made. It invokes at (2) the presumption of inducement and at (5-6) the counterfactual of truth. Newham then pleads that a list of hypothetical scenarios which it asserts at (16) "prove active reliance". None of those engage with understanding that a representation was being made. Inherent in them is that there was an assumption that the Bank was acting/would act honestly.

162. It follows that Newham also does not assert that anyone understood a representation to be made at all. That being the case, Newham's case has, on the law as it stands, no real prospect of success.

163. Accordingly, the affirmation issue does not arise. However I will deal with it relatively briefly below.

Affirmation

Summary

164. The fundamentals of the law on affirmation were not in dispute. A contract tainted by misrepresentation is voidable *ab initio* at the instance of the representee. In other words the innocent party can choose whether to rescind the contract or insist on performance. Since the two rights are mutually inconsistent, the representee must make an irrevocable choice. If he chooses to affirm the contract, he cannot later change his mind and opt for rescission instead.

165. But the representee cannot exercise his right to rescind unless he knows that such a right has accrued to him; hence, what is required is informed election. First, the representee must have sufficient knowledge of its right to rescind the contract, and then he must manifest the election to affirm through words or conduct which, objectively construed, evince such an election.

166. The parties hotly dispute whether the Claimants' conduct can be taken as affirmatory, what amounts to sufficient knowledge, and whether sufficient knowledge can be inferred or attributed to the Claimants in these proceedings.

167. In order to succeed the Bank must persuade the Court that - at this stage of the case - that is in advance of disclosure or witness evidence, it can be determined that the Claimants had sufficient knowledge of their right to rescind the Loans, and that, whatever their inner intentions may have been, by their conduct they have elected not to do so.

168. It is not impossible for a case of waiver to be decided at this stage. A notable example is *Barber v Imperio Reinsurance Company (UK) Ltd*, a decision of Potter J which was upheld by the Court of Appeal in 1993 (Court of Appeal, unreported, 15 July 1993). However that was a relatively simple case. After a non-disclosure as to the account history had been discovered and complained of, reinsurers agreed to commute the relevant years, and to pay at a particular rate, which they did for some time. There was no scope for disagreement as to the facts. There was no question as to whether the requisite person had the requisite knowledge.

169. *Barber* therefore represents a fairly unusual case. Certainly it is far more common for courts faced with such arguments at this stage to refuse to grant summary judgment/strike out, often in quite dismissive terms. For example in *The Law Debenture Trust Corporation Plc v Ukraine* [2018] EWCA Civ 2026 [2019] 2 WLR 655, at [195] Dame Elizabeth Gloster, Sales LJ and David Richards LJ in a joint judgment said this:

> "We consider that, at the least, and even accepting that Ukraine's conduct in paying the Notes could amount to affirmation, a trial on the evidence would be required in order to determine: (a) whether Ukraine had the requisite knowledge of its alleged right to avoid the contract under English law; and (b) whether there was continuing duress and as to its extent. Such matters are not suitable for determination on a summary judgment application."

170. While it may not be the case that the Court of Appeal was intending to say that no case where such issues arose could ever be suitable for summary determination, this dictum provides a fairly clear hint that where affirmation cases raise questions of fact, for example as to knowledge, they should be allowed to proceed to trial.

171. Before passing to the facts and their application to the issues I will say a little about the relevant law.

172. The question, of course, is what constitutes informed election – and to this knowledge is key. The balance of authority favours the view that because waiver is based on meaningful assent there must at least be demonstrated that there is knowledge both of (i) the existence of the right and (ii) that the contingency on which that right can be exercised has occurred. In the insurance context (where knowledge of the right to rescind is endemic) the questions make sense in that order. Here the questions more naturally present themselves the other way round.

173. There are a variety of authorities fixing the relevant degree of knowledge in particular cases. There are thus authorities which say that:

    i) Actual knowledge will be sufficient;

    ii) Knowledge to put the party onto enquiry of the extent of a breach is likely to be sufficient: *Black King Shipping Corporation and Wayang (Panama) SA v Rassie (The "Litsion Pride")* [1985] 1 Lloyd's Rep. 437, 516-7;

    iii) Knowledge which simply puts the party on enquiry as to a possible breach or misrepresentation will not be sufficient: *Insurance Corporation of the Channel Islands v The Royal Hotel Ltd* [1998] Lloyd's Rep IR 151, 161-2;

    iv) Shrewd suspicion is not enough: *Aaron Reefs Ltd v Twiss* [1896] AC 273, at 280 at 290 and 293.

174. The relevant person need not have complete knowledge and need not know that there is a cast iron case – it is not necessary to know every detail. What is necessary to know is in essence the facts one would need to plead the case, even if not every element of that could be proved – and even if one cannot assume that what could be pleaded is in fact known. As Mance J said in *ICCI v Royal Hotel Ltd*, at 161-2

> "In summary, the type of affirmation here in issue involves an informed choice (to treat the contract as continuing) made with knowledge of the facts giving rise to the right to avoid it. Provided that the party knows sufficient of the facts to know that he has that right, it is unnecessary that he should know all aspects or incidents of those facts. … the party must generally also know that he has that right. The making of his choice must be communicated unequivocally to the other party before there can be a binding affirmation.
>
> What is required for affirmation is knowledge, not any form of constructive knowledge….
>
> I reject Ms Bucknall's submission that a party must be taken to know whatever he could properly plead…. At the other extreme knowledge is not to be equated with absolute certainty……For practical purposes knowledge pre-supposes the truth of the matters known and a firm belief in their truth as well as sufficient justification for that belief in terms of experience, information and/or reasoning."

175. This statement, which is oft repeated as the most complete grappling with of the detailed issues which arise, perhaps illustrates why, as soon as knowledge becomes an issue, summary determination becomes very difficult.

The factual background and arguments

176. The Bank's case in relation to the two actions is slightly different, but takes place against a backdrop of points which are common to both actions. It makes the following points:

    i) First, the LIBOR scandal became public knowledge in mid-2012, and so from around that time the Claimants knew the facts giving rise to their contention that the Alleged Representations were false.

    ii) Second, they had in-house lawyers and ready access to legal advice.

    iii) Third, any lawyer would be aware of the elementary principle that rescission may be sought for misrepresentation.

    iv) Fourth, it is well-publicised that ever since the scandal erupted, other claimants have been bringing claims against the banks involved, including the Bank, on essentially the same basis as the present claims.

    v) Fifth, between 2012 (when the LIBOR scandal erupted) and 2018 (when the present claims were issued), all of the Claimants, without reserving their rights, made regular payments under the Loans (and some also entered into variation agreements restructuring their Loans).

177. In the case of Newham, the Bank further relies on a series of public documents such as minutes of meetings of the Borough Council which it says demonstrate that Newham expressly considered bringing these claims, and consciously decided not to do so. Those public documents are quite striking to read. Without going into detail which is unnecessary in the light of the conclusion I have already reached, there was plainly a debate going on within Newham Council in 2016 as to whether there was scope for a claim in misrepresentation arising out of LIBOR rigging and that those in decision-making positions were strongly urged to take legal action.

178. The Bank submitted that it was uncontroversial that continued performance of obligations under a contract (in particular continued making of payments due under a contract) is clear evidence of affirmatory conduct. In support, the Bank cited the Court of Appeal's judgment in *Barber v Imperio*: "*there can be no clearer affirmatory conduct than a payment under the policy in dispute.*"

179. The real battleground was sufficiency of knowledge. Again the basic proposition was not controversial: for present purposes it was accepted that the Bank must establish awareness both of facts giving rise to the right to rescind, and of the right to rescind itself. The parties however disagreed as to what that basic proposition meant.

180. As for awareness of facts, the Bank submitted that it had to be sufficient knowledge of the primary facts giving rise to the claim, but not necessarily of every detail, and nor did the party have to have the degree of confidence equivalent to the standard of proof

in court. The Bank relied on *Campbell v Fleming* (1834) 1 AD & E 40 and *ICCI v Royal Hotel Ltd*.

181. The Bank further drew my attention to specific passages of the Claimants' pleadings and evidence which it submitted expressly admit the requisite knowledge. In the Leeds Claim, this was paragraph 75 of the witness statement prepared by the Leeds Claimants' solicitors in opposition to this application, which reads:

> "Given that the Regulatory Findings were subject to extensive media reporting at the time, the Claimants accept that it is likely that they each became aware of the fact that some adverse findings had been made against Barclays in relation to its involvement in the actual or attempted manipulation of LIBOR either when the Regulatory Findings were first published in June 2012, or shortly thereafter."

182. In the Newham Claim, the Bank relied principally on paragraph 24.6A of the Amended Reply, in which Newham pleads that it was aware from 29 June 2012 of various press reports discussing the regulatory findings against the Bank.

183. As for awareness of rights, the Bank submitted that the law was encapsulated in the following four propositions:

i) First, what is required is awareness of the existence of legal remedies which flow from the known facts, so in this case knowledge that there is a remedy of rescission for misrepresentation. However, there was no requirement for knowledge that a claim can be brought. Reliance was placed on *Moore Large & Co Ltd v Hermes Credit & Guarantee plc* [2003] EWHC 26 (Comm).

ii) Second, where the party has the benefit of legal advice, the Court will infer awareness of legal rights absent evidence to the contrary. For this proposition the Bank again relied on *Moore Large*, at [93]-[94] and [100], and on *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), at [160].

iii) Third, is it is not necessary to demonstrate that the party investigated or drew conclusions as to the merits of a claim. It is sufficient to say that the facts objectively demonstrated at least an arguable point to be taken.

iv) Fourth, the test is also satisfied by an awareness of facts that might demonstrate a claim coupled with a decision not to inquire into the legal rights. Here the Bank cited *Allcard v Skinner* (1887) 36 Ch D 145, at 188 and 192.

184. The Bank submitted that any English lawyer knows that rescission is a remedy available for misrepresentation. The Bank's submission that attracted the real resistance was that it was common ground that all the Claimants had ready access to legal advice, and that such advice either was taken (in which case, if the Claimants wished to argue that they nevertheless did not know they may have a claim against the Bank, they ought to have waived privilege), or it was deliberately not taken (which does not assist the Claimants) – sufficient, said the Bank, to infer knowledge of legal rights. The Bank also made further submissions in respect of Leeds (but not other Claimants in the Leeds Claim) and Newham.

185. In respect of Leeds, the Bank submitted that the last affirmatory conduct was a payment of interest on 21 June 2018, i.e. 5 days before the issue of the claim form – when Leeds certainly had knowledge of the rights in respect of which it was about to issue a claim.

186. In respect of Newham, the Bank relied on the following further evidence:

i) Paragraph 24.6A of the Amended Reply, in which Newham pleads that it was aware from 29 June 2012 of various press reports discussing the regulatory findings against the Bank.

ii) Paragraph 24.6B of the Amended Reply, where Newham pleads that on or about 25 November 2013 Newham's Corporate Finance Manager Stephen Wild became aware of a Financial Times report about *Graiseley Properties Ltd v Barclays Bank plc*.

iii) Response 10 in Newham RRFI, where Newham pleads that "*the Claimant received generic advice from its in-house legal department between April 2014 and December 2014 in relation to claims in respect of LIBOR misconduct*."

iv) A number of publicly available documents, both official documents of Newham such as Council meeting minutes or written evidence given to a select committee of the House of Commons, and unofficial materials produced by Newham officers such as blog posts and articles. The Bank's case is that these documents demonstrate not only awareness of the general possibility of local authorities in Newham's position to bring claims against their lenders on the basis of LIBOR manipulation, but also conscious consideration of pursuing a claim against the Bank at the time and a decision not to do so.

187. On this basis, it was submitted that the Court could safely hold, even at this stage, that all the Claimants had the requisite knowledge of their legal rights for the purposes of affirmation.

188. The Claimants submitted that nothing short of actual knowledge of both the facts and the arising legal rights will do. They relied on the following statements from *Peyman v Lanjani* [1985] Ch 457 (CA):

i) At p. 487F, Stephenson LJ:

> "knowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right yet choose with that knowledge not to exercise it."

ii) At p. 494E, May LJ:

> "This being so, I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the

> circumstances which exist he does have that right to make that choice which the law gives him."

iii) At p. 752G, Slade LJ:

> "With Stephenson and May L.JJ., I do not think that a person (such as the plaintiff in the present case) can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge."

189. On this basis, it was submitted that actual knowledge was required. It was submitted that cases cited by the Bank must be treated with considerable caution. The Leeds Claimants submitted that making an inference from a failure to waive privilege was undesirable because privilege was a fundamental right.

190. The Claimants submitted that the authorities relied on by the Bank do not go as far as to permit the Court to attribute knowledge to the Claimants on an interim application, first because there was no evidence of what facts were known to the legal advisors, and second because such inferences should only be drawn, if at all, following a trial of all the relevant evidence. It was submitted that the true ratio of the cited passages from *Moore Large* was that there was a rebuttable presumption of awareness of legal rights in circumstances where the party's legal advisers had actual knowledge of the relevant facts. Affirmation could not be inferred from a combination of the party's knowledge and having access to legal advice; *a fortiori*, nor could blanket inferences be drawn solely from the fact of access to lawyers. If the Bank was right, it was said, then the affirmation argument would have succeeded in *Law Debenture Trust v Ukraine*. Newham further relied on *ICCI v Royal Hotel Ltd*.

191. Newham submitted that the Bank was also wrong in its assertion that it was enough to show knowledge of the primary facts. It was submitted that to show affirmation the defendant must show that the claimant had actual knowledge, first, of "*all the facts which are essential to give rise to the cause of action*", and second, that he has a right to rescind on those particular facts. Reliance was placed on *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] 1 Lloyd's Rep IR 94, p. 126rhc. Sufficient knowledge of such a right, it was submitted, could not be present until the Court of Appeal decided *PAG* in March 2018. At any rate, even apart from *PAG* being finally decided only in March 2018, the question of sufficient knowledge was very fact-sensitive, and in circumstances where the Bank relies on what specific individuals are said to have known, it can only be examined at a full trial.

192. Finally, Newham (but not the Leeds Claimants) submitted that the Bank was estopped from relying on the restructuring of the Loans as affirmatory conduct because it represented that the restructuring would not affect Newham's right to bring a claim. Newham relied in this respect on an email from its Alison Mackie to the Bank's Duncan Forsey sent on 8 February 2017. The email attached a report addressed to Newham's Cabinet into the proposed restructuring of the Loans. Paragraph 4.1 of that attached report stated:

> "Officers have negotiated terms with the bank that this deal, if executed, will not prejudice the council's position in participating in any future legal action against the bank concerning LOBO's."

193. In answer to this, the Bank submitted that this report is simply inaccurate, and does not reflect the agreement reached. It took me to an earlier email from Mr Forsey to Newham's officers (including Ms Mackie), dating back to 17 June 2016. On this basis the Bank submitted that it was clear that the agreement specifically related to any possible involvement by Newham in a regulatory redress scheme only, not a civil action between Newham and the Bank. In any event, the Bank pointed out that Mr Forsey does not appear to have responded to Ms Mackie's email of 8 February 2017, and therefore there was no approval from the Bank of that draft report that Newham could point to.

Discussion

194. I have formed the firm view that had the issue of affirmation arisen I would not have granted the Bank's strike out application on this ground, for essentially similar reasons to those expressed by the Court of Appeal in the *Ukraine* case. In essence, and as I will outline briefly below, real issues arise as to:

i) The extent of knowledge of the Claimants as to the facts requisite to make the claim. While it is probable that this knowledge was in place prior to 2018 that is not sufficiently clear for the purposes of summary determination, particularly against the background of a degree of uncertainty as to (i) what the constituent elements of knowledge would be for particular misrepresentations and (ii) when that knowledge was complete with the relevant individuals;

ii) The extent of knowledge of the Claimants as to their rights to rescind for misrepresentation given the nature of the claims, and the lack of clarity as to the framework within which legal advice was given and received and when such advice was taken.

195. The Claimants have pointed out that they only need to show an arguable case on one of the limbs which go to make up a case in affirmation in order to defeat the application.

196. While they have attacked all four limbs, those attacks are by no means all of equal force.

197. The first, which relates to whether the conduct relied upon is affirmatory would not trouble me. While the Claimants submitted that, since the question relates to the Bank's perception of the conduct, there might be knowledge on the part of the Bank which could drive a conclusion that payment was not affirmatory, it is hard to see what knowledge of Barclays, not also known to (and therefore capable of being deployed by) the Claimants could lead to this conclusion. As the Court of Appeal said in *Barber,* payment is paradigmatic affirmatory conduct. None of the potential knowledge on the part of the Bank on which the Claimants relied would in my judgment impinge on the question.

198. The second question relates to the Claimants' knowledge and the date of that knowledge. As to this I was of the view that the Claimants have considerable difficulties. The submission that the Claimants did not have knowledge of the relevant facts until months after the Court of Appeal decision in *PAG* does not appear realistic,

though there is a sufficient lack of clarity about the evidence at this stage that I would probably be unwilling to hold that it quite reached the level of fancifulness required for a strike out.

199. On one level the Claimants' argument depends on misconstruing the law as to belief in the claim as requiring certainty that it is a good one. On this basis there could be no affirmation in any case where a novel claim arose. What the law requires is not this; it is that the complainant has a basis for belief in the claim. Thus if the requisite knowledge comes before this, there were then relevant payments, made without qualification.

200. But as to fixing a date, perhaps in part because of the approach taken to what is requisite to know, and in part because of the stage in the proceedings, the evidence is plainly lacking in detail. My impression from what there is is that while putting the date quite as early as the regulatory findings goes perhaps too far, given the slightly novel nature of the claim, I do consider it considerably more likely than not that the Bank would, even on the Claimants' case, succeed in establishing the requisite knowledge at some point in the succeeding two years or so in circumstances where that period included both knowledge (albeit in outline) that litigants were bringing claims against Barclays for LIBOR misconduct and (so far as Newham is concerned) that a claim by one litigant involving a claim in misrepresentation had been settled. Further as regards Newham during 2014 it received some advice – albeit generic – from its in-house legal department. There is also the knowledge gleaned from the dispute within the Council as to the advisability of action – the content of this must add something to the knowledge base of Newham. But that question might well be affected by further and fuller evidence and in the circumstances I prefer to go no further than this.

201. There was also contention about whether the knowledge was with the right people so as to be attributed to the Claimants. I was not persuaded that the Claimants had a better than fanciful prospect of contending that the knowledge was with the wrong people for the purposes of attribution. While the Claimants took some points on this, it appeared tolerably clear that at some point well before the *PAG* appeal decision individuals whose knowledge would be attributable to the Claimants had the level of knowledge I have indicated above. There is therefore no real prospect of success on the argument that the facts were known only to the wrong people. And indeed this point was maintained without any great degree of conviction by any of the Claimants.

202. What is by far the most troublesome is the second part of the knowledge equation – knowledge of the right. The claims brought were novel and not straightforward, as their litigation history reveals. This is the kind of case where one can see the reasoning behind the requirement for knowledge of the right, controversial as it undoubtedly is.

203. At the centre of the Bank's case was *Moore Large* where Colman J said:

> "93. The burden of proving both aspect of the state of knowledge of the party said to have elected rests on the party alleging election. However, with regard to the electing party's knowledge of the legal rights amongst which he can elect, in the absence of evidence to the contrary, such knowledge may be inferred from the fact that the party had legal advice: see Peyman v. Lanjani, supra, at page 487 per Stephenson LJ. May LJ agreed with the judgment of Stephenson LJ in general. So did Slade LJ.

> Although both gave full judgments, neither suggested that Stephenson LJ's observations as to the basis of that inference were wrong. …
>
> 100. In my judgment, in a case where the party said to have elected has been represented by solicitors and counsel whose conduct is relied upon as amounting to an election, it is normally to be inferred that such conduct has been specifically authorised by the client and has been the subject of legal advice. If, on the evidence before the court it is established that either the legal advisers or the client had knowledge of the facts giving rise to the right said to have been waived at the time when the affirmatory conduct took place, there must be the further inference that the party has been given legal advice as to his rights arising out of those facts. If that inference is to be displaced, there must be evidence of the advice, if any, that was given by solicitors and counsel and of the extent to which the party concerned was aware or was made aware of the right which he appears to have abandoned."

204. The problem for the Bank is that that dictum hints quite clearly at the facts. In *Moore Large* the affirmation was said to have taken place actually within the defence in the action, at a time when solicitors had long since been retained, and when counsel had drafted the defence itself. It was therefore a case where no even remotely tricky question of knowledge arose. There were lawyers retained charged with dealing with the dispute between the parties. The point made about evidence of the advice received arose after the party in question had failed to disclose such advice even at trial.

205. The second case principally relied on by the Bank was *Involnert Management Inc v Aprilgrange Ltd*, where Leggatt J (as he then was) said at [160]:

> "The need for knowledge of the legal right, although established by authority, is difficult to justify in principle. The requirement is inconsistent both with the principle that ignorance of the law is no defence and with the principle that in the field of commerce the existence and exercise of legal rights should depend on objective manifestations of intent and not on a party's private understanding. It is also potentially extremely difficult for the other party to prove such knowledge—all the more so since any relevant legal advice which may have been received will be protected from disclosure by legal professional privilege. The unfairness of the rule is mitigated, however, by a presumption that a party which had a legal adviser at the relevant time received appropriate advice. That presumption can only be rebutted by waiving privilege and proving otherwise: see *Moore Large & Co Ltd v Hermes Credit and Guarantee plc* [2003] EWHC 26 (Comm), [2003] 1 Lloyd's Rep 163 (at [92]–[100])."

206. However the issue did not arise in that case (Leggatt J concluding that the insurers did not have the requisite knowledge of the facts on the basis that their legal advisers did not have full knowledge of the relevant facts), and *Involnert* cannot therefore be regarded as adding any real weight to the judgment in *Moore Large*.

207. While the point as to knowledge of the right was put with great skill by Mr Beltrami I am not persuaded that this line of authority should be taken as establishing the propositions for which he contended or 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.

208. In my judgment the better view is that the authorities reflect a fact sensitive approach to a fact sensitive issue. Where a party (as in *Moore Large*) is engaged in litigation and has litigation solicitors and counsel involved an inference as to advice of their legal rights is likely to follow - absent the party proving at trial that they were not so advised (via a waiver of privilege).

209. Here however we are operating in territory some considerable distance from this. The Claimants do have in house legal advisers, but it is unlikely that they are specialist litigators, or even particularly experienced contract lawyers. It may well be, given the range of legal issues which a council has to confront, that they have an expertise in a particular area, and otherwise superintend the taking of advice from others when that is deemed to be necessary. That appears to be reflected for example in Newham's evidence as to the advice it received in house. I would certainly be unwilling to make the inference on a summary basis that the existence of such in house legal advisers means that the Claimants were or should have been advised as to their rights.

210. That is not to say that the Bank's case may not prove to be a good one. Given the factual history of the matter one can see that there might well come a point at which the Claimants must be taken to have had knowledge of the right. But while on the surface it would perhaps be surprising if after *Graiseley* or *PAG* there was not (i) a filtering through of knowledge and (ii) advice taken, there is plainly scope for dispute on this. Certainly the evidence before me is that the Claimants did not seek such advice when the regulatory findings were published and that they were not aware of the other civil claims in any detail until June 2018. That is so even in the case of Newham where plainly there was a flagging in the course of open dispute as to the need to take advice, but where it is denied that advice was taken – and indeed the transcripts of Council meetings do seem to reflect a reluctance either to incur the costs of advice *("It's going to cost to do this case – seriously, it's Barclays we're talking about court, Court of Appeal, Supreme Court …. we have a duty to make sure that we've got value for money for the Council tax payers in the London Borough of Newham, so the simple answer is no.*"), or avail themselves of what was seen as the dubious "free-lunch" of "no win, no fee" scoping advice.

211. That this is a potential dispute was in fact inherent in the approach which the Bank took to this question, which relied very much on the absence of evidence of advice having been taken to found the inference which I have been unprepared to draw. It follows that the point is arguable. It may also be that, depending on the evidence, a court might even conclude that if such advice was not sought it should have been. But again, that is the sort of question which obviously requires to be decided on the facts, and cannot provide a route around this real dispute.

212. Accordingly for the reasons I have given the case on affirmation, if it arose, would not be suitable for summary determination.