KEY POINTS

- The most recent authorities in respect of the common law claim of misrepresentation suggest that there is an "awareness requirement" which must be met to satisfy the test of reliance. The existence of such a requirement is questionable and it may be that such authorities turn on their unusual LIBOR-related facts.
- Whatever the merits of this development at common law, it does not apply to s 90A.
- That provision continues to be extremely uncertain in its scope as no claim has yet reached trial. However, it is undoubtedly wider than claims in fraudulent misrepresentation (or deceit).
- In particular, s 90A has no intention requirement, and pure omissions are actionable; it generally arises where an issuer has a duty to speak and the provision must be read so as to give standing to investors holding intermediated securities.

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Reliance: a comparison between the common law and s 90A FSMA

This article compares the reliance requirement for the common law claim of misrepresentation with the statutory action of s 90A of the Financial Services and Markets Act 2000 (FSMA). The authors focus on recent authority regarding reliance upon implied statements at common law and the uncertainties that remain under s 90A FSMA.

IS AN AWARENESS OF AN IMPLIED REPRESENTATION REQUIRED AT COMMON LAW?

Implied representations have been an appealing avenue for claims against financial institutions because of the asymmetry in information and contractual terms which typically exist between a financial institution and a customer. The financial institution will generally owe no advisory duty to a customer. It will offer products and services with tightly controlled express representations and exclusions for negligent misstatements.

Borrowers not wanting, or able, to meet repayment obligations have used the LIBOR scandal to contend that transactions could be rescinded on the basis that implied representations had been made as to the integrity of the benchmark when putting it forward as a reference rate in credit agreements, derivatives, structured products and other financial transactions. The most prominent implied representation LIBOR-related claims were *Graiseley Properties plc v Barclays Bank plc* (where the claimants challenged their liability under interest rate swaps), *Deutsche Bank AG v Unitech Global Ltd* (where the defendants sought to avoid liability under a credit facility, guarantees and interest rate swaps), *Property Alliance Group Ltd v The Royal Bank of Scotland plc* (*PAG*) (where the dispute focused on liability under four interest rate swaps), and *Marme Inversiones 2007 SL v NatWest Markets plc & Ors* (which extended this line of defence to EURIBOR-linked interest rate swaps).

CASE LAW BEFORE *LEEDS v BARCLAYS*

In *Graiseley* and *Unitech*, the banks were denied summary judgment on the LIBOR implied misrepresentations because "any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum": [2013] EWCA Civ 1372 [25] (Longmore LJ). However, neither claim made it to a contested trial. Graiseley settled with Barclays in the following year. Unitech appears to have withdrawn from the litigation after the court made a conditional order requiring it to pay US$120m, which was the principal sum originally lent and would have been payable in any event ([2016] EWCA Civ 119, [2016] 1 WLR 3598). That led to an uncontested trial in early 2019, which unsurprisingly the bank won ([2019] EWHC 969 (Comm)).

Both *PAG* and *Marme* went to trial. In *Property Alliance Group* [2016] EWHC 3342 (Ch), Asplin J held that an implied representation may take the form of an "assumption" in the mind of the reasonable representee which arises as a result of the conduct of the representor viewed in context (at [405]). She further concluded that:

- The mere proffering of draft transactional documents by RBS referencing LIBOR was not sufficient to give rise to any implied representation (at [407]). But they certainly would not have given rise to the pleaded representations, which were extremely wide and excessively technical – the only representations that could have been made were that:
  - LIBOR would be set in accordance with its definition; and
  - the bank itself had not made false or misleading submissions, or had itself attempted to manipulate the relevant rate (at [408]-[413]).
- There was no reliance by the claimant on any LIBOR representations because "for the most part, the matters which were pleaded did not cross [the claimant's directors'] minds" – at most, there was an assumption that LIBOR was "a commercial interest rate of interest, [which] would be set in a straightforward manner", but that was not a representation that had been pleaded (at [419]).
- On the evidence before the court (which was considered at great length by Asplin J) she was not able to conclude that any relevant LIBOR representations were false or made by RBS fraudulently or negligently.

On appeal, the Court of Appeal disagreed in part and held that the bank's proffering of transaction documents could be sufficient to create a representation as to integrity of the benchmark: [2018] EWCA Civ 355, [2018] 1 WLR 3529 [133]-[134]. The Court of Appeal was also prepared to cast that implied representation in wide terms, and not limited to the three-month sterling LIBOR to which the swaps made express reference: "RBS did impliedly represent that it was not manipulating and did not intend to manipulate sterling LIBOR" of any tenor (at [141]).

All this proved academic in those proceedings as the Court of Appeal was not prepared to disturb Asplin J's findings on falsity. In those circumstances, the Court of Appeal also did not review her reasoning on reliance.

In *Marme* [2019] EWHC 366 (Comm), in contrast, Picken J held that the alleged EURIBOR representations pleaded by the claimant were false but did not fall to be implied. RBS's conduct in jointly arranging a syndicated loan involving interest rate swaps, at best, gave rise to an implied representation that it was not itself manipulating EURIBOR and did not intend to do so in the future. That representation was not false on the evidence before the court. For good measure, Picken J went on to consider reliance in *obiter dicta*. He held that Marme had to show that it had "given some contemporaneous thought to the fact that some representations were being impliedly made" (at [286]). Picken J accepted the submission that, if it were otherwise, it would remove the need for reliance in implied representation cases and collapse the distinction between actionable non-disclosure and misrepresentation. In circumstances where Marme's director did not understand that any of the pleaded EURIBOR representations were made to him at the time, "it follows that those representations (or something approximating to them) were not, and cannot, have been 'actively present to his mind'" (at [288]).

THE DECISION IN *LEEDS v BARCLAYS*

The above authorities are the legal context in which to understand Cockerill J's difficult judgment in *Leeds City Council & Ors v Barclays Bank plc* [2021] EWHC 363 (Comm). A number of local authorities sought to rescind long term lending arrangements entered into with Barclays. All of the loans used LIBOR as the reference rate for setting interest and calculating the cost of early repayment. For the purposes of the strike-out application, Barclays was prepared to assume that implied representations were made, were false and were known to be false by the bank when made, but sought to strike out the claim by taking a point on reliance by reference to Picken J's judgment in *Marme*. It argued that, for there to be reliance, those acting for the claimant local authorities at the time must have given some actual thought to the implied representations at issue.

Having considered *PAG* and *Marme* in some detail, Cockerill J stated her preliminary view in the following way (at [102]-[103]):

> "… 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'. … The use of the phrase 'contemporaneous conscious thought' is a phrase used to denote a contrast to assumption."

Put another way, Cockerill J considered that an unconscious assumption is inadequate to constitute reliance and what is required is some conscious thought as to the implied representation.

The judge then "test[ed] this preliminary conclusion" against the authorities relied upon by the claimants, including *DPP v Ray* [1974] AC 370 (HL); *Spice Girls Ltd v Aprilia World Services BV* [2002] EMLR 478 (ChD), [2002] EWCA Civ 15, [2002] EMLR 27; and *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 CLC 134. Cockerill J concluded that none of these cases supported the claimants' position, but, with respect, not for the most persuasive of reasons:

- In *DPP v Ray*, a student went to a Chinese restaurant without paying for the food which he had eaten. He was convicted for dishonestly obtaining a pecuniary advantage by deception contrary to s 16(1) of the Theft Act 1968. Cockerill J doubted whether this authority contained relevant reasoning for a civil claim in fraudulent misrepresentation but, in any event, considered that the facts in *Ray* went beyond a mere assumption (at [113]):

> "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. This indicates that what is happening is more than an assumption."

This seems like a stretch. Of course, a waiter would assume that a customer would act honestly and not try to run off before settling the bill. But it is doubtful that there is any active consideration of the point. The use of terms "almost automatically" and "quasi-automatic" demonstrate the difficulty in finding any contemporaneous thought by the waiter. It seems to us that *Ray* is really a case where a representee operates on an assumption and the conduct of the representor reinforces the assumption.

- In *Spice Girls v Aprilia*, the Spice Girls were contracted for a promotional photo shoot with scooters. Geri Halliwell had already announced her intention to leave the group internally, but it was not publicly announced until after the photo shoot. As the Court of Appeal noted "no one at [Aprilia] gave any consideration at the time to what representations were to be implied into the statements and conduct of the Spice Girls" (at [67]), yet inducement in respect of the implied representation was upheld. Cockerill J concluded that, because no awareness point was taken in the case, this *dicta* did not take the claimants' case any further (at [117]). This seems like quite a thin point:

the fact that the Court of Appeal approved a finding directly contradictory to the proposition being advanced by Barclays raises legitimate questions about that proposition. It would appear on the reasoning in *Leeds v Barclays* that *Spice Girls v Aprilia* was wrongly decided.

- In *IFE*, the claimant's witness gave evidence that he had not understood that any representation was being made at the time. On appeal, Waller LJ expressed doubt that this was relevant to the question of reliance, as opposed to the question of whether the representations had been made (at [28]). Cockerill J declined to follow the point on the basis that it was *obiter*, the point had not been "properly in focus", and had been cited in the previous LIBOR cases without it previously having been suggested to stand for the proposition that awareness was not a freestanding requirement (at [130]). Again, these seem like thin points; it should be recalled that the case law to the contrary relied upon by the bank in *Property Alliance Group* and *Marme* was also *obiter*. It might fairly be asked why *obiter* comments of these first instance decisions carried more weight than *obiter* comments going the other way in two Court of Appeal decisions.

Cockerill J herself provides the answer to that latter question later in the judgment: she noted that *PAG* and *Marme* involved materially the same fact pattern (allegations of LIBOR/EURIBOR rigging), the same pleaded representations and were essentially indistinguishable from the present case (at [150]-[152]). If it were not for these cases, she accepted that (at [149]):

> "… 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."

There are other parts of the judgment where the LIBOR context appears to have carried particular weight with Cockerill J. She emphasised that misrepresentation claims arose in many different contexts (at [51]) but that, given *PAG* and *Marme* were concerned with essentially the same LIBOR rigging allegations as in the case before her: "I need to pay very careful mind to [them]" and "I should be cautious from departing too far from them" (at [75]). It was essentially because of the previous authorities in the same LIBOR context that the judge was sufficiently confident to be able to strike out the claims.

THE WIDER IMPLICATIONS OF THE DECISION

In these circumstances, it might fairly be asked whether the decision in *Leeds v Barclays* has a wider relevance beyond the LIBOR line of case law. Despite what we have noted above, on the face of the judgment, Cockerill J held that there is an awareness requirement in all misrepresentation cases. However, significantly, how it may be satisfied may vary depending on the context. In particular, in cases where the conduct "spoke for itself" – ie only a single message would be conveyed by that conduct – Cockerill J considered it would be "artificial" to insist on a freestanding requirement that the recipient of the representation must have given some thought to that representation (at [147]).

In our view it is doubtful that there is a *rule* that the representee must satisfy a factual test of subjective awareness. The fact that the court felt compelled to carve out unambiguous conduct when formulating an awareness requirement suggests that there may be something wrong with the requirement itself. It is not difficult to think of examples where that requirement simply will not work. For example, if a borrower completes an application form by inputting deliberate false representations and it is accepted by computer processing and without human review, can the lender bring a deceit claim? It would be absurd if there were no claim, but if there is a requirement of conscious awareness no claim would be possible.

It also might be thought puzzling that there should be any awareness requirement in a misrepresentation claim given *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2017] AC 142. There, the Supreme Court held that the representation does not even have to have induced a mistake in the claimant. If mistaken belief in the misrepresentations is not required, why should there be a distinct requirement for awareness? However, *Zurich* has since been confined by the lower courts to unusual cases where the claimant acts on the basis that the misrepresentation may be mistakenly accepted as true by a third-party decision-maker to whom it is addressed. In a paradigm case, where the representation is addressed to the claimant, the question remains whether it would "cause someone to accept the truth of the matters represented": *School Facility Management Limited v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm) [400]-[401] (Foxton J). Put another way, normally a misrepresentation must induce a mistake before it becomes actionable: "the representation so made must have had the effect of deceiving the [claimant]; and moreover, the [claimant] must have trusted to that representation": *Attwood v Small* (1838) 6 Cl & F 232 (HL) 448 (Lord Brougham).

Viewed from this perspective, the underlying issue before the court in *Leeds v Barclays* really is this: what counts as a mistake for the purposes of a claim in misrepresentation? In other contexts, the law does not limit mistakes to incorrect conscious beliefs. For rescission of gifts by way of deed in equity, an incorrect assumption suffices: see *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [105] (Lord Walker). In the context of a claim in unjust enrichment on grounds of mistake, there is an argument that even causative ignorance may suffice. There seems to us to be no good reason why a conception of mistake that is *narrower* than *Pitt v Holt* should be adopted in misrepresentation claims. It should suffice in an implied misrepresentation claim that the implied misrepresentation induced, Feature

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at the very least, an incorrect assumption. That may even take the form of materially contributing to a pre-existing assumption.

This point about misrepresentation as induced mistake is perhaps obscured by framing the issue as being about reliance. The real essence of reliance is causation – the induced mistake must cause entry into the relevant transaction. Can a person be influenced by a representation of which they are subjectively unaware? The answer must be yes. It clearly did not cross the sponsor's mind in *Spice Girls* that Geri Halliwell might be about to leave the group; yet but for that assumption the sponsorship deal would not have been concluded. The exception which Cockerill J recognised in *Leeds* itself for conduct which "spoke for itself" is also an illustration that an incorrect assumption can have causative effect.

For these reasons we consider that the better formulation of the test for reliance in misrepresentation claims requires:

- the claimant to mistakenly believe in the truth of the representation or at least mistakenly assume it to be true; and
- such mistake to materially cause the claimant to enter into the contract.

That is the most coherent way to understand the traditional language that a representation must have "operated on the mind" of the representee. Actual awareness of the representation *per se* is neither sufficient nor necessary. A person may be aware of the representation and deliberately choose to ignore it. A person may be unaware of the representation and still be influenced by the representation. For these reasons, in our view *Leeds v Barclays* was not correctly decided.

HOW IS THE RELIANCE TEST UNDER S 90A FSMA DIFFERENT FROM COMMON LAW?

Under Sch 10A para 3(1) to FSMA an issuer of securities is liable to a person who "acquires, continues to hold or disposes of securities in reliance on published information". There is considerable debate as to what "in reliance" means under s 90A. A crucial area of uncertainty is whether an investor may rely upon the published information without reading it, but indirectly relying on such material through price reliance. One view is that such reliance would be insufficient at common law and so it should also fail under s 90A which is the statutory equivalent. The better view is that s 90A is not shackled to any common law notions of reliance (which in any event, as explained above, should not require conscious awareness of the representation) and a wider construction is required to achieve the purpose of the statute.

First, unlike the common law, s 90A often will involve failure to comply with a duty to speak imposed upon issuers (under the Disclosure and Transparency Regulations) and so even silence may give rise to an implied representation. Section 90A creates a remedy based on pure omissions where no such remedy exists at common law. Pursuant to para 3(1)(b)(ii) of Sch 10A, a cause of action may be brought based upon the omission of required information in published information. It may be sufficient for a claimant to show that, had the omitted material been brought to its attention, it would have behaved differently. A more restrictive approach would be to require the claimant to have read or otherwise relied upon the publication which ought to have included the omitted material. In other words, the claimant will need to show that it mistakenly believed that the publication was full and truthful. This has a parallel to the common law rationale underpinning misrepresentation actions, albeit that the concept of mistake at common law now appears to be implicitly shrunken by *Leeds v Barclays*.

Second, s 90A was introduced to comply with the UK's obligations under the Transparency Directive 2004/109/EC (Directive). The court should therefore construe the statute so as to achieve the purposes of the Directive:

- enhanced investor protection; and
- increased market efficiency.

To achieve these purposes, reliance can and should be construed to include indirect reliance upon price, since otherwise the vast majority of investors (who are passive and do not read published information) will have no remedy. But would such an approach mean that there is no reliance requirement, since in practice all investors rely on price? We think not for two reasons: first, not all investors rely on price when investing (some will not be able to show even an assumption as to price) and, second, precisely how the court formulates indirect reliance will in practice mean some investors cannot bring a claim. These issues remain as yet undecided but is only a matter of time before a s 90A claim reaches a first instance judgment on this highly significant threshold issue.

Third, the context in which s 90A operates also suggests that a different approach to the common law is appropriate. The securities in question will be intermediated and the ultimate beneficial owner (UBO) will have no legal title to the securities. For s 90A, a UBO's reliance upon the published information will be sufficient, even though there was no reliance by the entity with legal title: see *SL Claimants v Tesco Plc* [2019] EWHC 2858 (Ch). This is an exception to the "no look through" principle. Accordingly, any claimant who has a proprietary interest (even indirect) in the securities and who relied upon the published information may in principle bring a claim. In the context of dealing in intermediated securities, it is more likely that some parties in the proprietary chain may not have read the published information, but that should not prevent them from bringing a claim; an incorrect assumption, ie price reliance, should suffice. ■

Further Reading:

- *Marme v RBS*: the end for LIBOR manipulation claims? (2019) 7 JIBFL 441.
- What does Lloyds/HBOS tell us about ss 90 and 90A of FSMA? (2020) 2 JIBFL 80.
- LexisPSL: News: Misrepresentation requires "active appreciation" – assumption is not enough (*Leeds City Council v Barclays*).