

Dispute Resolution  
Case Law Update  
Rosling King LLP



### Background

Royal Bank of Scotland plc (“RBS”) was the principal provider of commercial banking services to Property Alliance Group Ltd (“PAG”), a property investment and development business.

The claim arose from four interest rate derivative products (“Swaps”) that RBS sold to PAG between 2004 and 2008. Each of the Swaps was referenced to the GBP 3 month London Interbank Offered Rate (“LIBOR”). RBS was also retained by PAG to provide financing facilities, including investment facilities.

In spring 2010, the management of PAG’s banking affairs was transferred to RBS’s Global Restructuring Group (“GRG”).

In June 2011, PAG terminated the Swaps, which triggered a mark-to-market (“MTM”) break cost of £8.261 million. PAG also agreed refinancing terms with RBS and entered into a composite facility.

### The Claims

PAG’s claims against RBS fell into three separate categories:

The Swaps claim: PAG claimed that it had been missold the Swaps, alleging that RBS had failed to provide a solution to, or protect them from, its interest rate risk. PAG asserted that RBS’s actions had left it in a worse financial position than if they had not entered the Swaps. It was also alleged by PAG that the Swaps could not accurately be said to have been hedging instruments. As such, PAG claimed for rescission, damages arising out of RBS’ representations, and breaches of contract in connection with the sale of the Swaps.

The GRG claim: PAG claimed damages for breach of contract arising out of its transfer from the RBS management team in Manchester, to the GRG, and its subsequent management by the GRG.

The LIBOR claim: PAG claimed for rescission of the Swaps, damages for misrepresentation, and breach of contract arising out of RBS’ alleged participation in, and knowledge of, the manipulation of LIBOR rates by both RBS and other LIBOR panel banks. PAG asserted that, had it known of any LIBOR manipulation it would not have entered into the Swaps that were LIBOR based.

### The Decision

In reaching its decision, the High Court (the “Court”) considered each category of claim in turn. The key points of the judgment are summarised below:

#### The Swaps Claim decision:

- The parties agreed that RBS did not owe PAG a general duty to advise in relation to the Swaps and as such PAG was contractually prevented from bringing such a claim. The Court rejected PAG’s claims that RBS owed a duty wider than that to take reasonable

care not to mis-state the facts. The Court found that RBS was under no obligation to provide PAG with a “scenario analysis” of potential break costs, the MTM value of any of the Swaps, or details of the size of the internal credit line assigned by RBS to the Swaps.

- All of PAG’s allegations of misrepresentation, including representations that the products were “hedged” or would “protect” PAG and that the Swaps were “suitable”, were dismissed. The Court held that the meaning of words such as “hedge” and “protect” had to be considered in the context of the non-advisory nature of RBS’s role and accordingly PAG was contractually prohibited from advancing its claims.

**The GRG Claim decision:**

- PAG alleged that the Customer Agreements between it and RBS were subject to implied terms that RBS would act in good faith and not in a commercially unacceptable or unconscionable way, with respect to the performance of the Customer Agreements and also RBS’s exercise of various powers and discretions. The Court rejected this argument and held that there was no implied term that RBS would act in good faith.
- The Court also held that there were no implied terms in the parties’ Customer Agreements, which imposed limitations on various alleged contractual discretions enjoyed by RBS. The Court held that the Customer Agreements did not contain the necessary elements to allow there to be the alleged terms.
- Even if the Court was wrong about the existence of the alleged implied terms, it held that it would, in any event, have rejected PAG’s claims that RBS had breached those terms by acting in bad faith and/or irrationally.

**The LIBOR Claim decision:**

- The Court found that there was no implied representation and rejected PAG’s argument that the proffering of a transaction referenced to LIBOR would give rise to any implied representation about how LIBOR was set. The Court further found that the alleged implied representations had not actually been understood by the relevant individuals at PAG. Therefore, there was nothing to support the contention that PAG had entered into the Swaps in reliance upon the LIBOR representation.
- The Court also held that RBS was not involved in any so-called “trader manipulation” of GBP LIBOR and, consequently, any implied term in the Swaps relating to LIBOR had not been breached.
- The Court dismissed PAG’s allegations that the effects of the financial crisis, including a severe lack of liquidity, meant that the alleged LIBOR representations were false. This was an assertion which the Court found stemmed from a misunderstanding of what LIBOR was.

**Commentary**

This judgment does not introduce any new law, but is nonetheless highly significant in that it

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provides the first detailed indication as to how the courts will likely approach LIBOR manipulation cases.

Although all of PAG's claims were dismissed, this was only after a very detailed consideration of the witness evidence of both parties and relevant case law. However, it is a welcome decision for institutions involved in the selling of Swaps and products linked to LIBOR. It appears to highlight the Courts' reluctance towards implying terms into commercial contracts agreed between sophisticated parties and a reluctance to accept that the tendering of a transaction referenced to LIBOR will give rise to any implied representation about how LIBOR is set.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.