Case No: A3/2013/0785, A3/2013/0788 & A3/2013/0862

Neutral Citation Number: [2013] EWCA Civ 1372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE FLAUX &THE HONOURABLE MR JUSTICE COOKE
[2012] EWHC 3093 (Comm) & [2013] EWHC 471 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2013

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL
and
THE RIGHT HONOURABLE SIR BERNARD RIX

- -

Between:

Claim No. 2012 Folio 1259 A3/2013/0862	**GRAISELEY PROPERTIES LIMITED & ORS**	**Respondents**
	-and-	
	BARCLAYS BANK PLC	**Appellants**
	-and-	
Claim Nos. 2011 Folio 1199 & 2012 Folio 464 A3/2013/0785	**1) DEUTSCHE BANK AG**	**Respondents**
	2) DBS BANK LIMITED	
	3) BBK B.S.C.	
	4) SHINHAN BANK	
	5) LIREF (SINGAPORE) PTE LTD	
	6) PT. BANK NEGARA INDONESIA (PERSERO) TBK, TOKYO BRANCH	
	7) BMI BANK BSC	
	8) DB INTERNATIONAL (ASIA) LIMITED	
	9) AXIS SPECIALTY LIMITED	
	10) DB TRUSTEES (HONG KONG) LIMITED	
	- and -	
	1) UNITECH GLOBAL LIMITED	**Appellants**
	2) UNITECH LIMITED	
	-and-	
	DEUTSCHE BANK AG	**Respondent**
	-and-	
	UNITECH LIMITED	**Appellant**

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Mr Robin Dicker QC & Mr Jeremy Goldring QC (instructed by **Clifford Chance LLP**) for the **Appellants Barclays Bank Plc**
Mr Stephen Auld QC, Mr Farhaz Khan & Mr Simon Oakes (instructed by **Cooke, Young & Keidan LLP**) for the **Respondents Graiseley Properties Ltd & ors**
Mr John Brisby QC, Mr Alastair Tomson & Mr Michael D'Arcy (instructed by **Stephenson Harwood LLP**) for the **Appellants Unitech Global Ltd and Unitech Ltd**
Mr Richard Handyside QC & Mr Adam Zellick (instructed by **Allen & Overy LLP**) for the **Respondents Deutsche Bank AG & Ors Folio 2011 1199**
Mr Mark Hapgood QC, Mr Timothy Howe QC & Mr Adam Sher (instructed by **Freshfields Bruckhaus Deringer**) for the **Respondent Deutsche Bank AG Folio 2012/464**

Hearing dates: 15th, 16th & 17th October 2013

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Judgment

Lord Justice Longmore:

Introduction

1. These two appeals result from the distortion or manipulation of the London Inter-Bank Offered Rate ("LIBOR") frequently used as a reference rate in the calculation of interest in loan agreements or swap agreements. In both the current appeals banks are endeavouring to recover sums due under such agreements and the borrowers (or their guarantors) have sought permission to amend their pleadings to allege (inter alia) that the banks made implied representations as to the efficiency of or the non-manipulation of LIBOR. In the Graiseley v Barclays case Flaux J on 29th October 2012 gave permission for such amendments to be made. In the two Deutsche Bank cases Cooke J on 28th February 2013 declined to follow Flaux J and refused permission to make amendments in the two cases but gave permission to appeal. In the light of that decision of Cooke J Barclays, despite the fact that their case had proceeded to disclosure of documents, sought an extension of time in which to seek permission to appeal Flaux J's decision and Moore-Bick LJ on 22nd April 2013 granted permission to appeal; he encouraged the listing of both such appeals at the same time. We heard argument first in the Deutsche Bank cases but in this judgment we will consider Graiseley v Barclays first since it is that case which is the most advanced and indeed has a trial date in April 2014.

2. LIBOR is defined by the British Bankers' Association as:-

> "The rate at which an individual contributor panel bank could borrow funds were it to do so by asking for and then accepting interbank offers in reasonable market size just prior to 11.00 a.m. London time."

There is a number of panel banks for each currency of which Barclays is one. Each bank submits a rate and an average of rates is then calculated after omitting a number of the highest and the lowest rates.

3. The recent report of the Treasury Select Committee quotes the finding of the Financial Services Authority ("FSA") as to the significance of LIBOR and the related Euro rate of EURIBOR, describing them as:-

> "Benchmark reference rates that indicate the interest rate that banks charge when lending to each other. They are fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts."

The Graiseley Action

4. The Graiseley case concerns, in effect, two such derivatives contracts which the claimants (who are largely owners and/or managers of care homes in the Midlands) were obliged to enter into as a condition of Barclays granting the relevant loan facilities. One of these contracts was a conventional swap; the other with somewhat different characteristics has been called "the collar". Part of the case of the Graiseley claimants is that these contracts were unsuitable contracts for them to have made, a

fact that relevant Barclays personnel knew full well at the time the contracts were made. These allegations will have to be tried in any event.

5. In its Final Notice dated 27th June 2012, the FSA identified two distinct phases of wrongdoing on the part of Barclays. The first concerned submissions from Barclays to the British Bankers' Association ("BBA") from 2005 to 2008, which took into account requests by interest rate derivatives traders to the submitters (who were responsible for submitting the LIBOR rates to the BBA) which the FSA found were motivated by profit. Secondly, the FSA found that during the financial crisis from about September 2007 until about May 2009, on instructions from senior management of Barclays, the submitters lowered their LIBOR submissions to the BBA, in response to negative media comments about the bank, a process which is described throughout the evidence before the Treasury Select Committee as "low-balling". This court received, without objection, a considerable amount of further evidence in relation to Barclays and LIBOR which may arguably show knowledge of what was happening at a high level within Barclays.

6. The specific implied representations relied upon by the Graiseley claimants and objected to by Barclays are set out in the draft amended pleading at paragraph 9 and they are as follows:-

> "(1) On any given date up to and including the date of the Swap and the date of the Collar, LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 a.m. on that date.
>
> (2) 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, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11.00 a.m. on that date.
>
> (3) Barclays had not on any given date, up to and including the date of the Swap and the Collar:
>
> (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
>
> (4) 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)."

7. The pleading goes on to refer to a rate that was being measured in part by the bank's own personal interest. The pleading then sets out how the representations were made by the agents of the bank, that is to say, for present purposes, those managers and staff in the local branches in the Black Country with whom the claimants dealt, in documents (including drafts of the various agreements which referred on a number of occasions to LIBOR and to the setting of the so-called screen rate), a series of emails passing between the bank and the claimants, and meetings.

8. Then the pleading sets out in detail at paragraph 12 the respects in which the representations are said to be false and those track in large measure the detailed findings made by the regulatory authorities. There is then a plea in paragraph 12A setting out why those representations are alleged to be fraudulent; what is pleaded is relevant knowledge and/or recklessness in that Barclays was proposing to potential customers that they enter into financial transactions containing obligations measured by reference to LIBOR such that the LIBOR representations were being made, or might be made, to the said customers, and that those representations were or might be false.

9. Then the claimants say that, prior to disclosure, the best particulars they can give of whose knowledge it was, or which individuals had the relevant knowledge, is a number of categories of managers and others within the bank, which again tracks the conclusions reached by the regulatory authorities, specifically the findings made by the regulatory authorities about the involvement of senior management of the bank together with the involvement of derivatives traders who made requests to the submitters and also the involvement of the compliance department. There is then a specific plea that the claimants relied on the representations through their chief executive officer, Mr Hartland, and also that the bank intended the claimants to rely upon the representations and was well aware that the claimants or a class of persons which included the claimants would rely upon the representations.

10. Flaux J dealt with three objections raised by the bank to the granting of permission to amend. First, whether there was any basis for implication at all; secondly, whether or not it could be said that it must have been obvious to the people in Barclays who are alleged to have had the relevant knowledge that the representations were being made and were false; and thirdly, whether any representations were made with Barclays' authority. No issues arise in relation to the second and third objections any longer at this stage in the proceedings.

11. In relation to the first objection the judge held that, if Barclays were to oppose the applications successfully, it had to show that there was no prospect of success. He then went on to hold that Barclays could not show it had "an unanswerable case that the implied representations were not made". The judge also gave permission to the

claimants to rely on an implied term to the effect that Barclays would not, during the currency of the contracts, manipulate or make false returns in respect of LIBOR. Breach of such a term would, of course, only result in a claim for damages, not rescission.

The Deutsche Bank actions

12. The first Deutsche Bank action has been called "the Lenders' action". In it Deutsche Bank ("the Bank") and eight other lenders claim under a credit facility agreement made with Unitech Global Ltd ("UGL") on 24th September 2007 as amended by a term sheet dated 22nd October 2010 and against Unitech Ltd ("Unitech") as UGL's parent company guarantor. US$150 million was advanced and, as a result of various failures to pay instalments due, or other events of default, repayment was accelerated so that the total is allegedly due to the lenders. The second to ninth claimants (together with the Bank "the lenders") are said to have acceded to the credit facility agreement by virtue of an assignment or transfer of rights or novation pursuant to clause 29 of that agreement.

13. In the second action which has been called "the Swap action" the Bank claims $11 million, approximately, from Unitech under the same guarantee of UGL's obligations in respect of an interest rate swap agreement, which incorporated the terms of an ISDA 2002 Master Agreement. The defendant's case is that this swap agreement was proposed by the Bank as a hedge for UGL against interest rate fluctuations and that the credit facility agreement and the swap agreement were part of a single package deal. Unitech and UGL contend (as do the claimants in the Graiseley action) that the swap agreement was represented and recommended as suitable for UGL when it was not, particularly by reference to the terms of the credit facility agreement itself. It is alleged that the misrepresentations induced the two agreements and were made in breach of a duty of care owed by the Bank.

14. The credit facility agreement provided for payment of interest by reference to LIBOR, which was defined in the definitions section by reference to the applicable screen rate as displayed for the relevant currency and term, or overdue amount, on the appropriate page of the screens of Reuters or Telerate.

15. Under the interest rate swap confirmation, the obligations related to six month US dollar LIBOR, as set out in the annex to the ISDA 2002 Master Agreement:-

> "The rate for a Reset Date will be the rate for deposits in US Dollars for a period of the Designated Maturity, which appears on the Telerate, Page 3750, as of 11.00 a.m., London time on the day that is two London Banking Days preceding that Reset Date. If such rate does not appear on the Telerate Page 3750, the rate for that Reset Date will be determined as if the parties had specified US LIBOR Reference Banks as the applicable Floating Rate Option."

16. It is (or may be) relevant to know that there are currently LIBOR reference rates for ten different currencies. For each currency there is a rate for each of 15 different maturity periods (or "tenors") ranging from overnight to one year. There are, therefore, 150 different LIBOR rates in total.

17. Prior to February 2011, the USD LIBOR panel consisted of 16 contributor banks (of whom the Bank was one) and the USD LIBOR rates were calculated in the following manner:-

> "(1) Each contributor bank would submit its USD LIBOR submissions to Thomson Reuters based on the following question: "at what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m."
>
> (2) Upon receiving submissions from the contributor banks, Thomson Reuters would exclude the four highest and the four lowest rates. The remaining (eight) rates were, arithmetically averaged to produce the USD LIBOR rates.
>
> (3) Accordingly, high and low "outlying" submissions were excluded from the published LIBOR rates."

18. In both Deutsche Bank actions, the borrowers wanted to plead implied representations as set out in paragraph 5GC of a proposed amended pleading in the lenders' action and paragraph 36C of a proposed amended pleading in the swap action, which were for convenience of the argument labelled (A) – (D), albeit numbered (1) – (4) in the pleading itself. They were that:-

> "(A) LIBOR was a genuine average of the estimated rate at which members of the Panel could borrow from each other in a reasonable market size just prior to 11.00 a.m. London time on any given day, as set out in the last sentence of paragraph 5GA above.
>
> (B) The LIBOR rate itself was a rate based on the respective Panel member banks' submissions to Thomson Reuters which were good faith accurate estimates of the rate at which they could actually borrow from each in a reasonable market size just prior to 11.00 a.m. London time on any given day, as set out in the last sentence of paragraph 5GA above.
>
> (C) The first claimant had not itself acted, was not acting, and had no intention of acting, in a way which would, or would be likely to, undermine the integrity of LIBOR.
>
> (D) The first claimant was not aware of any conduct (either its own, or of other banks on the Panel) which would, or would be likely to, undermine the integrity of LIBOR."

19. Cooke J referred to a test for the making of representations formulated by Toulson J in IFE Fund v Goldman Sachs International [2007] EWCA Civ 811:-

> "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."

20. Cooke J then said that pleas (A) and (B) sought to place in the mouth of one bank a statement about the overall integrity of the LIBOR system or of an individual bank's contributions to it which was unrealistic and did not meet Toulson J's test. He accepted that pleas (C) and (D) were "a little more promising at first blush" but said that in the context of the credit and the swap agreements no representation was being made in relation to the means by which the LIBOR figure was compiled. He was prepared to allow a plea of an implied term that the bank would do nothing during the existence of the contracts to jeopardise the ordinary and proper assessment of the relevant LIBOR rate to which the transactions were linked but not the plea of an implied representation based merely on the fact that the bank was a panel bank and offered or made a financial transaction linked to LIBOR. To imply such a representation would, he said, amount to a duty to disclose any information which the bank had which might undermine the integrity of LIBOR. He said that pleas (C) and (D) had, therefore, no prospect of success. He was aware of Flaux J's decision but said he got no assistance from it because every case, in which an implied representation was allegedly applicable, would turn on its own facts and on the facts before him:-

> "one cannot look at what the banks knew and what the banks did in order to spell out what a reasonable person in the position of the defendants would have inferred was being implicitly represented as existing fact by [the Bank] when contracting by reference to a LIBOR rate."

He also refused permission to allege a negligence or breach of warranty claim.

21. Cooke J then referred to the fact in the Lenders' action that there were 9 claimants other than Deutsche Bank which had acceded to the credit facility agreement, the third and seventh claimant having done so by way of novation. He pointed out that the effect of novation is to extinguish the existing agreement and create a new contract. Any right to rescind in relation to the credit facility agreement was therefore lost when that agreement was extinguished and replaced by the new novated agreements. Although this part of the decision was expressed briefly in para 50 of the judgment, it has assumed considerable importance in this litigation because, armed with this conclusion about novation in their favour, Deutsche Bank and the other lender claimants proceeded to apply for summary judgment in respect of the availability of rescission in relation to the existing pleas of misrepresentation regarding the unsuitability of the swap transaction. This was granted by Teare J on 20th September who held that the decision about novation operated as an issue estoppel between the parties. He permitted the defendants to allege an implied term of the contracts in the following terms:-

> "5GA. It was an implied term or contractual warranty in both the Credit Agreement and the Swap (the LIBOR implied term)

> that the first claimant would not, either on its own or in conjunction with another Panel member, seek to manipulate the setting of the relevant LIBOR rate by which interest rates in the agreements were set, whether by making false submissions as to the estimated rate at which it could borrow from other Panel members in that currency and tenor in reasonable market size just prior to 11.00 a.m. London time on any given day to Thomson Reuters or otherwise. Such a term is to be implied on the basis that its existence would be obvious and in order to give commercial efficacy to the relevant agreements."

But any damages ensuing from such breach could only operate as a counterclaim which was not to prevent immediate judgment for the sums now due (or most of them) in both the lenders' action and the swap action. Cooke J's decision on novation has thus proved disastrous for the Unitech defendants and it was the focus of much more detailed argument before us than before Cooke J from both Mr Brisby QC for the Unitech appellants and Mr Handyside QC for Deutsche Bank and the other lender respondents.

Submissions

22. It fell to Mr Hapgood QC for Deutsche Bank and Mr Dicker QC for Barclays to submit that the proposed amendments should not be allowed. Mr Hapgood sought to defend Cooke J's judgment while Mr Dicker sought to attack Flaux J's judgment. Their submissions had a considerable degree of overlap and may be considered together. They were to the following effect:-

    i) the amendments did not satisfy the test for implied representations set out by Toulson J in the IFE Fund case;

    ii) the fact that there had been a proposal by the banks that the loan agreement and the swap agreements should refer to LIBOR for the purpose of calculating interest rates did not mean that any representation about LIBOR or a particular bank's participation in LIBOR was being impliedly made;

    iii) that was all the more the case when one read the detail of the agreements and saw that they included entire agreement clauses and disclaimers of any intention to make any representations;

    iv) such clauses or disclaimers could not be defeated by a plea of fraud because the clauses prevented any assertion that any representation was made; and

    v) the most that any allegation of fraud amounted to was an allegation of fraudulent non-disclosure, a cause of action unknown to English law.

    Mr Stephen Auld QC for the Graiseley claimants in the Graiseley action and Mr Brisby for the Unitech defendants in the Deutsche Bank actions submitted the proposed amendments were all arguable and should be permitted.

23. On the novation aspect of the Deutsche Bank actions, Mr Brisby submitted

    i) the novation point was not open to the Lenders on the pleadings;

ii) on the proper construction of both the original credit agreement and the agreements by which the other claimants (including the 3rd and 7th claimants ("BBK and BMI")) had acceded to the credit agreement, the accession was by way of assignment, not of novation; since assignees took subject to equities, the claim for rescission was not barred; and

iii) in any event, the credit agreement, if novated at all, was only partially novated in the case of BBK and BMI so that the right of rescission remained against all the other claimants.

Mr Handyside submitted:-

i) the Lenders' pleadings needed no amendment and, in any event, the novation point would more naturally be made in reply;

ii) the documents by which BBK and BMI came to participate into the loan were expressed to be novations; "novation" was a term of legal art which meant that the original credit agreement was extinguished and a new agreement came into existence in its place; and

iii) if English law had any concept of partial novation, it could not apply in this case.

Proposed pleas of implied representations

24. I have concluded, with great respect to Cooke J, that the proposed pleas of implied representation in both cases are arguable. In those circumstances it is probably as well to say as little as possible because I would not want to inhibit in any way the approach or decisions of the trial judge.

25. Put very shortly, 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. If the LIBOR scandal had occurred before these cases were begun and what are now the proposed pleas had been incorporated in original pleadings, they would not, in my view, be amenable to a strike out application and it is not surprising that Barclays did not, at first, seek to appeal Flaux J's decision.

26. We received sustained submissions about the true ratios of Ward v Hobbs (1878) 4 App. Cas 13 and Bell v Lever Bros [1932] AC 161 to the effect that there is no obligation to disclose one's own dishonesty or breach of statutory duty; such submissions would be inappropriate on a strike out application and, in my view, equally inappropriate to an application for permission to amend. That may be the law where nothing is said and there is no duty to speak, but even that is not wholly free from doubt see: ING Bank N.V. v Ros Roca S.A. [2011] EWCA Civ 353 and [2012] 1 WLR 472 paras 90-96 per my Lord, Rix LJ (as he then was).

27. In the present case, however, the banks did propose the use of LIBOR and it must be arguable that, at the very least, they were representing that their own participation in the setting of the rate was an honest one. It is, to my mind, surprising that the banks do not appear to be prepared to accept that even that limited proposition is arguable.

28. 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.

29. The banks' reliance on the disclaimer and entire agreement clauses is arguably misplaced when the allegation is that the contracts were fraudulently induced, as Cooke J (para 19) appeared to accept. At least, the point cannot be decided in the banks' favour on a summary basis. It must be said, however, that Unitech defendants' pleading on fraud is not formulated very precisely at the moment and should be formulated with greater precision after disclosure.

30. The banks' submissions boiled down to saying that they were prepared to accept that they would do nothing dishonest or manipulative during the term of the contract and that should be enough for any counterparty. I can only say that, in my view, it is arguably not enough. If the day after the contracts had been made, the banks had told their counterparties that they had been manipulating LIBOR in the past and intended to do so in the future, but would be happy to pay any loss that their borrowers could prove, the borrower would (arguably) be sufficiently horrified so as to think he would be entitled to rescind the deal. The law should strive to uphold the reasonable expectations of honest men and women. If in the end it cannot do so, that should only be after a proper trial.

31. The banks are, no doubt, on much stronger ground in relation to the first alleged representation in the Graiseley case and representations (A) and (B) in the Deutsche Bank case. They can say with considerable force that the proposed representations amount to statements about the conduct of banks other than themselves and no one could expect any statement to that effect to be made by one bank proposing LIBOR. But I do not consider it the function of this court at this stage of the proceedings to be too selective about the precise representations which the parties wish to advance. The trial judge should be able to discern and, if necessary, judge between the various alleged representations once he has a full picture of the disputes between the parties. For the same reasons I would not refuse the subsidiary amendments relating to negligent misrepresentation and breach of warranty.

Novation

32. That leaves the novation point in the Deutsche Bank case, which has assumed an importance it did not appear to have in front of Cooke J as a result of the Bank's successful application for summary judgment to Teare J.

33. It is, of course, common form for one bank to make a loan and then seek to encourage participation in the loan from other lenders. No doubt any accession by a new lender could be done by novation in the strict legal sense of that term by extinguishing any previous contract (including any contract already acceded to by previous new lenders) and creating a new contract each time there is a new accession. One may wonder what the commercial point of such an elaborate arrangement would be, unless it was the deliberate intention of the parties to defeat any equities (such as the right to rescind) which might apply to the original contract. But strict legal novation is

obviously a conceptual possibility. The question is whether that is what was contemplated and did occur in the present case.

34. Naturally enough the credit agreement made express provision for what it called "Changes to the Parties":-

> "**29.1 Assignments and transfers by Obligors**
>
> Neither Obligor may assign or transfer any of its rights and obligations under the Finance Documents without the prior consent of all the Lenders.
>
> **29.2 Assignments and transfers by Lenders**
>
> Subject to the following provisions of this Clause, a Lender (the **Existing Lender**) may at any time;
>
> (a) assign any of its rights; or
>
> (b) transfer either by way of novation or by way of assignment, assumption and release any of its rights or obligations under this Agreement,
>
> to any other person (the **New Lender**).
>
> **29.3 Conditions to assignment or transfer**
>
> (a) Unless the Company and the Facility Agent (acting on the instructions of the Majority Lenders) otherwise agree, a transfer of part of a Commitment or part of its rights and obligations under this Agreement by the Existing Lender must be in a minimum amount of US$1,000,000.
>
> (b) The Facility Agent is not obliged to enter into a Transfer Certificate or otherwise give effect to an assignment or transfer until it has completed all know your customer requirements to its satisfaction. The Facility Agent must as soon as reasonably practicable notify the Existing Lender and the New Lender if there are any such requirements.
>
> (c) If the consent of the Company is required for any assignment or transfer (irrespective of whether it may be unreasonably withheld or not), the Facility Agent is not obliged to enter into a Transfer Certificate if the Company withholds its consent.
>
> (d) Unless the Facility Agent otherwise agrees, the New Lender must pay to the Facility Agent for its own account, on or before the date any assignment or transfer occurs, a fee of US$2,000.

(e) Any reference in this Agreement to a Lender includes a New Lender but excludes a Lender if no amount is or may be owed to or by it under this Agreement.

29.4 Procedure for assignment of rights

An assignment of rights will only be effective on receipt by the Facility Agent of written confirmation from the New Lender (in form and substance satisfactory to the Facility Agent) that the New Lender will, in relation to the assigned rights, assume obligations to the other Finance Parties equivalent to those it would have been under if it had been an Original Lender.

29.5 Procedure for transfer using a Transfer Certificate

(a) In this Sub-clause:

Transfer Date means, in relation to a transfer, the later of:

i) the proposed Transfer Date specified in that Transfer Certificate; and

ii) the date on which the Facility Agent executes that Transfer Certificate.

(b) A transfer of rights or obligations using a Transfer Certificate will be effective if:

i) the Existing Lender and the New Lender deliver to the Facility Agent a duly completed Transfer Certificate; and

ii) the Facility Agent executes it.

(c) Where a transfer is to be effected using a novation on the Transfer Date:

i) The New Lender will assume the rights and obligations of the Existing Lender expressed to be the subject of the novation in the Transfer Certificate in substitution for the Existing Lender;

ii) the Existing Lender will be released from those obligations and cease to have those rights; and

iii) the New Lender will become a Lender under this Agreement and be bound by the terms of this Agreement as Lender.

(d) Where a transfer is to be effected by an assignment, assumption and release, on the Transfer Date:

i) the Existing Lender will assign absolutely to the New Lender the Existing Lender's rights expressed to be the subject of the assignment in the Transfer Certificate;

ii) the New Lender will assume obligations equivalent to those obligations of the Existing Lender expressed to be the subject of the assumption in the Transfer Certificate;

iii) to the extent the obligations referred to in subparagraph (ii) above are effectively assumed by the New Lender, the Existing Lender will be released from its obligations referred to in the Transfer Certificate; and

iv) the New Lender will become a Lender under this Agreement and will be bound by the terms of this Agreement as a Lender.

(e) The Facility Agent must execute a Transfer Certificate delivered to it and which appears on its face to be in order as soon as reasonably practicable and, as soon as reasonably practicable after it has executed a Transfer Certificate, send a copy of that Transfer Certificate to the Company.

(f) Each Party (other than the Existing Lender and the New Lender) irrevocably authorises the Facility Agent to enter into and deliver any duly completed Transfer Certificate on its behalf."

35. This is an elaborate provision which undoubtedly draws a distinction between "assignment" on the one hand and "transfer either by way of novation or by way of assignment, assumption and release of any of [the Existing lender's] rights or obligations under this Agreement" on the other hand. Moreover the procedure for transfer using a Transfer Certificate (which was how each new lender in the present case became bound) itself differentiates between a transfer to be effected by using a novation and a transfer to be effected by an assignment, assumption and release. But when we see that in each case the new lender is to become "a Lender under this Agreement and will be bound by the terms of this Agreement as a Lender" (clauses 29.5 (c)(iii) and 29.5 (d)(iv) respectively), one wonders whether the term "novation" is indeed being used in its strict legal sense. If it were, the parties would be making a new agreement and not agreeing to be bound by the terms of the old agreement at all.

36. When one sees that, although the relevant two new lenders (BBK and BMI) became bound on execution of Transfer Certificates with "novation" in their headings, all the other new lenders became bound on execution of Transfer Certificates with "assignment, assumption and release" in their headings or otherwise almost identical terms, it begins to look as if it is a matter of indifference (at any rate to Deutsche Bank) which kind of transfer is being used. We were told that a leading textbook writer about credit agreements thinks that clause 29 is drafted in the way it is because English law recognises a term "novation" whereas New York law does not. Be that as it may, it is difficult to see why the Credit Agreement (recognised as such and,

apparently continuing, under clause 29) should be completely discharged merely because BBK or BMI as the case may be signs a document with novation in its heading when other new lenders accede to the agreement without any need for it to be discharged.

37. In these circumstances it seems to me to be arguable, despite Mr Handyside's reliance on the definitions of (inter alia) the words "Finance Document" and "amendment" in clauses 1.1 and 1.2 of the Credit Agreement, that novation is not being used in its strict legal sense of the old contract being discharged. If, however, it is being used in this strict legal sense, there must at least be an argument that, on the facts of the present case, there is only a partial novation so that BBK and BMI became parties to a new contract freed of the equity of rescission whereas the other parties (whether the original or the other new lenders) remain bound under "this Agreement" and will be affected by any such equity. That is by no means to say that the concept of partial novation is free from difficulty but an application for permission to amend is not the right time at which all these problems should be addressed.

Conclusion

38. For these reasons, I would allow the proposed amendments, allow the appeal from Cooke J and dismiss the appeal from Flaux J.

Lord Justice Underhill:

39. I agree.

Sir Bernard Rix:

40. I agree also.