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THE HIGH COURT'S DECISION IN CROSSLEY & ORS V VOLKSWAGEN AKTIENGESELLSCHAFT & ORS – A NEW DIRECTION FOR THE LAW ON IMPLIED FRAUDULENT MISREPRESENTATIONS?

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SUMMARY

In recent years, claimants in a number of banking litigation cases have sought to establish *implied* fraudulent misrepresentations as to the defendant banks' alleged involvement in manipulating LIBOR, in an attempt to seek to rescind loan agreements and derivative products referencing that rate (the "**LIBOR claims**"). For various reasons, none of those claims have yet successfully established the actionability of the implied misrepresentations alleged, which are widely thought of as being the *ex post facto* constructs of lawyers. Indeed, it has appeared that implied fraudulent misrepresentation claims will generally be difficult to get off the ground, primarily due to an apparent requirement for the claimant to have given *contemporaneous conscious thought* to the representation for the purposes of reliance (the "**Awareness Requirement**"). However, a recent summary judgment decision by Waksman J in *Crossley & Ors v Volkswagen Aktiengesellschaft & Ors* [2021] EWHC 3444 (QB) (the "**Crossley decision**") sheds doubt on that. In this blog, we explore the Crossley decision and its implications for financial institutions and other large corporates.

THE LIBOR CLAIMS AND THE LAW PRIOR TO THE CROSSLEY DECISION

As stated above, none of the LIBOR Claims has so far been successful in establishing the actionability of a defendant bank's alleged implied fraudulent LIBOR misrepresentations. Some appear to have settled before trial and produced no meaningful case law on the point. In two cases that have proceeded to trial (*Property Alliance Group v RBS* [2016] EWHC 3342 and *Marme Inversiones v NatWest Markets plc* [2019] EWHC 366 (Comm)), obiter comments were made in the High Court supporting the view that the implied fraudulent misrepresentations alleged would fall foul of the Awareness Requirement.

Prior to the Crossley decision, the clearest decision on this point was, however, that of the High Court in *Leeds City Council and others v Barclays Bank plc* [2021] EWHC 363 (Comm). A number of

local authorities had sought to rescind certain LIBOR-linked lending arrangements on the basis of various complex implied fraudulent misrepresentations relating to LIBOR. The defendant successfully sought summary dismissal on the basis that, to establish reliance on the implied representations (even assuming they were made), those acting on behalf of the claimants at the time must have given some actual thought to them. This having not been pleaded, the claimants, it was said, had not satisfied the Awareness Requirement. Significantly, Cockerill J held that there was such a requirement and granted the defendants' application. In doing so, it appears that she relied heavily upon the obiter comments made in *Property Alliance Group* and *Marme* and the similarities between the complex implied representations pleaded in those claims and in *Leeds*.

It is important to note that the decision in *Leeds* is due to be re-visited by the Court of Appeal on 22 February 2022. Prior to the Crossley decision, however, it served as authoritative confirmation of the Awareness Requirement and, therefore, of the extreme difficulties involved in getting an implied fraudulent misrepresentation claim off the ground.

THE CROSSLEY DECISION

The Crossley decision arises in the context of the group litigation being brought by purchasers of Volkswagen Group ("**VW**") cars, whose engines contained "defeat" devices designed to manipulate the outcome of emissions tests (commonly known as the "dieselgate" emissions scandal). Part of the claimants' case is based on an implied fraudulent misrepresentation claim (referred to in the proceedings as the "**Deceit Claim**"). Broadly speaking, the claimants allege implied fraudulent misrepresentations by VW that its cars were lawful to drive on the roads and complied with all relevant regulations.

VW applied for the Deceit Claim to be struck out or summarily dismissed on the basis that the claimants had not properly pleaded, but in any event could not properly make out, that the Awareness Requirement had been satisfied. In stark contrast to the decision in *Leeds*, Waksman J refused to grant the application. He was, of course, only considering whether the Deceit Claim had a real prospect of success, rather than finally determining the claim. He did, however, make a number of comments indicating a potential softening of the courts' position going forward in relation to the Awareness Requirement. In particular:

- He considered it to be a distinguishing feature from *Leeds* and the other LIBOR claims that the implied representations were "relatively simple". Indeed, he quoted passages from *Leeds* where Cockerill J had indicated that "*in the simplest of representation by conduct cases*" the Awareness Requirement might be substituted by something *"which might loosely (and without careful analysis) be characterised as assumption.*"

- He also suggested that, in *Leeds*, Cockerill J may have failed to give proper weight to the Court of Appeal authority, *Spice Girls Ltd v Aprilia* [2002] EWCA Civ 15, which involved a sponsorship agreement made between the Spice Girls' trading company and Aprilia. After the agreement

had been made, Geri Halliwell left the band. Aprilia alleged implied representations to the effect that Spice Girls Limited did not know and had no reasonable grounds to believe that any of the Spice Girls would leave the band during the term of the contract. The Court of Appeal noted that "*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*", but, nonetheless, the implied representations were held to have induced the contract. Cockerill J in *Leeds* had disregarded *Spice Girls* on the basis that awareness was not in issue, but Waksman J disagreed and very much thought it was.

IMPLICATIONS OF THE CROSSLEY DECISION

This is an evolving area of law, with the next key development likely to be the Court of Appeal's decision in *Leeds* later this year. That may well provide further clarity but, in the meantime, the Crossley decision indicates the potential for the law to take a different course. In particular, it appears that there is a possibility that the law may arrive at a position where, provided the representation is articulated in a sufficiently simple manner (which should be achievable in most cases), claimants may be able to establish reliance on it on the basis of an *unconscious assumption* (like that in *Spice Girls*), rather than on the basis of *contemporaneous conscious thought* having been given to the representation. If so, that would constitute a considerable watering-down of what has, to date, been understood to comprise the requirements of an implied fraudulent misrepresentation claim; something which will, no doubt, be of significance to financial institutions and large corporates for a variety of reasons.

First, implied fraudulent misrepresentation claims have always been attractive to claimants bringing claims against financial institutions and large corporates, not least because they provide a way of using findings by regulators to drive high-value civil claims and can lead to generous remedies. In recent years, following the decisions in the LIBOR Claims, the momentum towards bringing such claims appeared to be waning but a watering down of the Awareness Requirement could spark renewed interest in this space.

Second, any softening of the Awareness Requirement could have knock-on implications in respect of other key legal requirements applying to financial institutions and large corporates. Most notably, for those that are UK-listed or UK-domiciled and listed overseas, Schedule 10A of the Financial Services and Markets Act 2000 establishes liability to any person who "*acquires, continues to hold or disposes of*" securities *in reliance on* untrue or misleading statements in (or omissions from) information published by the issuer over a recognised information service, where a "person discharging managerial responsibility" knew of (or was reckless as to) those statements. There are a number of actions currently proceeding under this provision (which appears to be particularly attractive to litigation funders) but there are significant outstanding questions about, among other issues, what is required to establish reliance.

If something less than conscious awareness (such as an unconscious assumption) is found to be sufficient to establish a common law implied fraudulent misrepresentation claim, that may have read-across to the reliance arguments adopted in Schedule 10A claims. Schedule 10A claimants have, for example, already alleged reliance on implied statements in published information that they appear inherently unlikely to have given contemporaneous conscious thought to. Clearly, the Crossley decision will only serve to encourage such arguments.

CONCLUSION

In summary, the Crossley decision indicates a potential for the law on implied fraudulent representations to take a new direction that may increase the litigation risk exposure of financial institutions and large corporates. We will be closely monitoring the appeal in *Leeds* and intend to produce a further update once the Court of Appeal's judgment is available.

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Rhys Corbett

London

rhys.corbett@bclplaw.com
+44 (0) 20 3400 3531

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