Neutral Citation Number: **[2020] EWHC 1902 (Comm)**

Case No: **CL-2015-000107 CL-2019-000033**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **13 July 2020**

Before :

Mr Justice Butcher

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Between :

Anthony Allen	**Claimant**
- and -	
COÖPERATIEVE RABOBANK U.A.	
(Formerly known as COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A.	
(Trading as Rabobank International, London Branch))	**Defendant**

And

Anthony Conti	**Claimant**
- and -	
COÖPERATIEVE RABOBANK U.A.	
(Formerly known as COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A.	
(Trading as Rabobank International, London Branch))	**Defendant**

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Richard Leiper QC and Zac Sammour (instructed by **Michelmores LLP**) for the **Claimant**
David Craig QC and Simon Pritchard (instructed by **Milbank LLP**) for the **Defendant**

Hearing date: **13th July 2020**

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JUDGMENT

Mr Justice Butcher **Monday, 13 July 2020**

(**3.09** pm)

Judgment by **MR JUSTICE BUTCHER**

1. This is an application for summary judgment by the defendant bank, which I will call "the Bank", in two actions. Those two actions have been brought by former employees of the Bank, Mr Allen and Mr Conti. Until his contract of employment with the Bank came to an end in 2009 Mr Allen was employed in the Bank's London branch at managing director level as the head of Liquidity and Finance in the Global Financial Markets group. He had had that role since 2004.
2. Mr Conti was employed in the Bank's London branch at director level as a senior trader in the Global Financial Markets group. He had been employed by the Bank since 1997.
3. The background to the claims and to this application is helpfully summarised in the parties' skeleton arguments.
4. In brief it is as follows: that in October 2008 both Mr Allen and Mr Conti were told that the Bank was relocating the department in which they both worked, the Global Financial Markets department, to Utrecht. They were informed that they were at risk of redundancy and were offered the opportunity to apply for roles in Utrecht. Mr Allen declined to do so but Mr Conti took up the invitation. Thereafter, Mr Allen worked for a brief period in London assisting the Bank with the transition; Mr Conti worked in a new role in Utrecht but this lasted only a short time.
5. By the middle of 2009, therefore, both Mr Allen and Mr Conti had parted ways with the Bank. They did so pursuant to Compromise Agreements signed, in Mr Allen's case, on 29 January 2009 and, in Mr Conti's case, on 12 May 2009. Both those Compromise Agreements contain the general release which is central to this application and which I will set out in due course.
6. From 2010, after the Compromise Agreements were made, the Bank was facing investigations into its LIBOR processes by the then FSA. Mr Allen was contacted by the Bank in that year and asked to assist in that investigation. He was contacted by the Bank and the FCA again in 2013 and asked to attend an interview in connexion with the FCA's investigations.

7. The Bank was investigated as to its practices in relation to LIBOR submissions not just by the FSA, now FCA, but also by the US Commodity Futures Trading Commission and the Department of Justice of the United States. The outcomes of these investigations became publicly known on or about 29 October 2013, culminating in settlements by the Bank with the regulators as part of which the Bank was obliged to make payments totalling in excess of US$ 1 billion.
8. On 28 November 2013 Mr Allen received a warning notice from the FCA informing him of proposed action against him to prohibit him from carrying on any regulated activity and to fine him £1.75 million. The FCA's regulatory proceedings were subsequently stayed because of an investigation into Mr Allen by the Serious Fraud Office and then by the United States Department of Justice commencing proceedings.
9. Those proceedings started on 16 October 2014 when Mr Allen and Mr Conti, among other former employees of the Bank, were indicted by the Department of Justice in the United States District Court for the Southern District of New York. Mr Allen and Mr Conti were indicted on counts of conspiracy to commit bank fraud and wire fraud in relation to their involvement in the Bank's LIBOR submission processes.
10. It is common ground that both Mr Allen and Mr Conti had submitted LIBOR rates on behalf of the Bank during the periods of their employment, though there is a dispute as to the frequency with which Mr Allen had done so. The parties also disagree as to whether Mr Allen was responsible for supervising the LIBOR submission process. Mr Allen says that he was not.
11. Mr Allen and Mr Conti pleaded not guilty to the charges brought against them. They were tried and convicted following a trial presided over by Judge Rakoff in the United States District Court for the Southern District of New York on 5 November 2015. Mr Allen had testified in his defence, Mr Conti had not. Four of the Bank's other former employees had by that time pleaded guilty in relation to LIBOR manipulation.

12. Mr Conti and Mr Allen, however, successfully appealed their convictions. On 19 July 2017, their convictions were overturned and their indictment dismissed by the United States Court of Appeals for the Second Circuit. The basis on which the appeal was allowed was that their rights under the Fifth Amendment of the United States Constitution had been infringed by the Department of Justice's reliance on evidence that had been given to the FCA in compelled interviews.

13. Mr Allen and Mr Conti had appealed their conviction on a number of grounds. The United States Court of Appeals for the Second Circuit had, however, dealt only with the Constitutional issue which I have referred to. Because this was dispositive the court did not rule on any of Mr Allen's or Mr Conti's other grounds; but, as I understand it, both during the trial and in the appeal both Mr Allen and Mr Conti maintained that they were entirely innocent of the charges brought against them and that the LIBOR submissions which they had made reflected their genuine and honestly held views as to the rate at which the Bank could have borrowed on the interbank market at the relevant times.

14. On 25 January 2019 the FCA discontinued its proceedings against Mr Allen. As I understand it, no reasons were given.

15. Accordingly, it remains an issue between the parties as to whether Mr Allen and Mr Conti were guilty of the wrongdoing of which they were accused by the FCA and the Department of Justice in connexion with the LIBOR submissions which they made on behalf of the Bank. The Bank says they were; Mr Allen and Mr Conti say they were not. Clearly that is not an issue which I can resolve on this application.

16. The present proceedings were commenced by Mr Allen in 2015 and by Mr Conti in 2019. In very brief summary the two Claimants claim that the Bank (a) breached the implied term of their contracts, or an equivalent common law duty, that it would indemnify them for losses and liabilities incurred in the execution of their authority, and (b) breached alleged implied terms in respect of training and supervision or equivalent common law duties. They claim damages for: (i) the cost of

defending the Department of Justice Proceedings, which claim is also pursued as a debt; (ii) in Mr Allen's case, the cost of addressing the FCA investigation, also pursued as a debt; (iii) lost earnings as a consequence of the Department of Justice proceedings; and (iv) anxiety and distress arising from the Department of Justice proceedings, and, in Mr Allen's case, also in respect of the FCA investigation.

17. The Bank's answers to these claims include that they fall within the terms of the general release in the Compromise Agreements. On that basis they were therefore fully and finally settled. The Bank also says that certain of the terms alleged to be implied into the Claimants' employment agreements cannot be so implied. The Bank has sought summary judgment on those issues.

18. The second issue is relevant only if the cases are not entirely disposed of by way of summary judgment against the Claimants on the first argument.

19. The test for summary judgment is familiar. It is helpfully summarised by Lewison J in Easyair v Opal Telecom [2009] EWHC 339 (Ch) at paragraph 15, in a passage which has been regularly cited since as follows:

‘As Ms Anson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED and F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED and F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals and Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.'

20. With that approach in mind I turn to consider the issue of whether the Bank is entitled to summary judgment in respect of both actions on the basis of the terms of the general releases in the Compromise Agreements. Those general releases were in these terms:

'These terms are offered without any admission of liability and the employee accepts that they are in full and final settlement of all claims in all jurisdictions that the employee may have against a group company or any of its officers or employees now or in the future arising out of or in connection with the employee's position as a director of any group company or any other offices the employee holds within the group and the employee's employment with any group company or its termination or in any other respect. In this clause 'claims' includes without limitation any claim for a redundancy payment protective award, unfair dismissal, wrongful dismissal, discrimination on grounds of sex, race, disability, sexual orientation, religion or other similar belief, equal pay, age and any other breach of any contractual or statutory right provided always that the terms of this waiver shall not apply to any claim in respect of accrued pension rights or any claim in respect of personal injury or in respect of the plans referred to in clause 3. The employee warrants that as at the date of this agreement the employee is not aware of any facts or circumstances which would give rise to a claim in respect of personal injury.'

I should interpolate that the words 'or in respect of the plans referred to in clause 3' appear only in Mr Allen's and not in Mr Conti's version of the general release.

21. It is also pertinent to set out here clause 17 of the Compromise Agreements, or at least it is clause 17 in Mr Allen's Compromise Agreement, by which the Claimants confirmed that they had received independent legal advice. It was in these terms:

'The employee confirms that he has taken independent legal advice from [here inserted the name of the legal adviser] of [inserted the name of the law firm] on the terms and effect of this agreement, his rights against the Bank and any other group company and on the basis of that advice the employee accepts those terms. The legal adviser [name inserted] has confirmed to the employee

that she is a qualified solicitor holding a current practising certificate and that she or her firm has an insurance policy in force covering the risk of a claim by the employee in respect to any loss arising in consequence of her advice.'

22. The Bank contends that the present claims fall clearly within the ambit of the general releases properly construed. It submits that there are no special rules applicable to interpreting a general release in a settlement agreement.

23. It draws attention to the following features of this general release:

(1) that the Claimants agreed to a *full and final* settlement;

(2) secondly, that it was of *all claims*;

(3) thirdly, that it was of all claims the Claimants *may* have against the Bank, (emphasising that it is of the claims that the Claimants "may have", not merely "have");

(4) fourthly, that it is a settlement of claims which might be brought in *all jurisdictions* (the Bank emphasising that that is not just in an employment tribunal but also in court, and not just in this jurisdiction, that of England and Wales, but in other jurisdictions which might not have employment tribunals);

(5) fifthly, that it is of claims *now or in the future*;

(6) sixthly, that it is of claims arising out of or in connection with the Claimants' employment;

(7) seventhly, that it includes but is not limited to claims for breach of a contractual right;

(8) and eighthly, that it excludes, as the Bank would say, only claims in respect of approved pension rights and personal injury, and, for Mr Allen, the plans referred to in clause 3 of the Allen Compromise Agreement.

24. As the Bank says, save where express provision was made to the contrary, the Compromise Agreements were intended to and did draw a line under the employer/employee relationship. They were intended, as the Bank says, to ensure that, save for the excluded claims, the Bank would and could not face any claim by the Claimants in the future even if those claims did not exist and were

not known to the Claimants at the time that they entered into the Compromise Agreements. That is, the Bank says, in and of itself a part of the factual matrix.

25. Further and in any event, the Bank says, it is clear that the Claimants' claims fall within the ambit of the general releases because they arise as a result of alleged breaches of firstly, an employee's right to be indemnified by his employer against losses and liabilities and reimbursed for all expenses incurred in the proper execution of his duty, and secondly, alleged implied terms as incidents of the duty of mutual trust or confidence or a common law duty. Those are claims, the Bank says, that fall within the natural meaning of the phrase 'all claims'; they are claims against the Bank; they arise out of or are connected with the employee's employment; and they are claims that the Claimants may have had then or in the future, including in the event that they were subject to regulatory or criminal proceedings for matters arising out of or connected with their employment.

26. In relation to the case on which the Claimants principally rely, that is to say BCCI v Ali [2002] 1 AC 251, the Bank says that the decision of the majority of the House of Lords was heavily influenced by the fact that the claims for stigma damages, which it was found were not released by the general release in that case, did not exist as a matter of law at the time that the general releases were entered into. By contrast, it is said that here the claims which the Claimants have brought are not claims which were unknown as a matter of law. As the Bank contends, firstly, the terms and duties relied upon, namely an employee's right to an indemnity and the implied duty of trust and confidence are not new or novel. They were well known duties at the time the parties entered into the Compromise Agreements. Secondly, the Claimants were employed in a heavily regulated industry and the Compromise Agreements were therefore entered into in circumstances where it would have been well known that regulatory authorities and prosecutors could launch investigations and prosecutions into suspected wrongdoing at any time, including after an employee's employment had ended. And thirdly, that at the time of signing the Compromise Agreements the parties would have known that if employees had been party to communications with traders such as those which

Mr Allen and Mr Conti had had and which the Bank has set out in the schedules to its Defences, that would put them at risk of regulatory investigation and prosecution, and the Claimants were clearly aware, as the Bank says, that they had been party to such communications.

27. For their part the Claimants contend on this application that there is an argument which stands at least a real prospect of success that the general releases did not extend to the claims which they bring. They contend that these claims are claims which did not exist in 2009. At that point neither the Department of Justice nor the FCA had brought charges against either of them, nor intimated that such charges might be brought. The Claimants had therefore not incurred any costs of defending themselves. The Bank had not refused to indemnify them in respect of any such costs, and in 2009 they enjoyed good reputations within the financial industry and neither man's reputation was then tainted. They had not therefore suffered loss as a consequence of the Bank's failure to provide them with adequate training and support.

28. It is said therefore that these claims did not arise until well after the general release and that they were not claims of a sort that could reasonably be supposed to exist or be anticipated. The only basis on which this application can proceed, as the Claimants say, is that it must be assumed that the Claimants are right in their case that they acted entirely properly during their employment and that their LIBOR submissions reflected only their genuine and honest beliefs as to the rate at which the Bank would have been able to borrow money on the interbank market at the relevant times. On that basis all they could have known in 2009 was that they had performed their roles as they believed they should have done.

29. Equally, the Claimants say, it is clear from the Compromise Agreements and the circumstances in which they were entered into that the Bank for its part did not suppose that Mr Allen or Mr Conti would be subject to regulatory or criminal proceedings arising out of their performance of their duties. This, as the Claimants say, is most clearly seen from the form of the reference which, by the terms of the Compromise Agreements, the Bank agreed to provide to any prospective employer.

That was in terms that, in respect of the last position held, there was nothing that affected the Bank's assessment of the fitness and propriety to perform the functions which the Claimant had been employed to do for the Bank. It is also apparent, as the Claimants say, from the fact that the Bank had never raised with either of the Claimants their conduct in relation to LIBOR submissions as a cause for concern during the course of their employments. The Compromise Agreements were therefore, as the Claimants say, entered into on the common basis that the Claimants had not acted in a way to impact their fitness or propriety to undertake functions controlled by the then FSA.

30. Against that background the proper construction of the general releases indicates that the present claims are not within their ambit. The Claimants say that the most important case here is BCCI v Ali. What was there decided was that a general release should not be construed to cover claims which were outside of what the parties would reasonably have been taken to have supposed or to have contemplated at the time that the contract was entered into. Applying that approach, the Claimants say that the general release could not be taken to be a release of the present claims which were outside the parties' reasonable contemplation. While a general release could extend to unknown claims that would require clear language. No such clear language is present. The clauses do not refer to claims known or unknown, or claims whether within the parties' contemplation or not.

31. A narrower construction of the general release is, so say the Claimants, supported by clause 15 of the Compromise Agreements, or at least that is the numbering in Mr Allen's, which they say indicates that the focus of the general release is on claims that an employee could present to an employment tribunal. The declaration made by the Claimants' respective legal advisers indicates, as the Claimants say, that the focus of the advice was on existing claims arising out of the termination. The context, as the Claimants say, indicates that the construction favoured by the Bank is wrong. The main points have already been referred to. The Compromise Agreements were entered into in the context of a genuine redundancy. No concerns as to Mr Allen or Mr Conti's LIBOR

submissions had ever been raised during their employment and the Bank was itself unaware at the time that there was anything wrong with the general systems it had in place for LIBOR submissions.

32. In my judgment this is a case in which summary judgment should not be granted and the matter of the construction of the general release and its application to the facts should go to trial. Given that that is my view, I will not deal with the parties' respective arguments on those issues in detail. In my judgment it suffices to say this:

33. Firstly, I consider that there is clearly a realistic argument based on BCCI v Ali that the general release only extended to claims which were within the reasonable contemplation of the parties. I also consider that it is further clearly arguable that the general releases are not sufficiently clearly expressed for there to be no room for serious argument that they cover claims which were not within the reasonable contemplation of the parties. There is no language along the lines of ‘claims known or unknown’. Equally, there is no provision that the release applies to claims ‘whether or not within the contemplation of the parties’. Such language is sometimes found but is not here.

34. Secondly, it is further realistically arguable that the BCCI v Ali case was not confining the circumstances in which matters may not be within the reasonable contemplation of the parties to cases where the relevant claims did not exist as a matter of law. That does not appear to be what Lord Bingham regarded as critical (or at least there is a real argument to the effect that that was not what he regarded as critical) and Lord Browne-Wilkinson agreed with Lord Bingham. Lord Nicholls and Lord Clyde both appear to have considered that there were probably implied limitations on the general release which went beyond that which excluded claims which did not exist as a matter of law. It is arguable also that Lord Clyde's reference in paragraph 86 to the possibility of claims in tortious misrepresentation not being embraced by the general release is contrary to the idea that it was only because the claims were unknown in law that they were not covered by the general release.

35. Thirdly, there is an argument with a realistic prospect of success that in circumstances where there was no wrongdoing on the part of the Claimants and no knowledge of any wrongdoing in relation to LIBOR submissions on the part of the Claimants or the Bank, that the release was not intended to cover claims relating to or arising in connection with the Claimants' conduct of LIBOR submissions. Those are the assumptions on which it appears to me that this application must proceed and that, at least in part of its submissions, appeared to be accepted by the Bank. Given those assumptions, it appears to me that it realistically arguable that claims of the sort at issue were not within the subject matter of the release and that, applying the words of Lord Nicholls in paragraph 29 of BCCI v Ali ('The generality of the wording has no greater reach than the context indicates') it is arguable that the context here did not indicate a reach extending to possible claims arising from allegations of wrongdoing in relation to LIBOR submissions.

36. Further, it seems to me to be arguable with a realistic prospect of success that the issue of whether such claims are within the subject matter of the release is not necessarily answered by the fact that the duties of trust and confidence and the obligation on the part of an employer to indemnify an employee as a consequence of performing tasks within the scope of his employment are well known. It seems to me that it is arguable that an employee in agreeing a general release of the kind and in the terms at issue here would not contemplate that he was foregoing rights of indemnity against an employer in respect of matters which might subsequently be said to be wrongful but which both parties thought at the time of the release to have been perfectly proper conduct.

37. Fourthly, of course if there was knowledge of the wrongdoing at the time of the release or if it was within the reasonable contemplation of the parties that there had been, and in particular if it was within the reasonable contemplation of the Claimants, that would be potentially relevant to the issue of construction. The Bank also sought to contend that there is relevant factual matrix in the communications which were sent to and by the Claimants in relation to LIBOR submissions on the basis that they knew that in giving the impression that they were accommodating requests to

manipulate LIBOR submissions they had put themselves and the Bank at risk of regulatory and/or criminal investigations: see paragraph 7(7) of its skeleton argument. It seemed to me that there were clear issues as to exactly what should be made as to those communications. I can neither form a view on whether wrongdoing was within the reasonable contemplation of the parties, nor as to whether the Claimants knew or ought to have known that they had put themselves and the Bank at risk by 'giving the impression' alleged.

38. Accordingly, this is not a case in which the court can on this application decide all relevant aspects of the factual matrix. The present is therefore not a case falling within the type referred to in Lewison J's seventh category of a short point of construction which the court should decide, because in this case the court is not satisfied that it has before it all the evidence which is necessary for the proper determination of the question.

39. Fifthly, and more generally, it appears to me that this is a case in which the process of construction of the general release should be undertaken in the light of a full and proper consideration of the factual matrix in the round.

40. Sixthly, that approach is similar to that adopted in relation to whether there should be a summary determination of the construction of a similarly worded release reached by Master McCloud in Schluep v Rabobank [2016] EWHC 1175 QB, although it is fair to say, as Mr Craig QC does, that the arguments there were far from identical to those here because Mr Schluep was a junior employee and was arguing that the Bank was fixed with knowledge including that on the part of Mr Allen.

41. Given that I will refuse summary judgment on this point, clearly all arguments in relation to the construction and application of the general release will be open to the parties at the trial or other determination of this matter. I have determined merely that there is an argument which stands a realistic prospect of success in relation to it.

42. The alternative application made by the Bank is for there to be summary judgment in relation to the Claimants' allegation of what has been called the 'special risks duty'. What the Bank says is that the

Claimants have no real prospect of establishing that the Bank owed them a duty to, and I quote, 'indemnify the Claimants in respect of any special risks including any risks arising from making LIBOR submissions that they incurred in the performance of their duties.'

43. The alleged special risks duty is said to be separate from the Bank's admitted contractual duty to indemnify the Claimants in respect of losses and liabilities which they incurred in the execution of their duty. The Claimants contend that the alleged special risks duty is an implied contractual term or arises as an incident of the mutual duty of trust and confidence arising from the Claimants' employment relationship with the Bank or, they say, is part of the alleged common law duty on the Bank to ensure the Claimants' health, safety, wellbeing and protection from infringement of the law.

44. The Bank says that applying the principles as to the implication of terms set out in Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2016] AC 742, the term alleged cannot be implied. It is submitted that it is neither necessary nor obvious. It is not an incident of the duty of trust and confidence. In any event, the employment relationship and duty of trust and confidence ended in 2009; whereas the allegation is that the duty was breached several years later. It is also said that there was no duty of care of common law, ie sounding in tort, because the duties were defined contractually.

45. By contrast, the Claimants say that the existence of the duty and of the implied term can only be determined at trial. What they say is that the existence of the common law duty could only be determined on Caparo v Dickman lines and that would require a proper investigation as to whether it is fair, just and reasonable for the duty to exist. That, they say, cannot be done on the basis of the material before the court on this summary judgment application. In particular, they say that it would depend on whether the submission of LIBOR rates did give rise to special risks which is in issue. They say that the position is similar in relation to the implication of the term.

46. In my judgment the Claimants are right about this. It does not seem to me that the duty is ex facie unarguable. Whether it is to be implied as a contractual term or arises at common law appear to be

matters which should be addressed in the context of an investigation of the facts including whether the submission of LIBOR rates did give rise to special risks.

47. Accordingly, in this respect too I refuse the application for summary judgment and the summary judgment application will be dismissed.