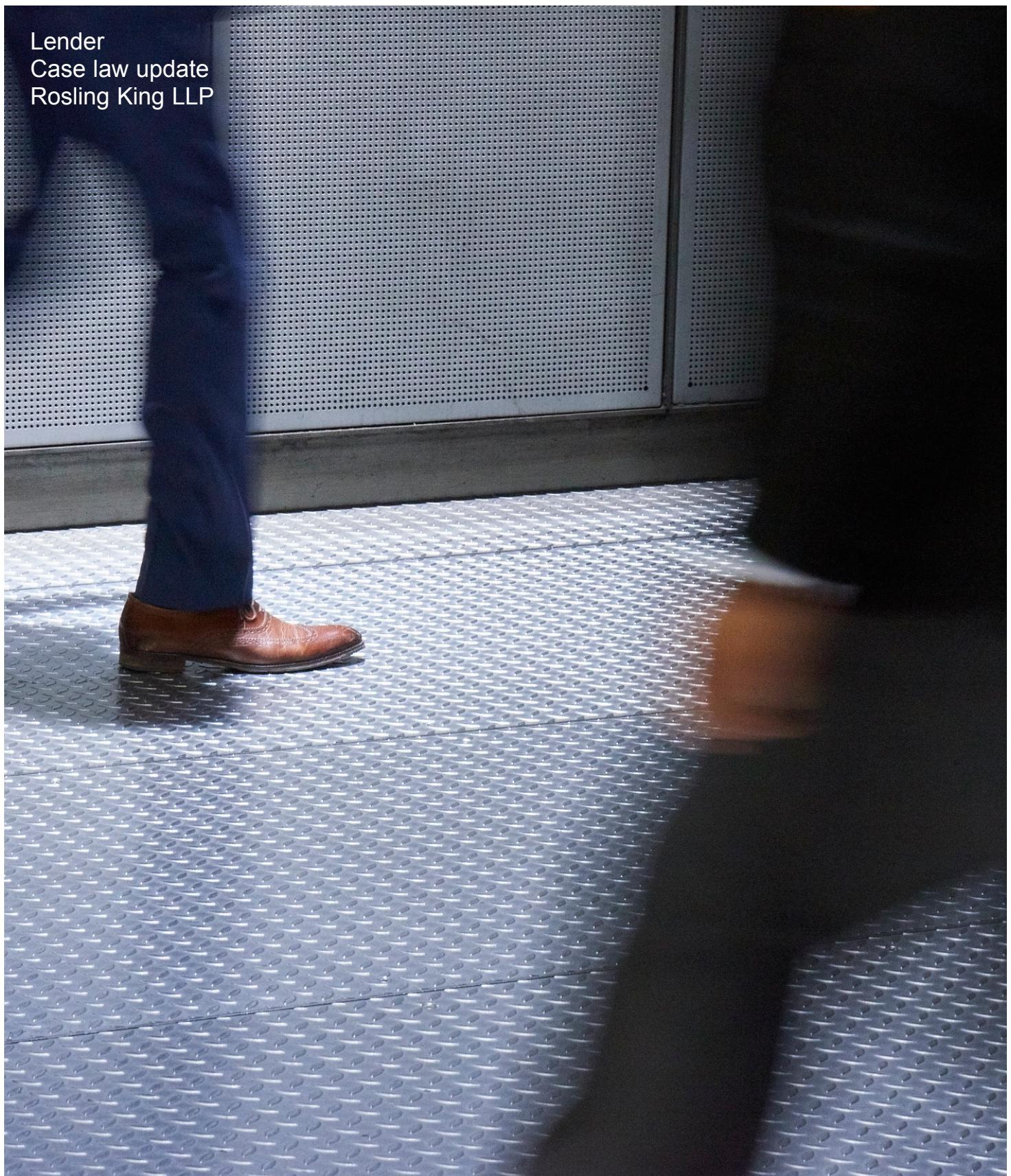


Lender
Case law update
Rosling King LLP



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This Queen's Bench decision provides a useful summary of the principles relating to summary judgment applications. It is a reminder to litigants pursuing professional negligence actions of the need to ensure that they are able to prove all constituent elements of a claim before pursuing litigation.

The Facts

The First Claimant was the sole shareholder of a company known as Vital Industries Limited ("Vital"). Vital had two subsidiaries known as Arc Aluminium Limited ("AAL") and Arc Aluminium Services Limited ("AASL"). The First Claimant, through AAL, had various intellectual property rights (the "Rights") in relation to various products, which he wished to retain from Vital at the same time as effecting its sale. The Rights were to be transferred to a company known as Genesis. The First Claimant instructed the Defendant to act on his and Genesis' behalf.

The First Claimant agreed to sell his shares in Vital, AAL and AASL to Firstmain Investments Limited ("Firstmain"). Terms were agreed and the Defendant drafted a Share Purchase Agreement, Assignment and Licence (the "Documentation"). The sale proceeded and the First Claimant and Genesis commenced negotiations to permit Thyssen Krupp Materials (UK) Ltd ("TKM") to develop and market products using the Rights.

Unfortunately, Firstmain defaulted on its payment obligations under the Documentation. It was alleged by Firstmain that the Assignment had been ineffective to transfer the Rights to Genesis (and they therefore remained vested in AAL). As a result of this dispute TKM withdrew from its agreement with the First Claimant/Genesis.

The Claimants pursued a claim against the Defendant alleging that the reason it was unable to enter into what would otherwise have been a lucrative deal with TKM was due to the defective drafting of the Documentation. However, the Defendant alleged that the rights had in fact vested in Genesis and it was wrong as a matter of law to say they had not. As such, the Defendant said there could be no breach of duty and the loss of the TKM deal could not be said to have been sustained by a drafting error in the Documentation. The Defendant applied for summary judgment.

The Decision

The Court referred to the decision of Easy Air Ltd v Opel Telecome Limited [2009] EWHC 339 (Ch) and noted the following principles in relation to summary judgment:

1. The Court must be careful in giving summary judgment.
2. The Court must consider whether the claimant has a "realistic" as opposed to "fanciful" prospect of success.
3. A "realistic claim" is one that carries some degree of conviction. This means a claim that is more than merely arguable.
4. The Court must not conduct a mini trial. However, this does not mean that the Court must take at face value, without analysis, everything that the Claimant submits.
5. The Court must not only consider the evidence before it on the hearing for summary judgment, but must also consider what evidence can reasonably be expected at trial.
6. The Court should hesitate to make a final decision without a trial, even where there is no obvious conflict of fact. However, it is not uncommon for a summary judgment

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application to contain a short point of law, which, if the Court is satisfied that it has all the evidence, should be decided.

Considering the precise terms and content of the Documentation, the Court held that the documents drafted by the Defendant were effective and did what they were required to do. Accordingly, it was held that the loss of the TKM business could not be said to have been caused by a breach of duty on the part of the Defendant.

Commentary

This case is a good reminder of the points that the Court will consider when determining applications for summary judgment. It is a fact specific judgment, which turned on the interpretation of complex documentation intended to affect a sale of a business and subsequent licence back of various intellectual property rights. Nevertheless, it is a salutary reminder to litigants considering a professional negligence claim to ensure that all aspects of the action (breach, duty and causation) can be established, as failure to do so may result in a successful application for summary judgment.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.