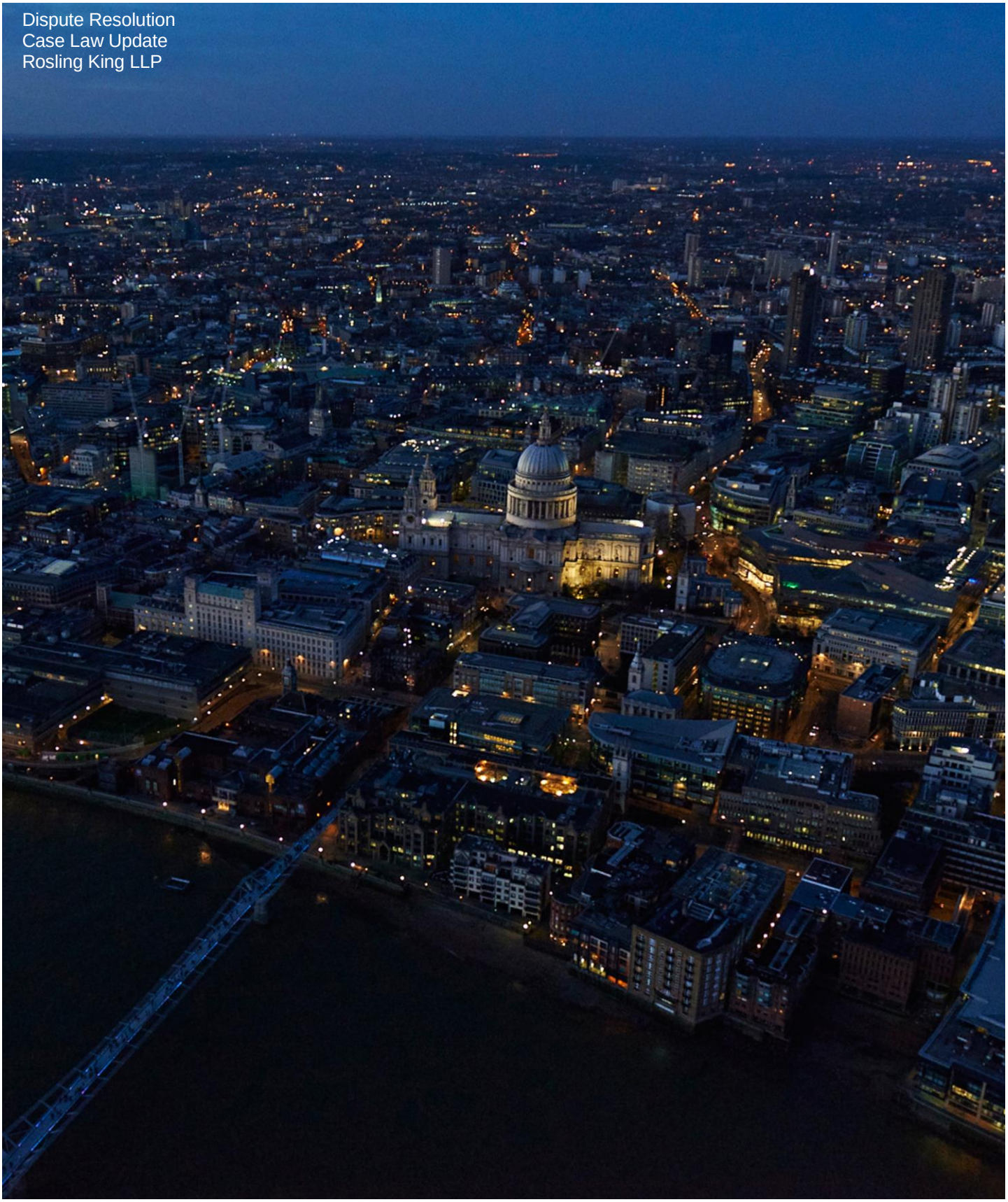
Dispute Resolution
Case Law Update
Rosling King LLP



The Claim

African Export-Import Bank, Diamond Bank Plc and Skye Bank Plc (the "Claimants"), all lenders, brought a claim against the borrower, Shebah, the guarantor, Allenne, and the personal guarantor of Shebah and Allenne, Dr O, (the "Defendants"), for sums due under the facility agreement.

Shebah, the First Defendant, was initially provided with a loan of US$100m, which was later increased to US$150m, with each of the Claimants providing US$50m. The facility agreement was initially based upon the LMA standard form, which was subsequently negotiated by solicitors acting on behalf of the Claimants and the Defendants.

In June 2012, the First Defendant paid one instalment under the facility agreement in the sum of US$6m. However, the First Defendant failed to pay any of the instalments which fell due thereafter. As such, and in accordance with clause 24.7 of the facility agreement, the Claimants accelerated repayment of the entire debt. This claim was brought on the basis that clause 24.7 was engaged on 16 October 2013, or in the alternative on 2 October 2014.

The Defendants commenced counterclaims against the Claimants, and sought to set off the alleged counterclaims against sums due under the facility agreement. However, the facility agreement contained a standard provision expressly excluding any right to set-off.

The Claimants subsequently applied for summary judgment under CPR 24.2 for the sums due under the facility agreement. The Defendants argued that they entered into the facility agreement on the Claimants' written standard terms of business, and therefore section 3 of the Unfair Contract Terms Act 1977 ("UCTA") was engaged, and the clauses within the facility agreement relating to the right to set-off were subject to the reasonableness test.

Mr Gillis QC, counsel for the Defendants, concurred that in order to succeed at trial the Defendants would need to prove that the Claimants consistently used the LMA form without negotiation in all cases when entering into syndicate loans. Further, Mr Gillis QC conceded that he could not demonstrate this on the evidence currently available, but argued that disclosure from the Claimants would mean there was a real prospect of evidence supporting this assertion coming to light, and on that basis, the claim should be allowed to proceed to trial.

The Judgment

In his judgment, Justice Phillips made reference to two cases when considering whether the above agreement was based on "the other's written terms of business" in accordance with section 3 of UCTA. Firstly, *Hadley Design Associates v City of Westminster [2003] EWHC 1717 (TCC) HHJ* in which Judge Seymour QC stated that in order for an agreement to fall within section 3 of UCTA it "should be intended to be adopted more or less automatically… without any significant opportunity for negotiation."

Secondly, Justice Phillips referred to *Yuanda (UK) Co Lt v WW Gear Construction Ltd [2011] Bus LR 360*, in which Edwards-Stuart J agreed with Judge Seymour QC, stating that the

agreement must be standard in that it is used for all transactions of a particular type "without alteration".

Justice Phillips did acknowledge that some negotiation may still leave the agreement essentially unchanged, to the extent that it would then fall within the remits of section 3 UCTA, and in those instances it would be a matter of fact whether it can be said that they have dealt on standard terms.

Justice Phillips held that there was no basis for inferring that the Claimants used the LMA form for all syndicated loan transactions without negotiation or adaptation. This was based on express evidence provided by the Claimants that their syndicate lending is negotiated on a transaction by transaction basis. As such, Justice Phillips held that the Defendants had no realistic prospect of arguing that the facility agreement was entered into on the Claimants' written standard terms of business. On this basis, the no set-off provisions were not subject to the reasonableness test and therefore applied in full force.

Further, Justice Phillips held that the Defendants could not rely on the alleged counterclaims as an arguable defence, commenting further that the alleged counterclaims had no merit.

Justice Phillips therefore granted summary judgment to the Claimants against all three Defendants for the principal sum outstanding under the facility agreement, the management fees and interest calculated on the basis that the loan was accelerated on 2 October 2014.

Commentary

This case provides clear guidance on the threshold which will need to be met in order for a commercial agreement to be made on "written terms of business" so that it may fall within the remit of section 3 of UCTA. Where commercial parties use a standard form, such as the LMA form, as a starting point for negotiations, and the agreement in question is then negotiated so that it is materially changed, it will not be considered to have been made on one of the party's standard terms. Therefore, section 3 of UCTA will not be applicable. As such, regard will need to be had as to whether negotiations are genuine. It will not be sufficient to refuse all requests for amendments. Further, the Court will consider commercial factors, such as whether parties have engaged solicitors to negotiate on their behalf in deducing whether the document has been meaningfully negotiated.

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