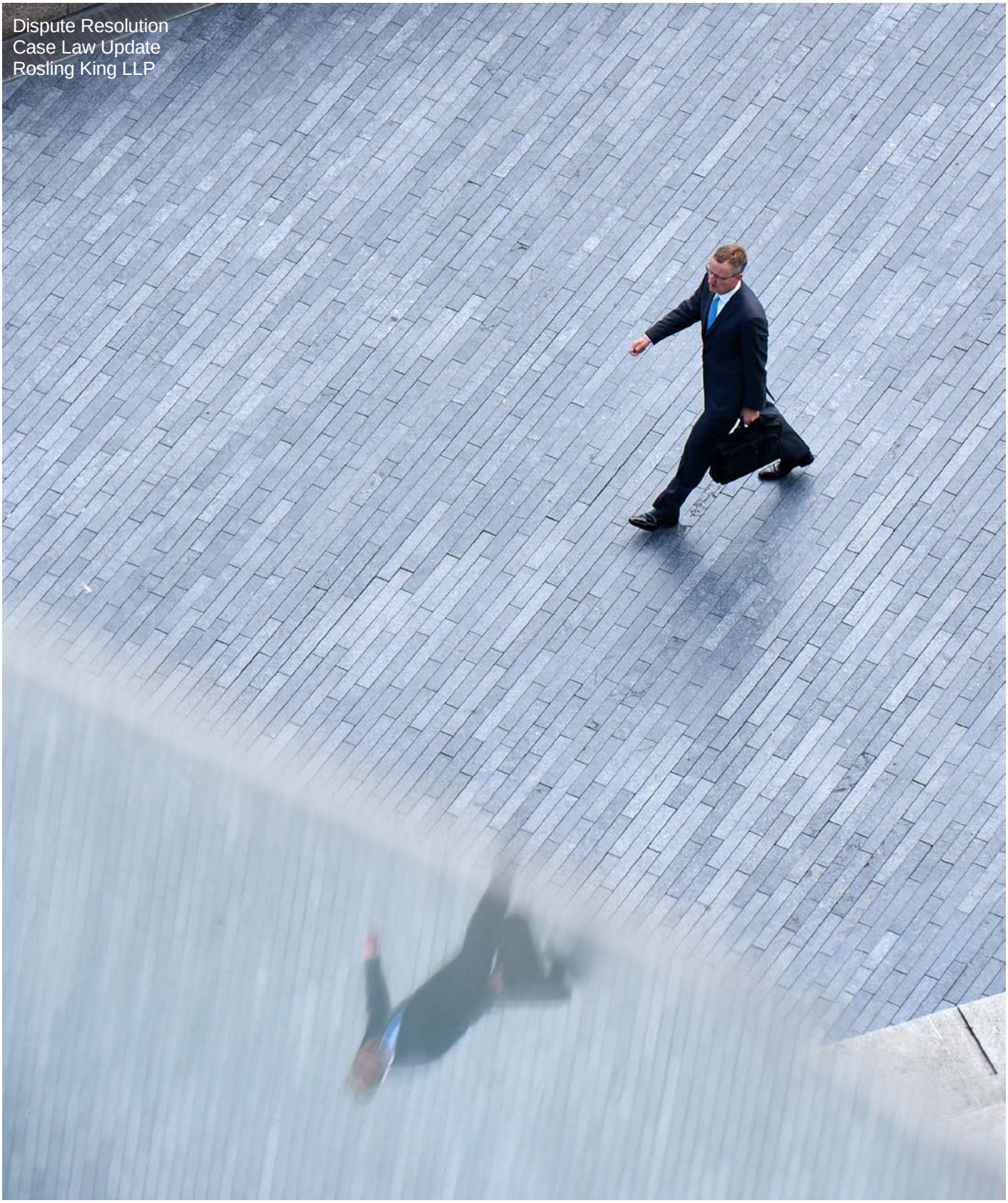
R K

Dispute Resolution
Case Law Update
Rosling King LLP



In this case, the High Court considered the enforceability of a disclaimer of liability within auditor reports against a third party.

The Facts

The Defendant, Grant Thornton, carried out audits for VEH Essen Hotels Group ("VEH") in 2006 and 2007. These auditor reports were relied upon by the Claimant, Barclays Bank, in consideration of their continuing loan facility to VEH in the sum of £250 million. VEH later became insolvent and were unable to repay the loan facility to the Claimant.

The Claimant, seeking to recover its losses, brought proceedings against the Defendant for professional negligence pursuant to the Defendant's alleged negligence in producing the auditor reports. The Claimant alleged that the Defendant failed to discover fraudulent statements made by VEH which exaggerated VEH's financial position. The Claimant alleged that this negligence caused their loss.

The auditor reports produced by the Defendant included a clause acting as a disclaimer which stated that they were made for VEH's director only and that the Defendant did not accept liability to third parties for their reliance on the information contained within the auditor reports. Such a disclaimer is often described as a "Bannerman clause" following the case of Royal Bank of Scotland v Bannerman Johnstone McClay (a firm) and others ((2002) The Times, 23 July 2002), this case found auditors liable for negligence in the preparation of accounts for a company which the bank then relied upon for the purpose of lending facilities on the basis that, whilst the auditors were carrying out their statutory duty to the company, they were aware of the bank's lending role in relation to the company and the fact that the bank would rely on the accounts prepared by them. The Court found in Bannerman that a finding of liability would have been precluded had the auditors disclaimed responsibility to the bank on learning that the bank wanted to look at the company's accounts to establish the company's creditworthiness.

The Claimant submitted that the terms of the disclaimer made it unreasonable and therefore inapplicable and that, as a result, they were entitled to recover their loss for reliance upon the auditor reports. The Defendant disputed the Claimant's submissions and sought summary judgment.

The Decision

The High Court reviewed the terms of the disclaimer in detail and held that the terms were clear, anyone who had read the auditor reports would have seen and understood the disclaimer clause, its meaning and the implications.

Further, the High Court referred to the nature of the parties involved, being two 'sophisticated commercial parties' who were both well versed in the usual limitations auditors impose on their responsibilities. The High Court found that the Claimant should have anticipated that such an exclusion clause would have been present in the auditor reports.

On this analysis of the facts, the High Court found that the clause was not unreasonable and

was capable of being relied upon by the Defendant. The High Court granted the Defendant summary judgment and concluded that the Claimant had no realistic prospect of success.

Commentary

This case demonstrates the facts that will be taken into consideration by the Courts when considering the effectiveness of a disclaimer clause. Where a clause is clear on its terms and utilised between commercially sophisticated parties, it will usually be effective in excluding liability. In cases where a party wishes to place reliance on documents containing such a clause, steps should be taken in advance to ensure that the party may rely on the documents in question.

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