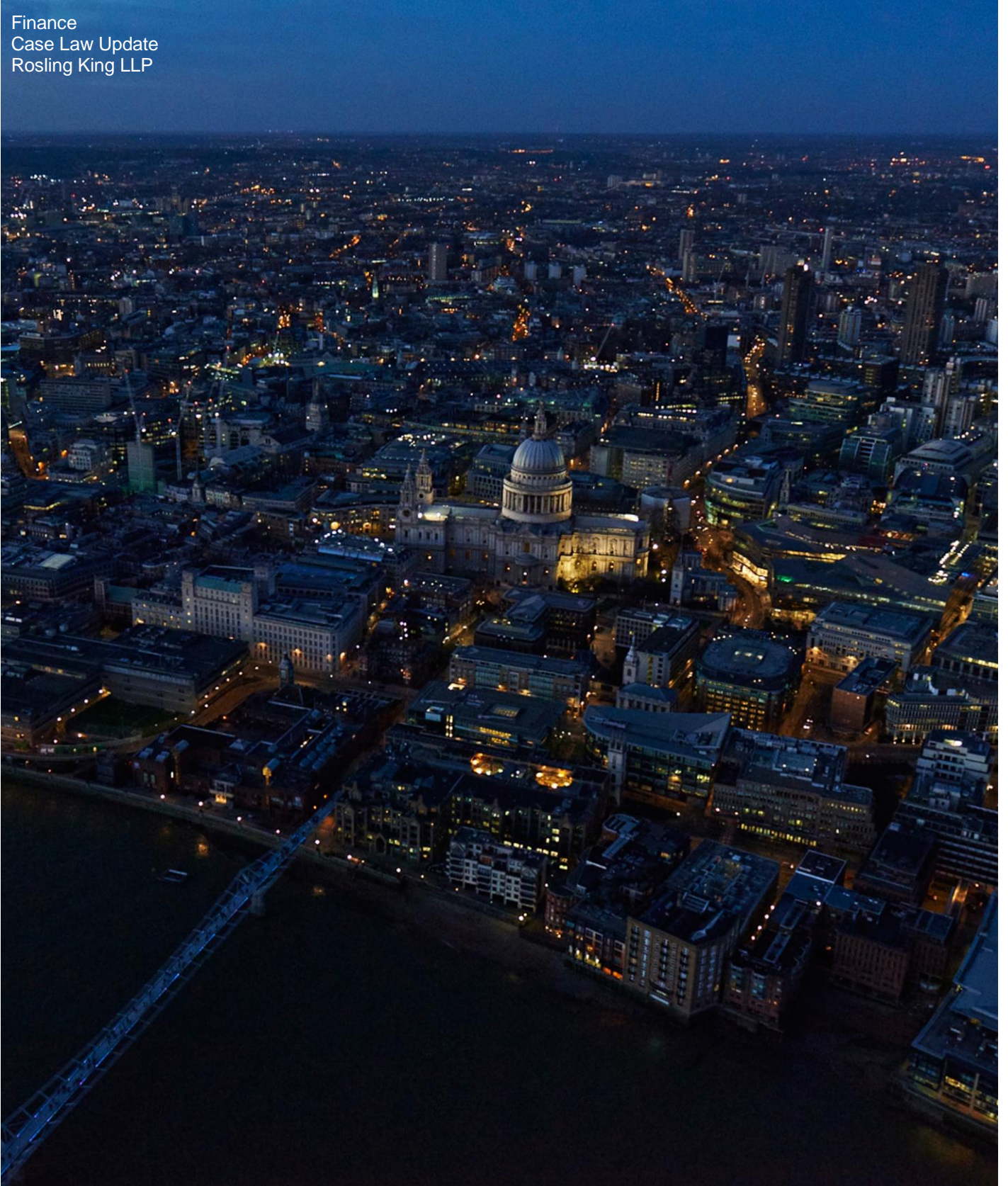


Finance  
Case Law Update  
Rosling King LLP



The Court of Appeal has allowed an appeal against a decision of the High Court, which concluded that two solicitors were guilty of dishonest assistance relating to a mortgage fraud.

On appeal, it was held that the previous Judge was wrong in his finding of dishonesty, on the basis that he had not made an explicit finding based on an assessment of what the solicitors had believed the facts to have been. The Court of Appeal further held that the previous Judge had failed to deal with the solicitors' defence and had therefore not been entitled to find that they were guilty of dishonesty.

The Court of Appeal subsequently reversed the Court of first instance's decision.

#### Background and Initial Claim

In 2006, Lord Edward Developments (Beechwood) Limited (the "Company") under the control of Mr Tibbetts, instructed Cobbetts to act for them in the purchase of development land consisting of three plots. In order to finance the acquisition, Clydesdale Bank Plc (trading as Yorkshire Bank) (the "Bank") provided the Company with a loan for £1.99 million. The loan was to be secured by way of a legal mortgage and a deed executed to that effect. The charge was subsequently registered by the Registrar of Companies, but the Bank's solicitors, BPE, failed to register their charge with the Land Registry.

In 2007, Cobbetts were instructed to act for the Company on the sale of one of the plots of land. Mr Murphy was the associate assigned with the conduct of this matter, under the supervision of Mr Denslow, a partner. At this point, Mr Murphy was unaware that the Bank had the benefit of an unregistered charge to secure its lending and informed the director of the Company that there was no charge registered on the title.

Unknown at the time to Mr Murphy and Mr Denslow, the Company then registered a first legal charge at the Land Registry in favour of a Mr Hayward (referred to herein as the "Hayward Charge") a copy of which Mr Murphy and Mr Denslow never saw. The effect of the Hayward Charge was such that the chargee was entitled to receive any proceeds of sale of the land, up to the limit that was secured by the Hayward Charge, before the Bank was entitled to any part of those proceeds.

Mr Murphy was later informed that the Company now intended to sell all the plots of land to Mr Tibbetts. In the meantime, Mr Murphy and Mr Denslow joined a new firm, Shoosmiths, who is the appellant in this claim. Mr Murphy was advised that Mr Tibbetts would purchase the land, acting in a representative capacity for Mr Hayward, the chargee in favour of the land. The sale of two of the plots to Mr Tibbetts were to be in part fulfilment of a debt owed to the Company, with the remaining plot of land being transferred to him by way of normal sale.

Mr Murphy had not been aware of the Hayward Charge and so took steps to discharge this in respect of the sale of the single plot. He was not aware of the sum secured by the Hayward Charge and sought instructions from the Company as to whether the proceeds of sale could be paid to Mr Hayward. These were obtained, and the transfer of the individual plot completed while the remaining two plots were nearing completion.

Mr Murphy was then informed by BPE that there was a charge in favour of the Bank that should have, but had not been, registered and that the Company had drawn down around £2 million that should have, but had not been, registered with the Land Registry. Despite this, Mr Murphy acted upon the instructions received from the Company to continue with the sale of the remaining two plots of land to Mr Tibbetts. Mr Murphy and Mr Denslow essentially concluded that the Hayward Charge “trumped” the Bank’s charge and proceeded with the transfer.

Mr Tibbetts therefore received all of the proceeds of sale in fraud of the Bank. BPE issued proceedings against Shoosmiths for equitable compensation or damages for alleged knowing assistance in breach of trust - being the payment of money representing the proceeds of sale.

Mr Murphy and Mr Denslow gave evidence in their defence, stating that whilst they had not known the amount of the Hayward Charge, they had believed that the combined sum arising from the sale of the plots had been less. The Judge however, held that Mr Murphy had learnt that there had been drawdowns by the Company and irrespective of whether the charge had been registered; the Company was liable to the Bank. The Judge held that when Mr Murphy and Mr Denslow followed instructions to proceed with the transaction, they were participating in a transaction which defeated the legitimate interests of the Bank and were subsequently found guilty of dishonest assistance in breach of trust.

Shoosmiths appealed the High Court’s decision, and this was allowed.

#### Judgment on Appeal

The pertinent issue on appeal was whether the Judge had erred on the basis of the facts that he found, in concluding that the two solicitors were guilty of dishonest assistance in breach of trust. The critical question was not what Mr Murphy and Mr Denslow had known about the Bank’s charge, but what they had known or believed about the Hayward Charge.

Unless the Judge was able to conclude from expressly addressing the solicitors’ evidence that he disbelieved them - he had not been entitled to make a finding of dishonesty. It was held that he was wrong in make a finding of dishonesty, particularly against solicitors, which should be met with careful consideration.

The Court of Appeal subsequently reversed the Judge’s decision, on the basis that the Judge had not made an explicit finding based on an assessment of what the solicitors had believed the facts to have been. In addition, the Court of Appeal concluded that the Judge had simply failed to deal with what was, potentially, a good defence.

#### Commentary

This case provides a reminder that findings of dishonesty must be made on firm findings of fact. It follows that evidence before a trial judge should be carefully considered in order to justify a finding of dishonesty.

