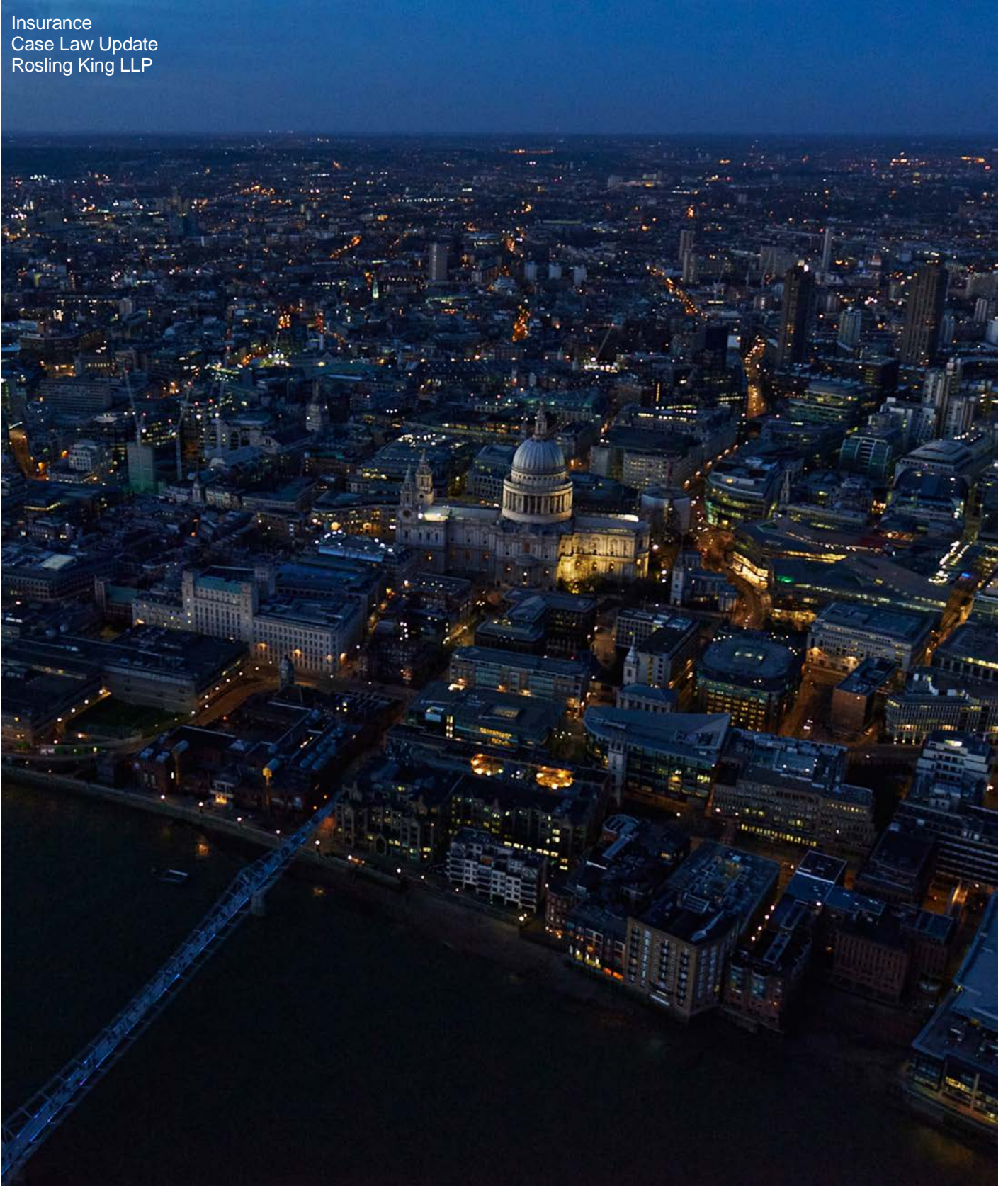


Insurance  
Case Law Update  
Rosling King LLP



March 2015  
Page 2

This recent decision of the Court of Appeal confirms that a solicitor's PII insurers will be liable to indemnify a firm for breach of duties towards a client, but not for breach of personal obligations. The case confirms that a solicitor's PII insurers may be expected to indemnify a solicitor where they are held liable to repay disbursements made by way of a loan by a loan company.

### The Facts

Impact Funding Solutions Limited ("Impact") was a firm that provided loans to litigants to pay for disbursements required during the course of litigation. If the claim was successful, the loans were expected to be recoverable from the unsuccessful party. However, if the case was lost the loans were to be repaid in some other way, normally by After the Event Insurance or Legal Expenses Insurance. If the ATE or LEI provider refused to pay then Impact would look to the solicitors as the secondary party for recovery. The question before the Court was whether solicitors' PII insurers were obliged to indemnify in such circumstances.

Impact obtained a judgment against the defendant firm of solicitors ("Barrington"). Impact subsequently brought a claim against Barrington's insurers ("AIG") pursuant to the Third Parties (Rights Against Insurers) Act 1930. AIG were entitled to rely on any defence it would have as if it had been sued by Barrington.

Impact and Barrington's relationship was governed by a Disbursements Funding Master Agreement ("DFMA"). However, in breach of its duty of care to its clients, and in breach of the DFMA, it was found that Barrington made little attempt to assess the merits of its clients' claims. As a result, numerous actions were abandoned for reasons of limitation or because they were unmeritorious. Additionally, loans obtained from Impact were not used to pay for disbursements, but to pay introduction and referral fees. On this basis, ATE insurers refused to both pay the costs of the abandoned claims and to reimburse the loans made by Impact. Accordingly, Impact looked to Barrington/AIG to repay.

AIG's policy covering Barrington incorporated the Minimum Terms required by the Solicitors' Indemnity Insurance Rules (the "Minimum Terms"). In the High Court, it was held that AIG was entitled to rely on an exclusion in the Minimum Terms which stated that AIG were not liable to indemnify for "breach by any insured of the terms of any contract or arrangement for the supply to, or use by, any insured of goods or services in the course of the Insured Firm's Practice" (the "Clause 6 Exception"). AIG argued that the DFMA was a contract which fell within the Clause 6 Exception. As such, it was not liable to indemnify Barrington in respect of its liability to repay "commercial loans" since PII insurers are not in the business of helping companies such as Impact to obtain repayment of loans to solicitors for the purposes of carrying on their practices. The High Court agreed and Barrington appealed.

### The Appeal

On appeal, Impact argued that the judge was wrong to characterise the DFMA as a contract to which the Clause 6 Exception applied because it was no more than a facility provided to and for the benefit of Barrington's clients. AIG argued the DFMA was a contract for services made with Barrington in the course of its practice with the result that it could rely on the

March 2015  
Page 3**Clause 6 Exception.**

The Court of Appeal considered that the purpose of the Clause 6 Exception was to prevent PII insurers being liable for liabilities of a solicitor's practice which may be considered personal, as opposed to liabilities arising from professional obligations to clients. i.e. a solicitor's PII insurance would not cover its liabilities to its suppliers, obligations to a cleaning company, or obligations under a lease or mortgage, but should cover claims arising from breach of obligations towards a client. On this basis it was held that the loans made to cover disbursements intended in the litigation were part and parcel of the obligations assumed by a solicitor in respect of his professional duties to his client, rather than obligations personal to the solicitor. It was held that a solicitor who negligently advises his client that a claim is likely to succeed and causes a client to incur disbursements which should not have been incurred will be liable to the client for disbursements needlessly incurred. As such, the Clause 6 Exception did not apply and AIG were held liable to indemnify Barrington. The Court of Appeal did however emphasize that the position would be different if Barrington had been operating a scam and were using the loans for personal purposes.

**Analysis**

This case is clear authority that the Clause 6 Exception found in the Minimum Terms is only intended to apply to exclude a PII insurer's liability for a solicitor's personal obligations, not liabilities arising from professional duties owed by a solicitor to its client. In particular, depending on the specific terms of the contractual arrangement, if a client needlessly incurs disbursements and liability under a loan agreement such loan company may be able to seek recovery from the client's solicitors and their indemnity insurers.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.