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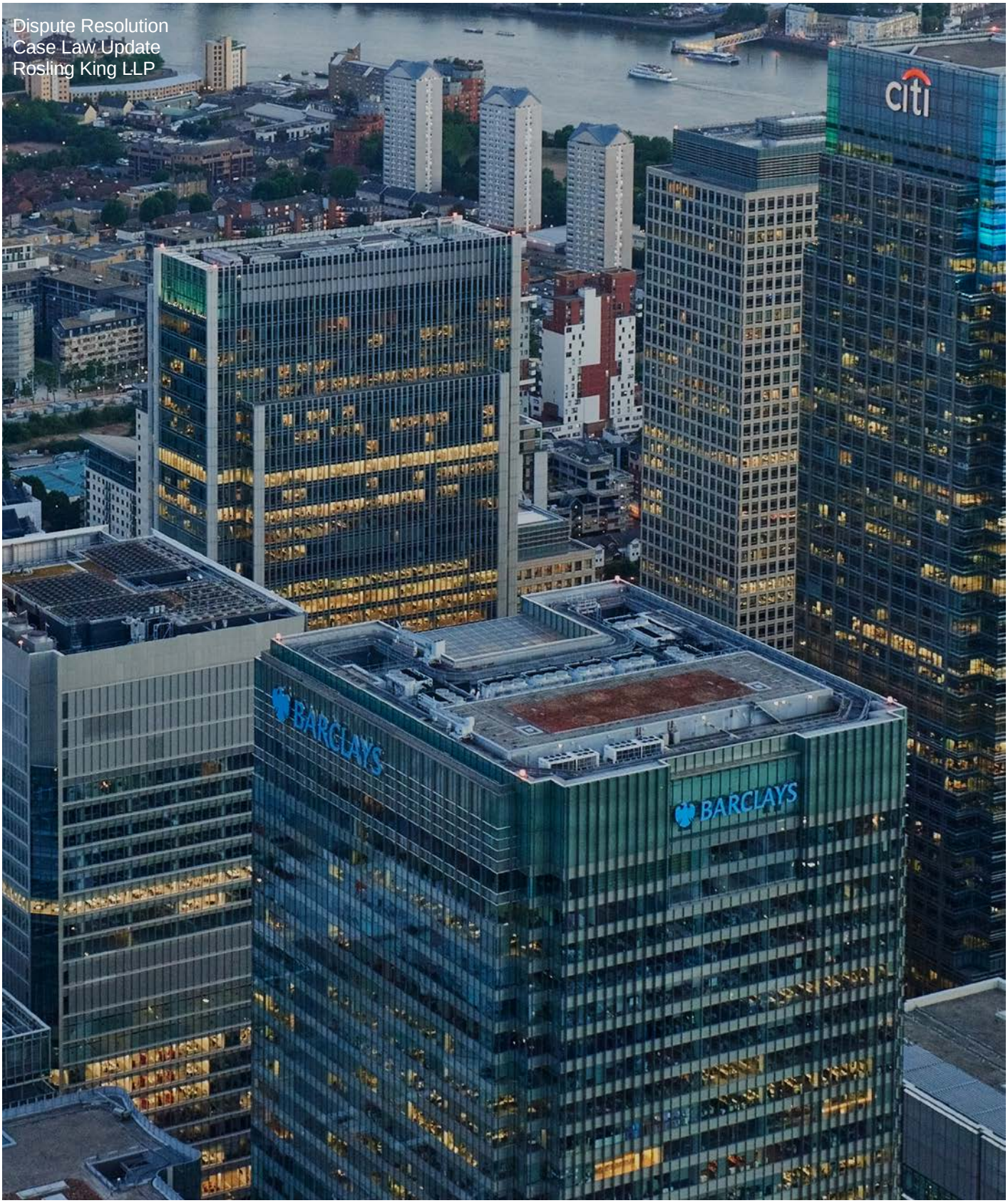
Dispute Resolution
Case Law Update
Rosling King LLP



This commercially sensible decision of the Court of Appeal considers the position of a lender making loans that are not regulated by the Consumer Credit Act 1974 (the "CCA") but using documentation which purports to comply with the CCA and headed with the statement "Fixed sum loan agreement regulated by the Consumer Credit Act 1974".

The Facts

The Defendants, and other borrowers in their circumstances, entered into an unsecured credit agreement with the Claimant which allowed them to borrow up to 95% of the value of their home on a secured basis and further take out a fixed sum unsecured loan of up to 30% of the value of their home, capped at £30,000. The unsecured element of £30,000 was in excess of the financial limit in place at the time for protection under the CCA, but the agreement nevertheless stated it was a regulated agreement.

During 2012 the Claimant realised that it had not fully complied with the regulations under the CCA, in particular, statements provided by the Claimant to the Defendants did not state the amount of credit originally provided under the agreement. The Claimant addressed the problem in relation to its borrowers who had regulated agreements under the CCA by providing corrected statements and re-crediting wrongly debited interest payments and default sums in respect of the period of non-compliance. However, the Claimant did not provide any redress to borrowers who entered into agreements before 6 April 2008 under which the amount of credit provided exceeded £25,000, on the basis that such agreements were not regulated by the CCA and therefore the borrowers had no rights.

At first instance it was argued: (1) that the contractual documents incorporated the CCA; (2) in the alternative the true effect of the agreement was that the agreements were to be treated as regulated; and (3) in the alternative, the same result could be relied on by the doctrine of estoppel. The judge at first instance agreed that the rights and remedies of the CCA were incorporated into the agreements, on the basis that it was express or implied, whether or not a regulated agreement, and as such borrowers in the Defendants' position were entitled to redress. This decision had potentially wide ranging implications for lenders and the Claimant appealed.

The Decision on Appeal

On appeal the Court of Appeal held:

(1) On the basis of the law as it stood, the CCA did not apply to regulate agreements for loans in excess of £25,000.
(2) It is not an easy question to answer as to whether the CCA can be expressly contracted into and, in light of the highly technical provisions of the Act, would require very clear words before this could be concluded.
(3) In this case there was no express incorporation of the CCA.
(4) It was not an express or implied term that the borrowers in the Defendant's position would have the protection of the CCA irrespective of whether the agreement was regulated or unregulated.
(5) Estoppel did not apply as there was no shared assumption the CCA would apply.

On this basis, the Court of Appeal held that the Defendants did not have the protection of the Act and were not entitled to the remedies it afforded. It was however arguable that the statements stating the CCA applied could give rise to a misrepresentation claim, but these would likely be time barred.

Commentary

This decision is a very welcome decision for lenders. It confirms that the CCA will not easily be incorporated into an otherwise unregulated agreement and shows that, even if an agreement is wrongly described as a regulated agreement when it is not, a lender may not be required to comply with the statutory scheme and obligations under the CCA.

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