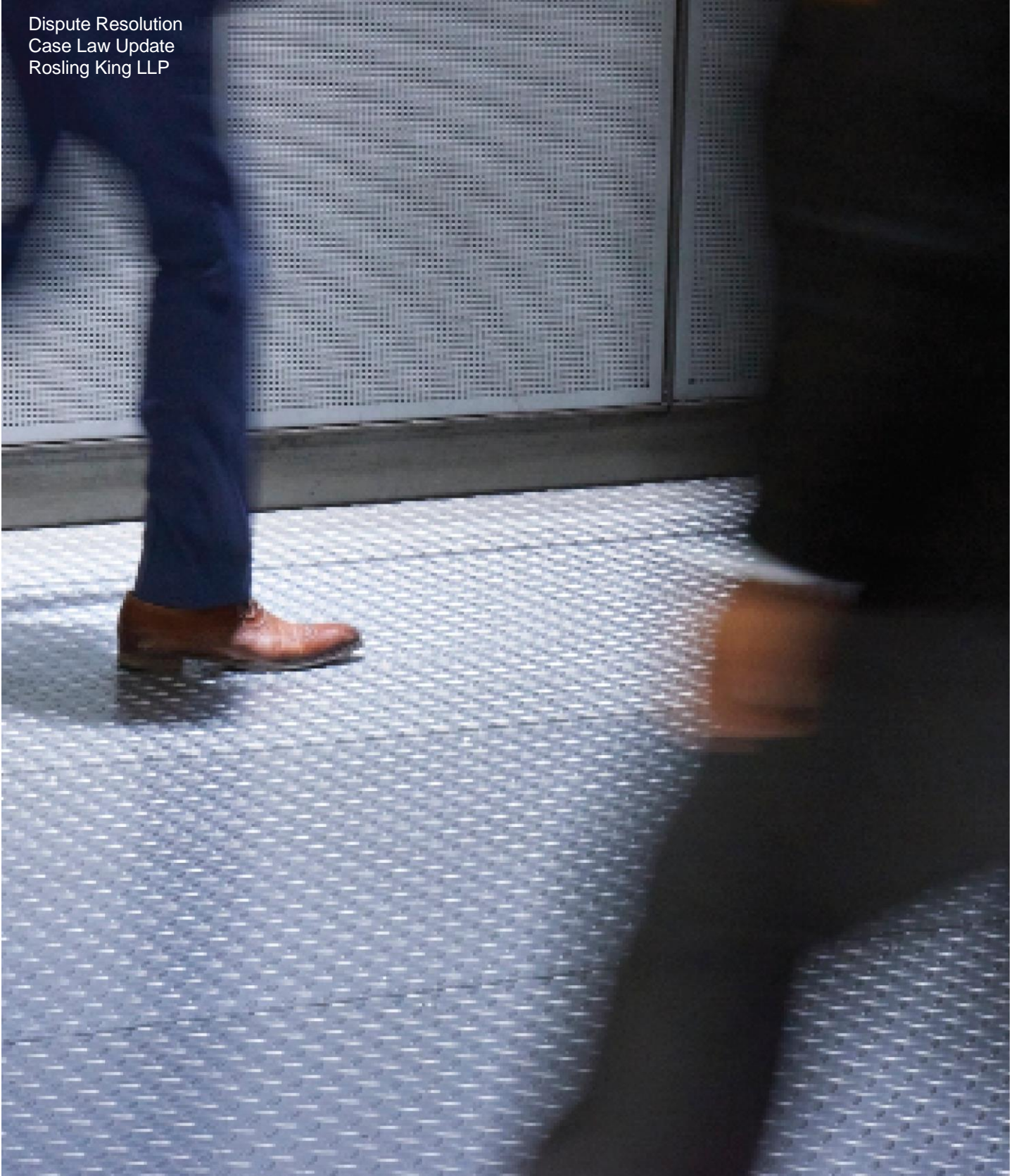


Dispute Resolution
Case Law Update
Rosling King LLP



A recent claim, heard in Chancery Division, has demonstrated the importance of directors' fiduciary duties owed to their companies when entering into transactions with parties in which they also have an interest. In addition to this, the claim also dealt with issues of limitation and whether an action would be deemed statute barred under the Limitation Act 1980 in matters concerning breach of duty.

The Case

In 2005, Mr Ackerman a director of both Haysport Properties Ltd and Twinsectra Ltd, the claimants in this matter and charitable companies, caused the companies to provide security, in the amount of £10m, and an unsecured loan note of £4m on behalf of New Liberty Properties Holdings Limited ("NLPH") as part of a property deal to acquire 350 commercial banking and residential units. NLPH was an offshore discretionary trust, with minimal assets, of which Mr Ackerman was a beneficiary and the driving force behind the New Liberty deal.

At this time Mr Ackerman was the sole active director for the claimants and so, in bringing the proposal to provide the security and loan note, he was effectively bringing this to himself. He did so without thought for the difficulties he faced in negotiating on behalf of both parties. The reality of the transaction meant that, while NLPH were able to proceed with the transaction, the claimants were effectively gaining no benefit when compared with their level of exposure. Twinsectra Ltd was left in the position of being an unsecured creditor to a company with near nil assets behind secured lenders with substantial amounts owing to them. Haysport Properties Limited provided £10m worth of security while only receiving a benefit of £25,000 per annum. NLPH subsequently entered into compulsory liquidation in December 2009 and the claimants were left making large interest payments in order to avert RBS, the main secured lender in the transaction, enforcing its security.

The claim was brought in June 2014 for breach of Mr Ackerman's fiduciary duties on the basis that Mr Ackerman was conflicted in suggesting and entering into the agreements, he failed to notify the claimants of this conflict and his subsequent breach of duty and that he failed to ensure that the claimants received separate advice in relation to the agreements. The claimants sought repayment of the £4m loan as well as orders that Mr Ackerman is liable for all losses as a result of entering into the agreements. In response to this, Mr Ackerman sought to argue that proceedings had been brought outside of the period for limitation and were statute barred.

Decision

Upon review of the matter, the Court agreed with the arguments put forward by the claimants and found that Mr Ackerman had been hopelessly conflicted in negotiating the agreements. The witness evidence put forward by Mr Ackerman showed that no consideration as to his fiduciary duties had been present at the time. It was shown that the claimants only entered into the transaction as Mr Ackerman had decided on their behalf that it was a good idea. As a result of this, the claimants were exposed to losses with no justification upon their part. The Court therefore held that Mr Ackerman was in clear breach of the duties he owed to the claimant companies.

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Whilst highlighting the extent of the fiduciary duty owed to a company by its directors and the risk directors face in acting on matters where self-dealing is evident this only addressed half the issues in play. Limitation had been the main argument raised by Mr Ackerman and the Court dealt with this in turn.

The claimants put forward the following arguments as to why the claim should not be statute barred:

- That the defendant had acted dishonestly;
- That he acted in deliberate breach of his fiduciary duty in circumstances which meant this would go undiscovered; or
- That the advancing of monies to NLPH fell within the recovery of trust property exclusion for limitation.

The Court was keen to point out that it did not think that dishonesty could be shown here and that Mr Ackerman was at all times a man in good standing. However, it was clear that Mr Ackerman had entered into a transaction where there were no reasonable grounds to believe that any of the monies paid over to NLPH would ever be repaid. As a result, the Court felt that there should be no period for limitation and it would fall within the s.21 Limitation Act exemption, considering the nature of the claimants' business. Notwithstanding this, the Court also held that, as Mr Ackerman had a positive duty to disclose breaches of his fiduciary, and did not do so, limitation would not be a factor until these breaches were discovered. On the facts, as Mr Ackerman was the sole active director, the claimants were not in a position to do so until he was replaced as a director in April 2011.

Commentary

This case provides a salient reminder of the ambit of directors' fiduciary duties and the consequences of falling to adhere to those duties. In addition, limitation will not always be clear cut in cases involving breaches of duty and fraud or dishonesty is not needed to defeat arguments of cases being statute barred under the Limitation Act 1980.

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