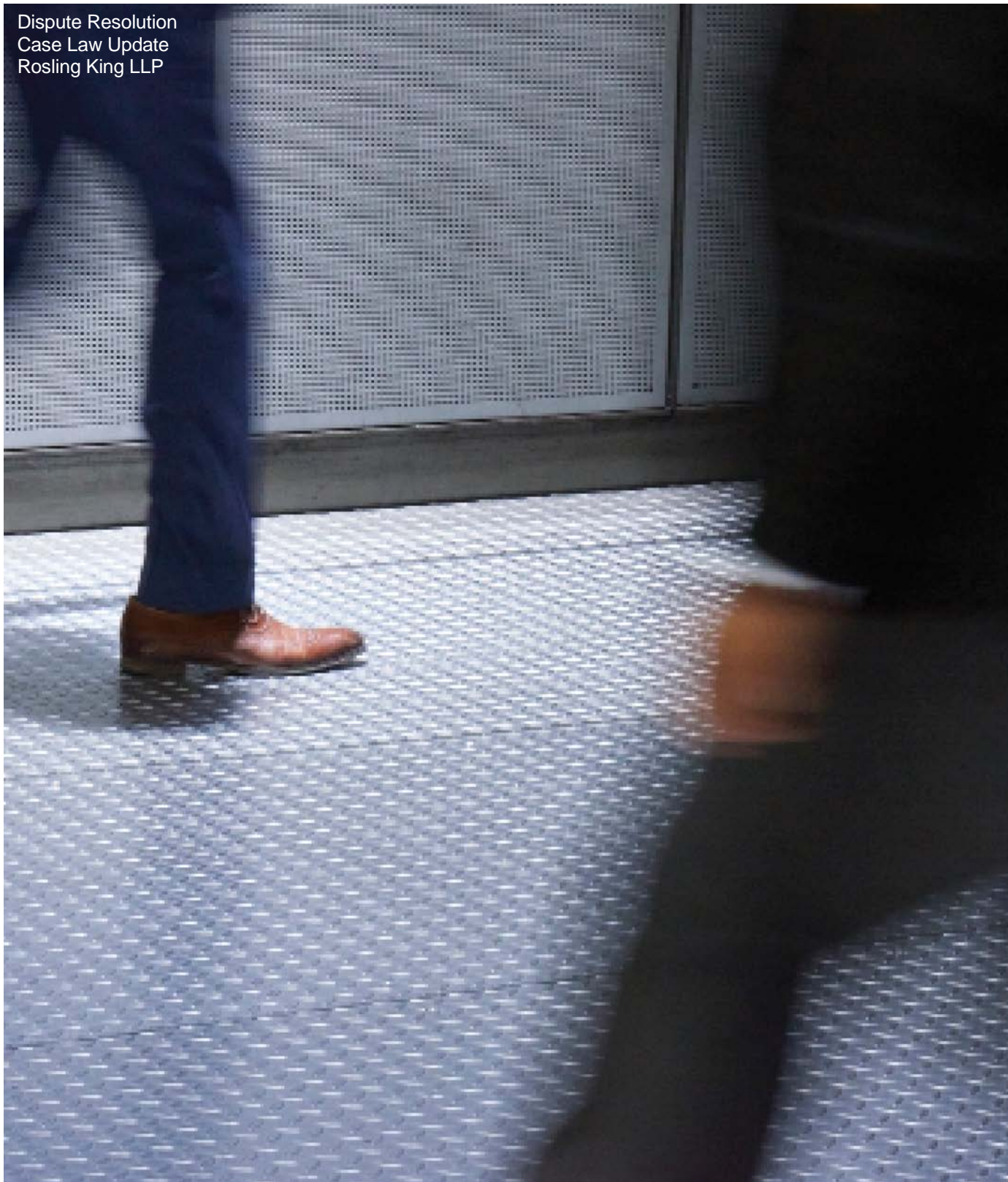




Dispute Resolution  
Case Law Update  
Rosling King LLP



This Court of Appeal decision looks in detail at the authorities, general principles and effect of limiting a solicitor's retainer. The implication following this decision is that, in certain circumstances, lenders may be considered experienced clients and, as a result, should take care when drafting their letters of instruction to solicitors.

### The Facts

The Defendant was a solicitor who was instructed to act on behalf of the Claimant in the preparation of a consent order in relation to ancillary relief proceedings. The Claimant later came to regret the terms of the consent order and pursued a professional negligence claim against the Defendant for her advice, or lack of advice, in relation to the merits of the order.

At trial, the Defendant argued that she was acting under a strictly limited retainer to only finalise an adequate consent order which represented the Claimant's pre-agreed arrangement with her husband. Accordingly, it was the Defendant's case that she was not instructed to advise on the content or merits of the agreement. It was the Claimant's case that, had the Defendant given competent advice, she would not have agreed to the consent order and would have obtained a more favourable decision in the ancillary relief proceedings.

The Court at first instance agreed with the Defendant and held that she was not under a duty to advise on the merits of the order. The Claimant appealed.

### Decision on Appeal

The Court of Appeal upheld the decision at first instance and considered, in detail, the case law surrounding limiting a solicitor's retainer. The Court identified the following general principles:

- (1) A solicitor and client may limit their retainer. However, as a matter of good practice, a solicitor should confirm such agreement in writing. If it does not, the Court may not accept that any such limitation was agreed.
- (2) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake;
- (3) It is implicit in a solicitor's retainer that he/she will give advice which is reasonably incidental to the work being carried out; and
- (4) In determining whether the advice is reasonably incidental, consideration will be given to the character and experience of the client.

Interestingly, in relation to the experience of a solicitor's client, the Court of Appeal referred to the decision of *National Home Loans Corporation PLC v Giffen Couch and Archer* [1998] 1 WLR 207. In this case, a lender instructed a firm of solicitors to investigate title, report to it on its standard form and carry out a bankruptcy search. The Defendant solicitor complied with its instructions, but did not advise on the borrower's existing arrears or threat of legal proceedings. Despite the lender's arguments to the contrary, given the terms of the solicitor's instructions and the experience of the commercial lender client, it was held that the solicitor was not in breach of duty.

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### Commentary

This case provides a useful summary of the principles that will be applied when considering whether a solicitor's retainer is limited. It indicates that, in certain circumstances, lenders may be considered to be experienced clients. It is therefore important that lenders think seriously and carefully about the terms of their instruction letter, to ensure that they are not limiting the scope of a solicitor's duty of care and thereby possibly limiting the scope of a potential future recovery.

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