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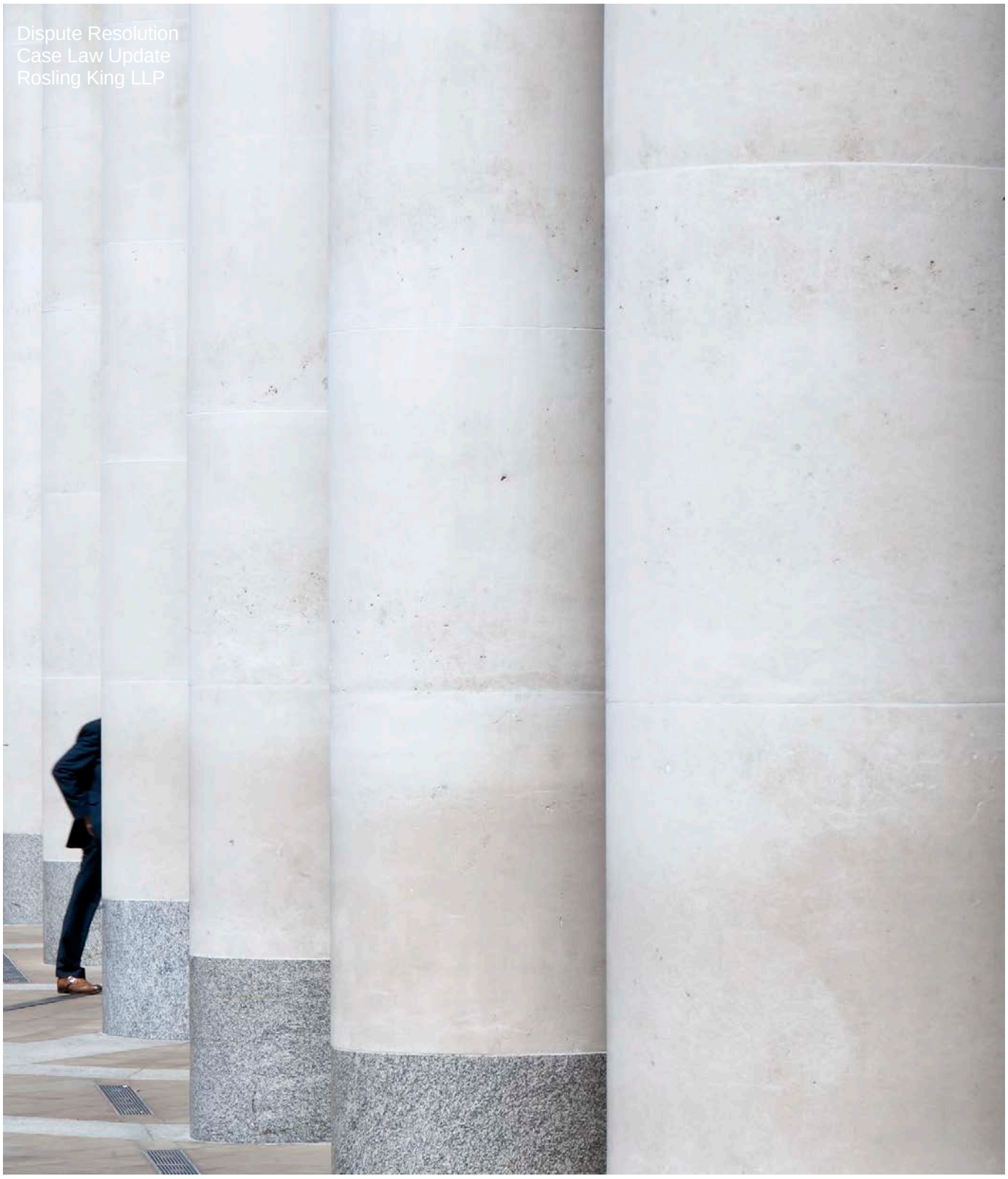

The Court of Appeal recently considered the correct interpretation of an exclusion clause which placed a contractual time limit on the buyer bringing a breach of warranty claim against the seller.

The Claim

The claim arose out of a Share Purchase Agreement (the "SPA") which was entered into by the Hut Group Limited (the "Buyer") and Mr Nobahar-Cookson and Barclays Private Bank & Trust Limited (the "Seller") on 30 May 2011, for the sale of a company called Cend (the "Target"). Both the Buyer and the Seller made multiple warranties to each other relating to the accounts, business, assets and affairs of the Target.

The Buyer and the Seller subsequently both made warranty claims against each other, including a claim for breach of the Seller's management accounts warranties (the "Claim"). The claims led to proceedings in the Commercial Court.

The Seller argued that the Buyer was time barred in respect of its Claim. Clause 5.1 of Schedule 5 of the SPA (the "Clause") stated as follows:

"The Sellers will not be liable for any Claim unless the Buyer serves notice of the Claim on the Sellers… as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter." [emphasis added]

The Seller argued that the Clause became engaged when the Buyer became aware of the factual grounds for the Claim, as opposed to when they became aware that the factual grounds could amount to an actionable claim. On that basis, the Seller argued that the Buyer had become aware of the factual grounds of the breach when they received the Target's management accounts. Therefore, the Clause applied and the Buyer was time barred from bringing the Claim.

The Trial Judge held that the Seller's interpretation of the Clause was incorrect and that the phrase "*aware of the matter*" should be construed to mean becoming aware of the proper basis of the Claim. The Trial Judge held that the Buyer only became "aware of the matter" once they received advice from a forensic accountant. Therefore, the Buyer was entitled to bring the Claim. When considering the construction of the Clause, the Trial Judge refused to apply the contra proferentem rule on the basis that both parties had provided warranties to each other and they were both therefore bound by the Clause.

As the Trial Judge rejected the Seller's argument that the Claim was time barred, judgment was made in the sum of £4.3 million in favour of the Buyer's Claim, and £10.8 million in favour of the Seller's counterclaim.

The Appeal

The Seller appealed the Trial Judge's decision on the basis that the Trial Judge had erred in finding that the Buyer had not fallen foul of the contractual time limit in the SPA. The Seller invited the Court of Appeal (the "Court") to consider the meaning of "aware of the matter" and

put forward three possible interpretations:

(1) aware of the factual grounds giving rise to the Claim (even if the party is unaware that those facts give rise to a legitimate claim);
(2) aware that there might be a claim under the warranties; and
(3) aware of the Claim, and that there is a proper basis for the Claim.

It was common ground between the Buyer and the Seller that should the Court be minded towards either options (1) or (2) above, then the Appeal should be allowed.

The Judgment

The Judges unanimously dismissed the Appeal, and, whilst they agreed with the Trial Judge's decision, their justification for dismissing the Appeal differed.

The Court held that the Trial Judge had erred in stating that the contra proferentem rule did not apply. If it is necessary to resolve ambiguity, and the ambiguity cannot be resolved by linguistic, contextual or purposive analysis, exclusion clauses should be interpreted in the narrowest possible way. Lord Justice Briggs held that it is irrelevant that the exclusion clause applies to both parties in the same way and that this should not prevent the contra proferentem rule from being applied.

When considering the three options put forward by the Seller, Lord Justice Briggs held that option (2) above was so uncommercial it could not constitute a viable interpretation of the Clause, as the effects of this interpretation could not have been intended by the parties when entering into the SPA.

Lord Justice Briggs held that neither interpretations (1) or (3) gave rise to "forensic difficulties in litigation", however the ambiguities within the Clause should be resolved by having regard to the narrowest interpretation of the abovementioned options. Therefore, construction (3) represents the correct interpretation of the Clause.

Whilst Lord Justice Hallett and Justice Moylan agreed with Lord Justice Brigg's Judgment, they both stated that they would have placed a greater emphasis on the commercial sense of the Clause when considering the interpretation of the same.

Commentary

This case confirms that, where there is ambiguity in the meaning of an exclusion clause, parties must first consider the linguistic, contextual and purposive analysis. However, in the event that these fail to provide sufficient clarity to the clause, the contra proferentem rule will then apply. The ambiguous clause should be construed in its narrowest form, irrespective of whether the clause in question applies to both parties.

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