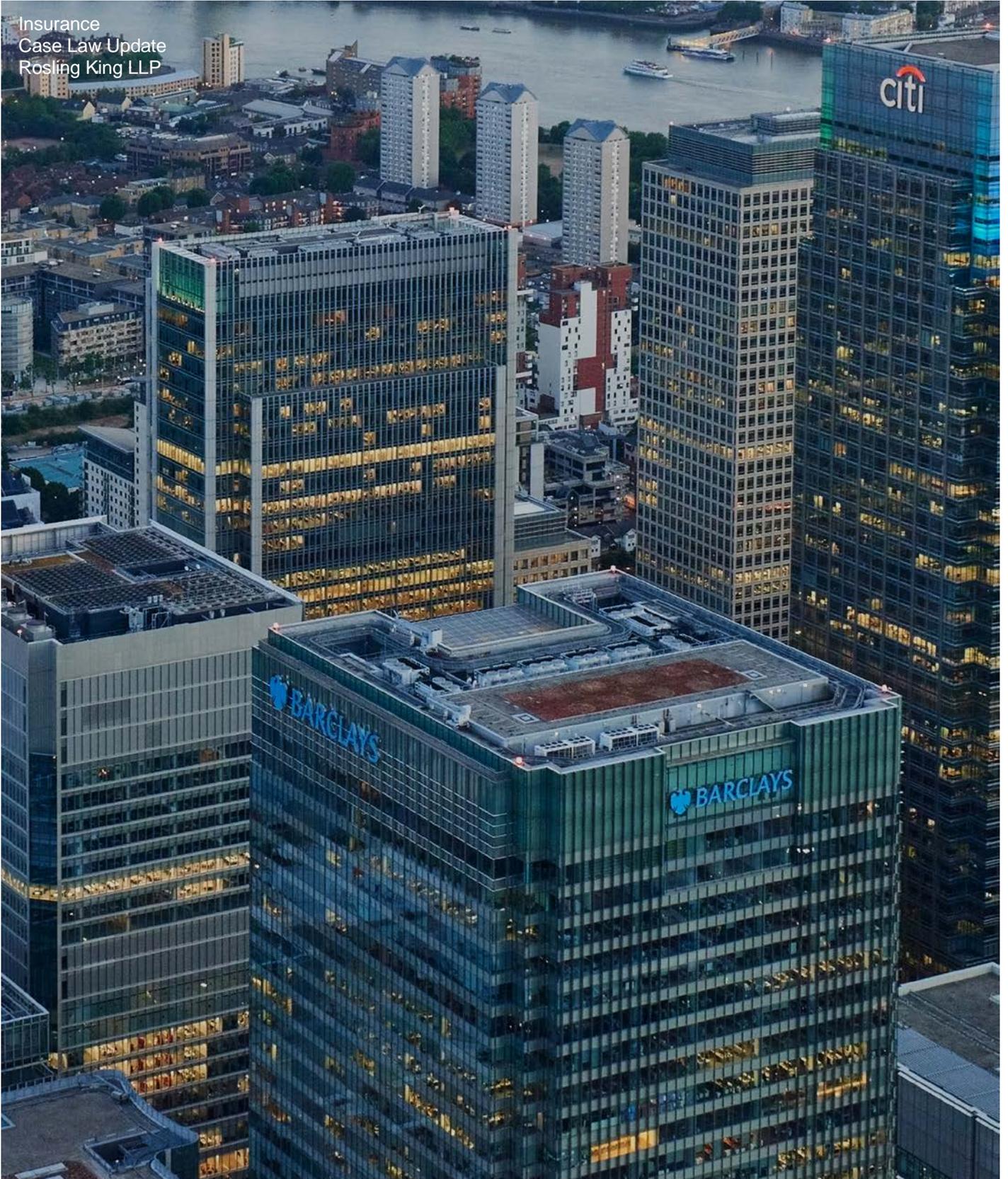


Insurance
Case Law Update
Rosling King LLP



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The Commercial Court recently dismissed a claim for business interruption (BI) losses arising from employee theft, due to breach of special claims conditions in the policy which were a condition precedent to recovery.

The Facts

The Claimants, a holding company for businesses operating the Ted Baker brand worldwide, and its wholly owned UK subsidiary (collectively "Ted Baker"), brought an insurance claim after a large amount of stock was stolen by an employee from its London warehouse between 2003 and 2008. Ted Baker sought to recover its losses in respect of the stolen goods covering a period of approximately 5 years under a series of insurance policies with the Defendant underwriters, Axa Insurance Plc ("Axa").

Axa contended that Ted Baker was precluded from bringing the claim as it was in breach of special claims conditions in the contract requiring provision of certain information and documentation. Further, Axa submitted that the claim in respect of 2004 was time barred as the policy included a condition requiring particulars of claim to be delivered no later than 30 days after the expiry date of a specified indemnity period, which Ted Baker had failed to do.

Ted Baker argued that Axa was itself prevented from relying on these purported defences on various grounds including breach of contract and estoppel. Ted Baker claimed that there had been an estoppel by representation in that the need to provide the additional documents requested by Axa had been 'parked' pending, at least, resolution of the question of liability in principle.

The Decision

Justice Eder dismissed the claim in its entirety. The Court found that Ted Baker had been in breach of the special claims conditions in failing to provide documents from a list of items requested by Axa in the context of coverage investigations, including profit & loss and management accounts for 2005 to 2008. The Court noted that the experts of both parties agreed that it was reasonable to request these specific documents and their provision would not result in unreasonable cost and effort to Ted Baker (unlike compliance with some other requests from underwriters' "shopping list"). Therefore there was no reasonable justification for Ted Baker to withhold this information at the time.

The Court found that the suggestion of any agreement, waiver or estoppel by representation preventing Axa from relying on Ted Baker's breach of condition in relation to the 2004 losses was "quite hopeless", in circumstances where this argument had never been advanced until well after commencement of proceedings. In relation to the remaining losses, the Court held that there had been a limited agreement or estoppel by representation which only related to additional work specifically referred to in subsequent correspondence between the parties, and not to documents in the original list including the profit & loss and management accounts. As those documents had never been provided, Axa were entitled to rely upon breach of the special claims conditions and this was fatal to Ted Baker's claim.



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Commentary

The decision highlights the importance for insureds to carefully review policy wordings for potentially onerous claims handling provisions, and to comply fully with any conditions precedent to ensure that cover is not compromised. Any agreement to hold off from provision of full information and documentation requested by insurers to facilitate investigation of the coverage position should be clearly recorded in writing, in the interests of avoiding unnecessary disputes.

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