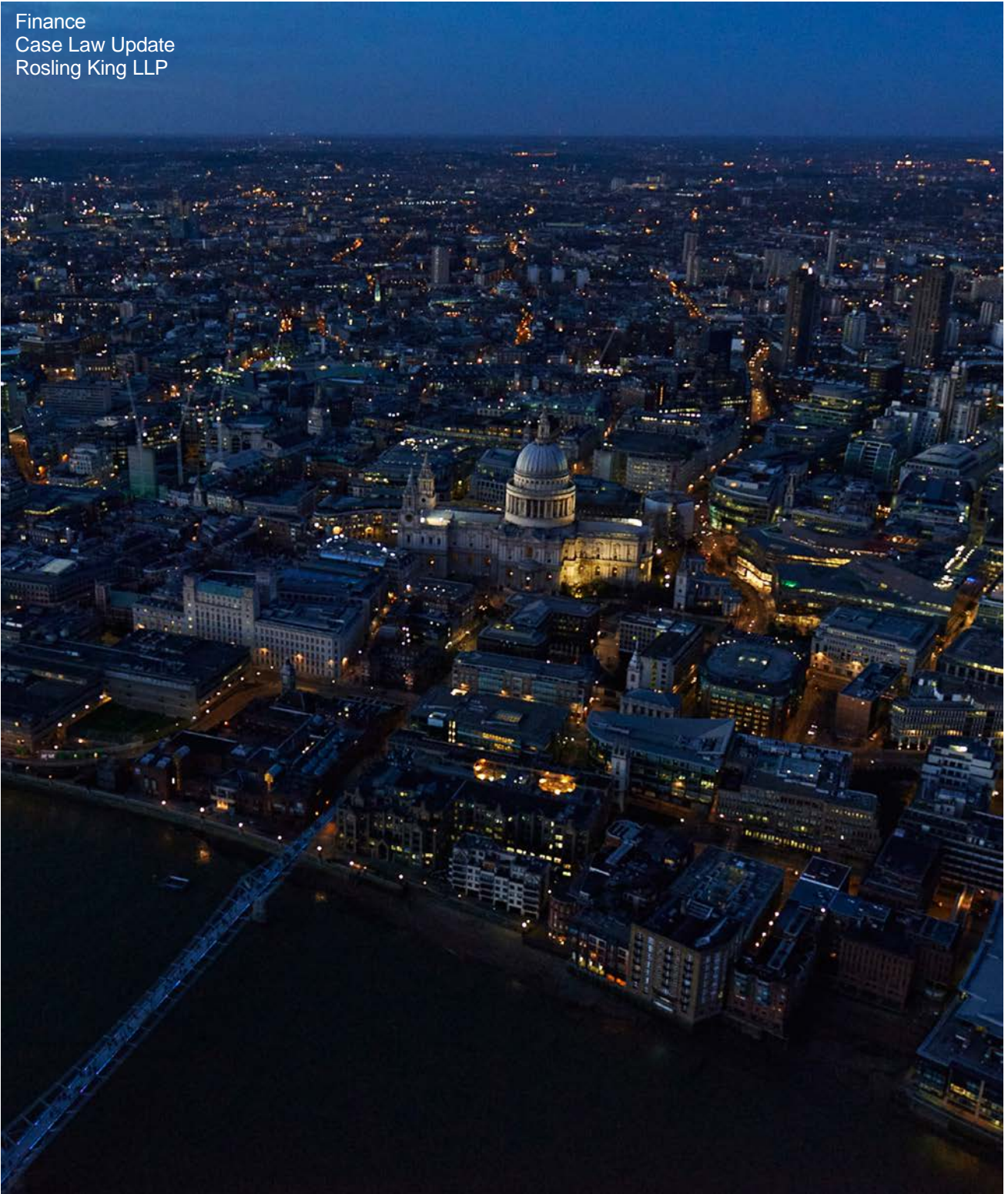


Finance  
Case Law Update  
Rosling King LLP



In this case, the Court of Appeal considered the decision of the Judge at first instance, which related to a claim brought by a consortium of around 400 buy-to-let landlords (represented by Mr Alexander) against West Bromwich Mortgage Company Limited. The Court of Appeal considered the appropriate approach to take where there are inconsistent terms contained in a lender's offer of mortgage and that lender's standard mortgage conditions.

### The Facts

In 2008, West Bromwich Mortgage Company Limited (the "Lender") issued a mortgage offer to Mr Alexander (the "Borrower") in respect of a buy-to-let mortgage. The mortgage offer letter stated that the term of the mortgage would be 25 years, with the interest rate fixed at 1.99% above the Bank of England Base Rate, commonly known as a "tracker" mortgage. The mortgage offer letter enclosed the 'Offer Document', which set out "*the costs, features, terms and conditions of the Loan*". The mortgage offer letter also included the Lender's 'Special Conditions of Offer' and the 'Lender's Mortgage Booklet' (together, hereinafter referred to as the "Mortgage Offer").

The mortgage deed, entered into by the Borrower in July 2008, specifically incorporated the terms of the Mortgage Offer, the Lender's 'Standard Conditions' and the Lender's 'Mortgage Conditions'. Clause 5 of the Lender's Mortgage Conditions provided that interest was payable at the rates specified in the mortgage offer letter, which "*except during any period in which interest is expressed to be at a fixed rate, may be varied by the [Lender] at any time*" for any of the specific reasons specified in the Lender's 'Mortgage Conditions'. Clause 14 of the Lender's 'Mortgage Conditions' provided that the Borrower may be obliged to repay the loan in full if the Lender were to give the Borrower one month's notice requiring such payment.

In September 2013, the Lender informed the Borrower that it was going to increase the margin over base rate applicable to his mortgage by 2% (i.e. in the Borrower's case, from 1.99% to 3.99%). The Borrower disputed that the Lender had the ability to do so and argued that the Lender's 'Mortgage Conditions' provided for rates to vary only after expiry of the initial fixed period and only in accordance with the Bank of England Base Rate. The Borrower further argued that clause 14 of the Lender's Mortgage Conditions' contradicted the 25 year mortgage term specified in the Mortgage Offer and submitted that clause 5 and clause 14 of the Lender's 'Mortgage Conditions' were inconsistent with the terms of the Mortgage Offer. The Borrower referred to clause 1 of the Lender's 'Mortgage Conditions', which provided that "*if there are any inconsistencies between the terms in the Mortgage Conditions and those contained in the mortgage offer letter then the terms contained in the mortgage offer letter will prevail*".

### The Decision at First Instance

The Judge at first instance found in favour of the Lender; he did not consider there to be a contradiction between the clauses in the Mortgage Offer and the Lender's 'Mortgage Conditions' and held that the Lender could rely on them. In his decision, the Judge considered the leading cases dealing with inconsistent contract terms, in particular the case of *Pagnan SpA v Tradax Ocean Transportation* [1987] 3 All ER 565, which reviewed the leading authorities in this field, and concluded that "*it is not enough if one term qualifies or*

*modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses”.*

The Judge found that the appropriate task for the court was to consider the provisions in the Mortgage Offer and the Lender’s ‘Mortgage Conditions’ together and, if possible, give sensible effect to each of them. This could be done by regarding one as modifying or qualifying the other. Applying this test to the offending clauses, the Judge found that clause 5 of the Lender’s ‘Mortgage Conditions’ was regarded as qualifying the terms contained in the Mortgage Offer. The Mortgage Offer specified the rate of interest to be paid after the initial period of a fixed rate of interest, but clause 5 of the Lender’s ‘Mortgage Conditions’ modified or qualified the Mortgage Offer by providing that, in certain specified circumstances, the rate specified in the Mortgage Offer may be varied. Further, the Judge found that no reasonable person would have understood the Mortgage Offer to contradict the provision in clause 14 of the Lender’s ‘Mortgage Conditions’ that the Lender would, in the events specified in the Lender’s ‘Mortgage Conditions’, require repayment of the mortgage before expiry of the 25 year term; a reasonable person would have understood clause 14 of the Lender’s ‘Mortgage Conditions’ to complement the Mortgage Offer, rather than contradict it.

### The Appeal

The Borrower appealed the Judge’s decision with the result that the Court of Appeal overturned the finding of the Judge at first instance. The Court of Appeal held that in considering the provisions of the Mortgage Offer and the Lender’s ‘Mortgage Conditions’, the correct approach when following the principle laid down by *Pagnan SpA v Tradax Ocean Transportation* was not to approach the inconsistency with the pre-conceived assumption that one should not strive to avoid or to find inconsistency. The Court of Appeal found that the clauses in the Mortgage Offer and the Lender’s ‘Mortgage Conditions’ were inconsistent on three grounds:

1. the Mortgage Offer was for a product which described the rate to be variable in accordance with changes in the Bank of England Base Rate and the Lender was therefore promising that any change in the rate was in accordance with this. The Lender’s ‘Mortgage Conditions’ incorporated standard wording which provided for an entirely different method of varying the rate and the term was therefore inconsistent;
2. the Court of Appeal found that the parties agreed the product description in “*clear, absolute and unqualified terms*” and that the wide powers conferred on the Lender under the Lender’s ‘Mortgage Conditions’ which allowed the Lender to unilaterally change this product to something else was inconsistent with the specifically agreed product; and
3. the Mortgage Offer set out the main purpose or object of the contract, namely to provide a mortgage product as described in the Mortgage Offer. The Court of Appeal found that “*a printed standard term which entitles the Lender to substitute a different product is inconsistent with that purpose or object*”.

In respect of clause 14 of the Lender's 'Mortgage Conditions', the Court of Appeal found that a clause which essentially allowed the Lender to require repayment on one month's notice at any time during the term was inconsistent with a product which was described to be a 25 year term and "*emasculated the obligations seemingly entered into by the offer document and made them, so far as the lender was concerned, optional*".

As a result of the Court of Appeal's findings, the terms set out in the Mortgage Offer prevailed and the inconsistent clauses in the Lender's 'Mortgage Conditions' was deemed not to have been incorporated into the mortgage contract between the Borrower and the Lender.

### Commentary

This decision highlights the importance of ensuring that a lender's standard terms are regularly reviewed and considered, not as standalone documents, but as a whole with any other documents which form part of the contract between the borrower and lender. Lenders must ensure that there is no inconsistency between the separate documents and should ensure that their suite of mortgage documents complement each other and can be read together without conflict. Where there are inconsistencies, lenders should not expect that the courts will approach such inconsistencies with the pre-conceived assumption that one should not strive to find an inconsistency and should not suppose that the courts will side with lenders when interpreting conflicting clauses in mortgage contracts. Further, this claim serves as a useful reminder that a lender may not be able to rely on its standard terms and conditions where these have not effectively been incorporated into the contract between the lender and the borrower. Lenders must ensure that where a particular clause is to be incorporated into a mortgage contract with a borrower that term should be included in the lender's special conditions, if these are deemed to prevail over that lender's standard mortgage conditions in the event of any inconsistency between the documents.

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