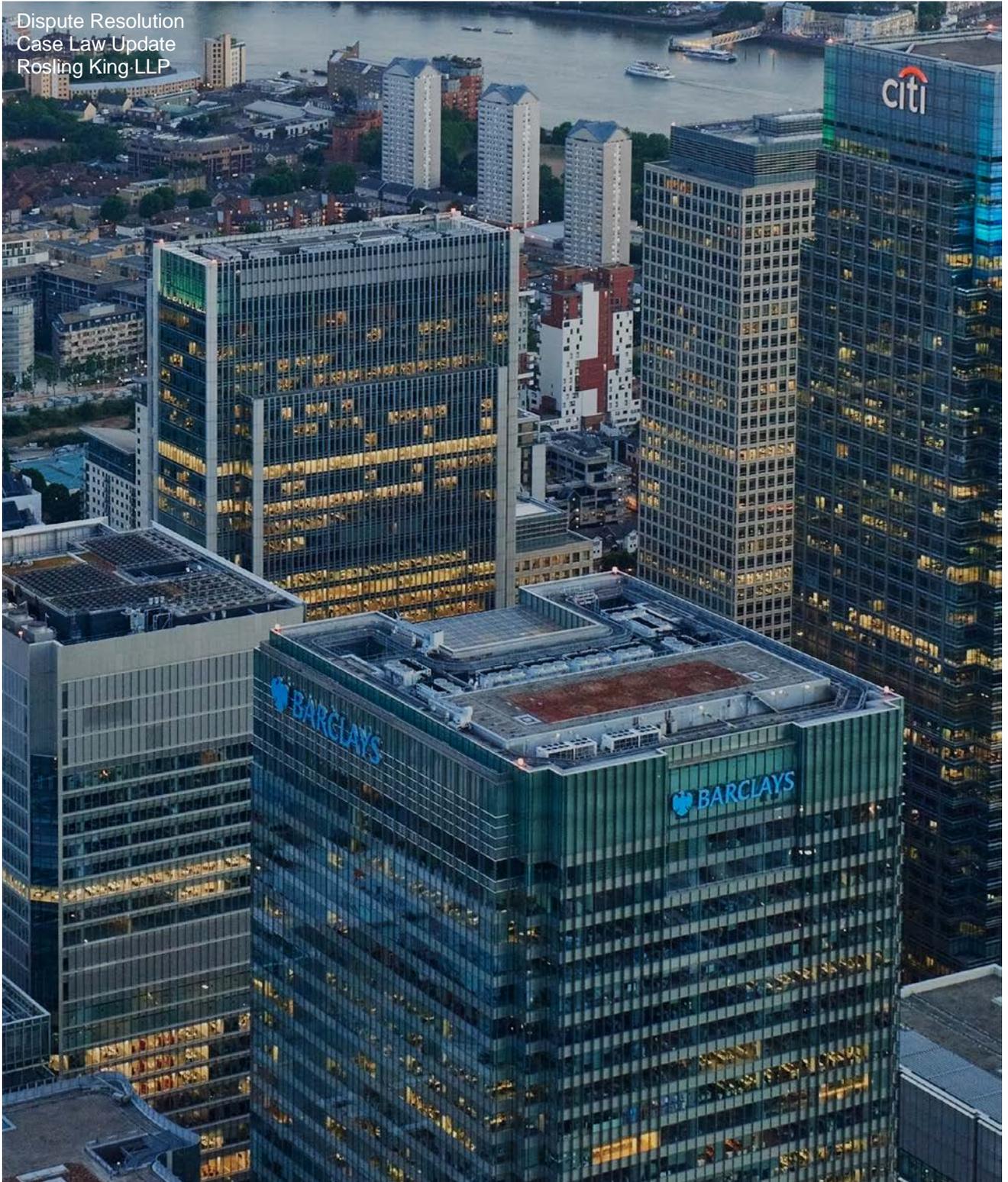


Dispute Resolution
Case Law Update
Rosling King LLP



The Claim

In an earlier Judgment the Court at first instance ruled that Countrywide Surveyors Limited (the “Defendant”) was liable in deceit to Mortgage Express (the “Claimant”), in relation to 39 loans, further to property valuations produced by the Defendant.

This claim deals with the assessment of damages. It was agreed between the parties that the level of damages should be assessed by the Court on the basis that none of the loans would have been made had it not been for the Defendant’s deceit. Therefore, the loss should be calculated as the amount loaned, plus the costs of realisation, less the sale price, plus any repayments made by the borrower.

The issue in dispute regarded the interest claimed by the Claimant and how it should be calculated.

The Claimant submitted that it was entitled to interest as damages, in addition to simple interest in accordance with section 35A of the Senior Courts Act 1981 (the “SCA 1981”), at the rate of LIBOR plus 1%, on the entirety of the damages. The Claimant’s case for interest as damages was based on the loss of opportunity to make an alternative loan, rather than the cost of borrowing.

The Defendant submitted that there was no case for interest as damages and that the evidence submitted by the Claimant in relation to this claim was not strong enough to justify the same. As such, the Defendant submitted that the Claimant was entitled only to simple interest in accordance with the SCA 1981, at LIBOR rates from the date on which the cause of action accrued to the date of Judgment. In monetary terms, the opposing approaches taken by the Claimant and Defendant amounted to a difference of £1,539,474. The Claimant claimed compound interest at £1,395,356 and statutory interest in the sum of £340,850, with the Defendant conceding statutory interest in the sum of £196,732.

In light of the above, the principals that arose for the Court to decide were as follows:

- (1) whether the Claimant had established its case to a sufficient degree to allow a claim for interest as damages; and
- (2) whether interest in accordance with section 35A of the SCA 1981 should be calculated at LIBOR plus 1% or LIBOR and some other rate.

The Judgment

The Court considered the three leading cases in the area, being *Swingcastle v Alistair Gibson (a firm)* [1991] 2 AC 223, *Nykredit v Edward Erdman No 2* [1997] 1 WLR 1627 and *Sempra Metals v IRC* [2008] 1 AC 561. The Court acknowledged that the decision in *Sempra Metals* drastically altered the legal landscape, allowing compound interest to be awarded as damages at common law. The Court further held that, in accordance with *Swingcastle*, the Claimant holds the burden of proof to establish that they would have made alternative loans had the money not been tied up with the 39 loans in question, in order to be entitled to interest as damages. In this instance, The Court held that the Claimant had failed to provide

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sufficient evidence to prove the same and therefore the Claimant was not entitled to interest as damages.

Further, the Court held that interest at 1% over base rate (or LIBOR) has been the norm in commercial cases; however it is a presumption rather than a rule and can be displaced if it produces an unfair outcome.

The Court held that when assessing the rate of interest to award the Court should not consider the rate at which the recipient of the compensation would have borrowed the funds. Instead the Court should look at general characteristics to decide the appropriate rate. The starting point should be the cost of borrowing, which the Court took as LIBOR and it is from there that the Court should make additions, or deductions, as appropriate. In this instance, the Court ordered an increase to reflect that the award was of simple interest only, and ordered that simple interest be paid at LIBOR plus 0.5% from the date of default.

Commentary

This case provides a clear indication of the method that the Court will adopt when considering the level of interest to award in commercial litigation. In addition, this case is a reminder that the Court will not always adhere to the commercial norm of 1% over base rate (or LIBOR) where the Court deems it inappropriate to do so.

Further, this case highlights the high burden of proof which lies with the Claimant in order to establish that they are entitled to interest as damages.

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