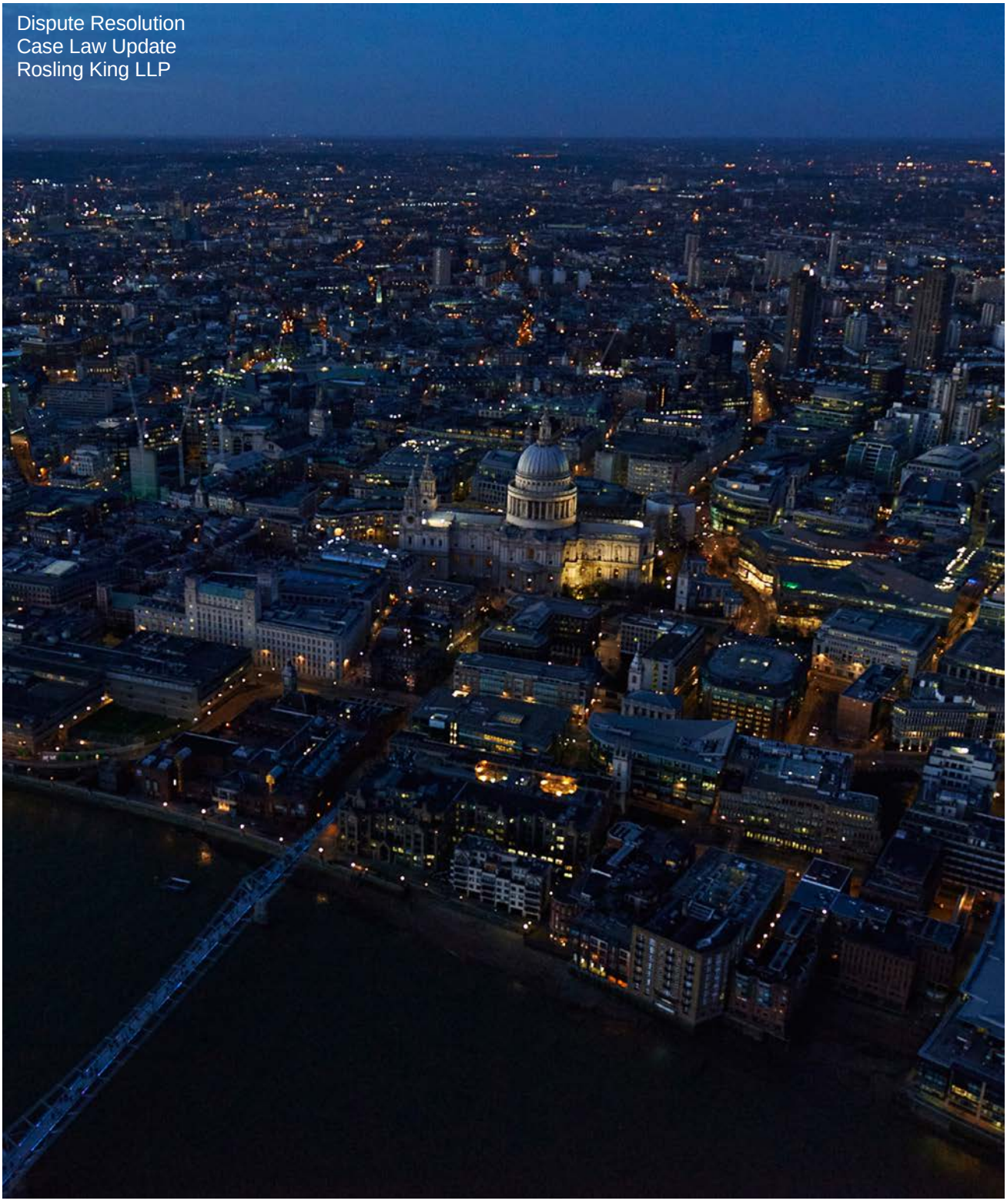
Dispute Resolution
Case Law Update
Rosling King LLP



The Claim

Mr and Mrs O'Hare (the "Claimants") opened accounts with Coutts & Co (the "Defendant") in August 2001.

Between 2001 and 2010 the Claimants were advised to purchase certain investment products by two employees of the Defendant, Mr S and Mr E. The Claimants issued proceedings in respect of loss suffered in connection with the investments they were advised to purchase in 2007/2008 (the "2007/2008 Investments") and 2010 (the "2010 Investments")

The Claimants alleged that the Defendant had breached its duty of care in both contract and tort as a result of the advice provided in respect of the investments. The Claimants alleged that the recommended investments were unsuitable. They further alleged that Mr S substantially played down the risk involved in the 2007/2008 Investments and that as a result of the investments generally, an unjustifiably high proportion of the Claimants' wealth was exposed to potential losses.

The Claimants also claimed £250,000 under an alleged agreement between the parties in respect of the Claimants' earlier complaint about products they alleged had been mis-sold in 2001.

The Defendant contended that the investment advice given was appropriate and that the investments were suitable. They argued that the Claimants' complaint was prompted by hindsight and not a lack of suitability of the products. In respect of the claim for £250,000 arising out of an alleged contract, the Defendant argued that the alleged contract was a non-binding statement of intent to provide $250,000 through future credits or discounts to the Claimants' accounts. It was not made with any intention to create legal relations, but instead was a goodwill gesture. In addition, the Defendant contended that the Claimants had already received the voluntary goodwill discounts over the course of the business relationship.

The Judgment

The High Court dismissed the claim brought by the Claimants in its entirety.

The Court held that the Defendant had not breached its duty to exercise reasonable care and skill when advising the Claimants as to particular investments. Further, the investments were not unsuitable. In reaching this conclusion, the Court considered the application of the reasonable standard in *Bolam v Friern Hospital Management Committee [1957] 2 All ER*. In *Bolam,* it was held that, where a doctor acted in accordance with an accepted body of medical opinion, he was not necessary negligent, even where medical opinion on the appropriate treatment differed. The doctor simply needed to prove that it was a reasonable and responsible accepted practice and as long as the risks associated were explained, it would not matter that other members of the profession did not agree with the approach, as long as some did.

The approach in *Bolam* has been applied in respect of a wide range of professionals. The question to be asked by the Court in applying the test is *"whether the defendants, in acting in*

the way they did, were acting in accordance with a practice of competent respected professional opinion". The Court found (and this was supported by the views of the experts) that in the context of financial investment advice, there was a lack of consensus in the investment sector as to how to address and deal with an investor's attitude to risk. As a result, rather than use the *Bolam* test, the Court preferred the approach taken by the Supreme Court in the Scottish case of *Montgomery v Lanarkshire Health Board [2015] UKSX 11*. In *Montgomery* the Supreme Court concluded that a doctor is under a duty to take reasonable care to ensure that their patient is aware of any material risks involved in any recommended treatment, as well as any reasonable alternatives. The Court found that whilst professionals were under a duty to advise as to the risks of a particular procedure or investment, an informed individual must take responsibility for their own decision and bear the result of that decision. The Court held that the Defendant had discharged their duty to the Claimants.

In considering whether or not the parties had entered into a legally binding contract for the Defendant to provide either £250,000 or $250,000 through future credits or discounts to the Claimants' accounts, the Court considered the pre-existing contractual relationship between the parties, together with the subsequent meetings between them to discuss a resolution. Such factors indicated that there was an intention for the arrangement to be legally binding. It was irrelevant that the Defendant had denied liability The Court concluded that, in the absence of an agreement as to the process for applying the discount to the Claimants, the Defendant had performed its duties. The cumulative discounts applied to the Claimants' accounts over the course of the business relationship fulfilled this obligation and so the Claimants' claim must fail in this regard.

In considering the issues of the case, only hearsay evidence of Mr S, who had previously been employed by the Defendant and advised the Claimants on some of the investments in dispute, was provided to the Court. In addressing Mr S's absence from the proceedings, as well as his lack of testimony during the trial, the Court found that his attendance was not necessary. The evidence of Mr S was recited in the witness statements of other witnesses called to provide testimony and this was sufficient to be relied upon, especially as the witness statements were supported by contemporaneous notes made by Mr S. It did not automatically follow that any oral evidence to the contrary provided by the Claimants should be given preferential treatment.

Finally, the Court considered, obiter, the measure of damages that would have been awarded in the event that the claim in respect of the 2007/2008 Investments had been successful. Ordinarily, the assessment of damages would have been based on contract i.e. to put the Claimants in the position they would have been in had the contract been performed. However, the claim in contract was time barred and so the Claimants could have only succeeded in tort. In recognising that the measure of damages in tort could have been more generous to the Claimants, the Court stated that the damages would have been limited to those available in a contract claim. The Court took the view that Claimants should not be able to benefit from a greater award of damages in tort as a result of them failing to bring the claim in contract in time.

The Claimants' claim was dismissed.

Commentary

This case provides useful insight into breach of duty and the approach that the Court will take. Here the Court decided that the *Bolam* test was not the correct approach in the context of financial investment advice, instead preferring the approach in the Supreme Court Scottish case of *Montgomery*, recognising that there was not, in the arena of financial advice, a professional consensus as to how to manage the risk appetite of a client.

The Judge's comments regarding the measure of damages, whilst obiter, are also of particular relevance for claimants and demonstrates the approach that the Courts will take in the award of damages in circumstances where a party could stand to profit from their own delay.

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