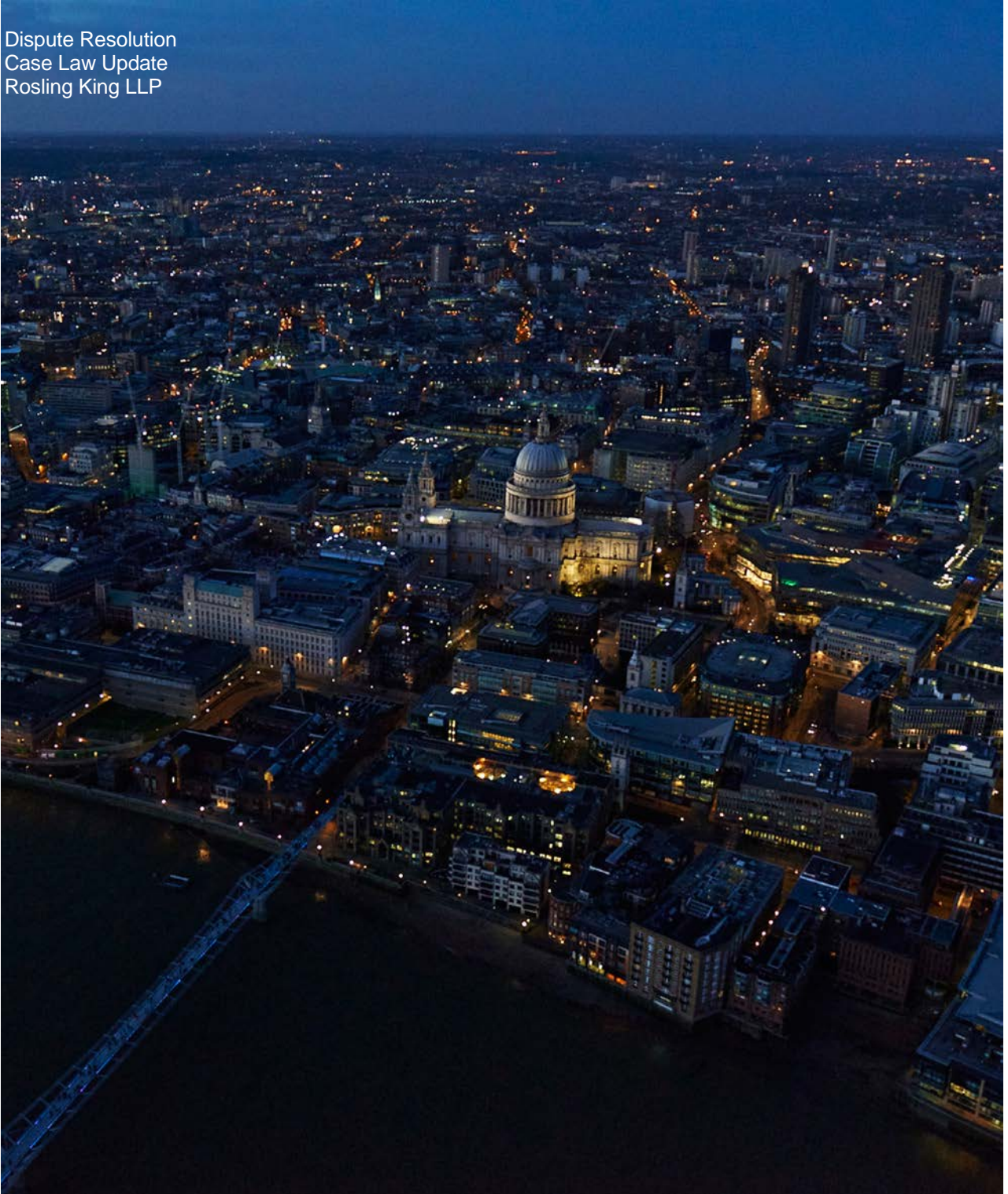


Dispute Resolution
Case Law Update
Rosling King LLP



The Facts

The Claimant, Lloyds Bank plc, agreed to lend a borrower up to £2.625m (the “Facility”) to assist with the development of a church building in 2007 which formed part of the Claimant’s security (the “Development Property”). The Claimant retained the Defendant project monitor, McBains Cooper Consulting Limited, to check the progress and quality of the works. The Defendant was required to approve any application for drawdown in connection with the Facility, submitted on behalf of the borrower. The Defendant was also to make recommendations to the Claimant as to the amount that should be paid against the drawdown request, in the form of monthly progress reports, between 2007 and 2009.

The Defendant duly provided the Claimant with reports and the Claimant relied on these when making further advances to the borrower. In particular, the Defendant provided the Claimant with a report which related to works the borrower had completed without the Claimant’s consent. After approximately 21 months, the Facility was virtually exhausted and the works to the Development Property incomplete.

The Claimant issued a claim in July 2013 against the Defendant for c.£1.4m, being the total amount advanced under the Facility, less the recoveries made from the sale of properties over which the Claimant had a charge. Credit was also given for any sums recovered following an adjudication commenced, by the Claimant against the Defendant, in mid-2013.

The Judge in this case issued two judgments. This note deals with the second judgment (the “Second Judgment”) which addressed the scope of duty and recoverable loss. The first judgment (the “First Judgment”) in this case was given over a year ago, on 2 October 2015, and dealt with reliance and causation. The First Judgment found that the Defendant was liable for the sums advanced by the Claimant which would not have been advanced but for the Defendant’s negligence. However, the Claimant contributed to its own loss and so the damages awarded were to be reduced by one third.

The Decision

The Judge referred to his findings in the First Judgment, in which he held that: (i) by the end of October 2008 the Defendant should have advised the Claimant of the likely future costs, which would have indicated a shortfall; (ii) the work carried out by the borrower, without the Claimant’s consent, was outside the scope of the Facility and the Defendant should have notified the Claimant of this; (iii) if the Claimant had taken external advice about the costs required to complete, and the likely value of the Development Property once completed, it would have been advised that funding completion of the Development Property was risky. Had the Claimant been properly advised by those external advisors, it would have terminated the Facility at the end of 2008 and demanded repayment. Since the repayment of the amount outstanding under the Facility would not have been forthcoming, it would have sold the Development Property in its condition at that time; and (iv) the Claimant could have placed the Development Property on the market in April 2009 for £800,000.

The Judge concluded that:-

- (i) a project monitor could not be liable for any loss which would have “arisen even if the advice had been correct.” A project monitor in the Defendant’s position would reasonably be expected to assume that, having committed itself to grant a particular loan for a specified purpose, particularly a religious one, the Claimant would be obliged, if not contractually, at least as a matter of business ethics, to honour the terms of the Facility, unless the borrower gave the Claimant cause to terminate it;
- (ii) the Defendant could not expect the Claimant to terminate a facility assuming that the borrower was performing and continuing to perform its obligations, simply because the facility may have become commercially unattractive for reasons beyond the control of either the Claimant or the borrower; and
- (iii) the losses that the Defendant was under a duty to protect the Claimant from included:
 - a. advancing money under the Facility to which the borrower was not entitled, or
 - b. advancing money in circumstances in which, if properly informed, the Claimant would have decided not to do so and would have terminated the Facility. However, the Defendant could not be liable for losses that would still have occurred, even if it had properly performed its duties.

The Defendant was liable for the payments made by the Claimant in reliance on the progress reports from the latter part of 2008 onwards, together with the sums paid by the Claimant for the unaccounted for works, which together totalled £815,770.93. Those sums were within the scope of the duty owed by the Defendant because, if the Claimant had been correctly informed as to the true position, none of those sums would have been advanced.

The Court also considered whether the Claimant had mitigated its loss. It considered the difference between the net proceeds of sale of the Development Property (£832,611), in comparison to what they would have been (estimated at £640,000 given the valuation of £800,000 obtained in April 2009) had the Development Property been placed on the market in April 2009, which totalled £192,611. The Court held that the £192,611 should be set off against the loss, as well as the one third deduction for contributory negligence which was established in the First Judgment. This resulted in £415,439.95 being owed by the Defendant to the Claimant.

Commentary

An important point for lenders is that any payments paid out by them, following the approval of a project monitor, should be recoverable if the lender would not have made an advance but for the project monitor’s negligent advice. It is important to note however, that a project monitor cannot be liable for losses that would still have occurred if it had properly performed its duties.

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