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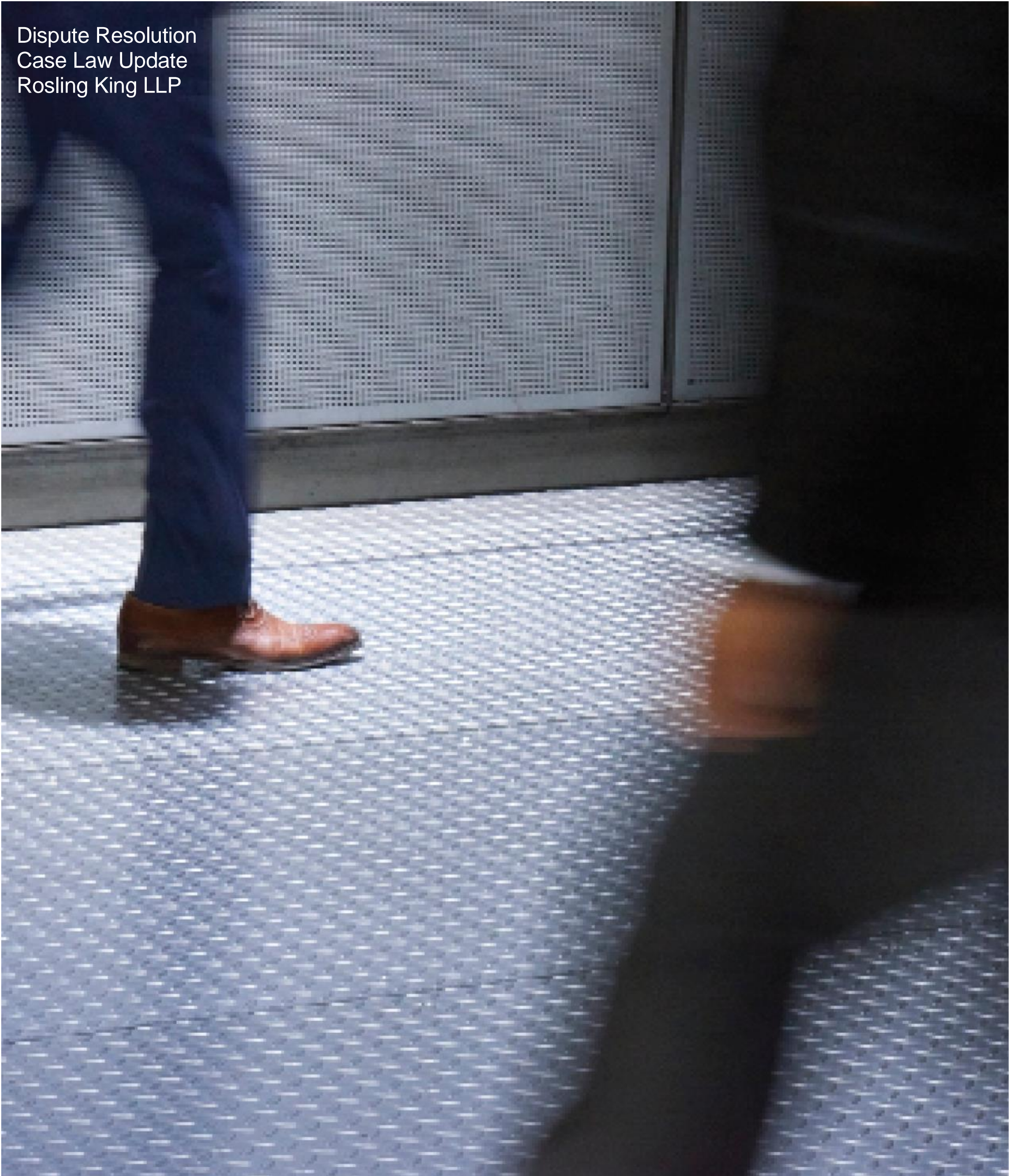

Background

The Appellant, Capita Insurance Services Ltd ("**Capita**") entered a Share Purchase Agreement dated 13 April 2010 (the "**SPA**") with the Respondent, Mr Andrew Wood ("**Mr Wood**") and others (collectively the "**Sellers**") for the acquisition of Sureterm Direct Limited ("**Sureterm**"), a company which primarily offered insurance for classic cars.

Shortly after the acquisition several of Sureterm's employees raised concerns regarding the way in which Sureterm sold insurance policies. In response Sureterm carried out a review of past sales. The review revealed that in many cases Sureterm's telephone operators had misled customers in order to make a sale. In accordance with its regulatory requirements, Sureterm reported the findings to the Financial Services Authority ("**FSA**") (as it was then known). The FSA concluded that Sureterm's customers had been treated unfairly and were due compensation. Capita and Sureterm agreed to pay approximately £1.35m in customer compensation.

The Claim

Capita subsequently sought to recover around £2.4m being the estimated compensation of £1.35m together with related costs and interest from Mr Wood. Clause 7.11 of the SPA contained an indemnity (the "**Indemnity**") under which the Sellers agreed to:

"pay to [Capita] an amount equal to the amount which would be required to indemnify [Capita]…against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by [Sureterm] following and arising out of claims or complaints registered with the [FSA] ..against [Sureterm] …and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service."

Mr Wood disputed Capita's claim. He alleged that the circumstances fell outside the scope of the Indemnity as the compensation payments arose from Sureterm self-reporting suspected mis-selling to the FSA, not as a result of a claim by any Sureterm customer to the FSA.

The High Court held that Mr Wood was liable to indemnify Capita, even though there had been no customer complaint to the FSA. Mr Wood appealed to the Court of Appeal. The Court of Appeal overruled the High Court, finding that on proper construction of the Indemnity, no liability could arise unless a mis-selling claim had been made against Sureterm, or a complaint had been registered with the FSA.

Capita appealed to the Supreme Court.

The Decision

The Supreme Court unanimously dismissed the appeal, concluding that on proper

interpretation the Indemnity was not triggered in circumstances where Sureterm self-reported mis-selling to the FSA.

In delivering the lead judgment, Lord Hodge made a number of useful observations on the issue of contractual interpretation, including that:

1. The Court must consider a contract as a whole rather than conducting a literalist exercise focused solely on the wording of a clause. The Court must check each suggested interpretation against the terms of a contract and its commercial consequences must be investigated; and

2. The Court can reach a view as to which construction makes more business sense where there are rival meanings. The Court must consider the quality of the drafting of a clause and consider that one side may have just struck a bad bargain.

In applying the above approach to the Indemnity, the Supreme Court found that:

1. The meaning of the Indemnity was opaque. Therefore, it was necessary to place the Indemnity in the context of the SPA as a whole to provide guidance to its meaning;

2. Capita's interpretation of the language used in the Indemnity was unlikely because it would have the effect that the clause failed to specify the identity of who could make a claim to the FSA. There must be a limit on who such persons could be; and

3. The contractual context was significant. The SPA also contained wide-ranging warranties which were subject to a two year limit. It is not contrary to business sense that the SPA also contained the Indemnity which was unlimited in time but only triggered in limited circumstances. The SPA may be a poor bargain for Capita but it is not the Court's job to improve that bargain.

Commentary

The case serves as a reminder that the Courts enjoy considerable flexibility in their approach to contractual interpretation but that they will not use this power to remedy what might have been a bad bargain for one party. Parties should ensure that clear wording is used in any agreement so as to avoid the scope for arguments as to the meaning of clauses in the event that a dispute arises.

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