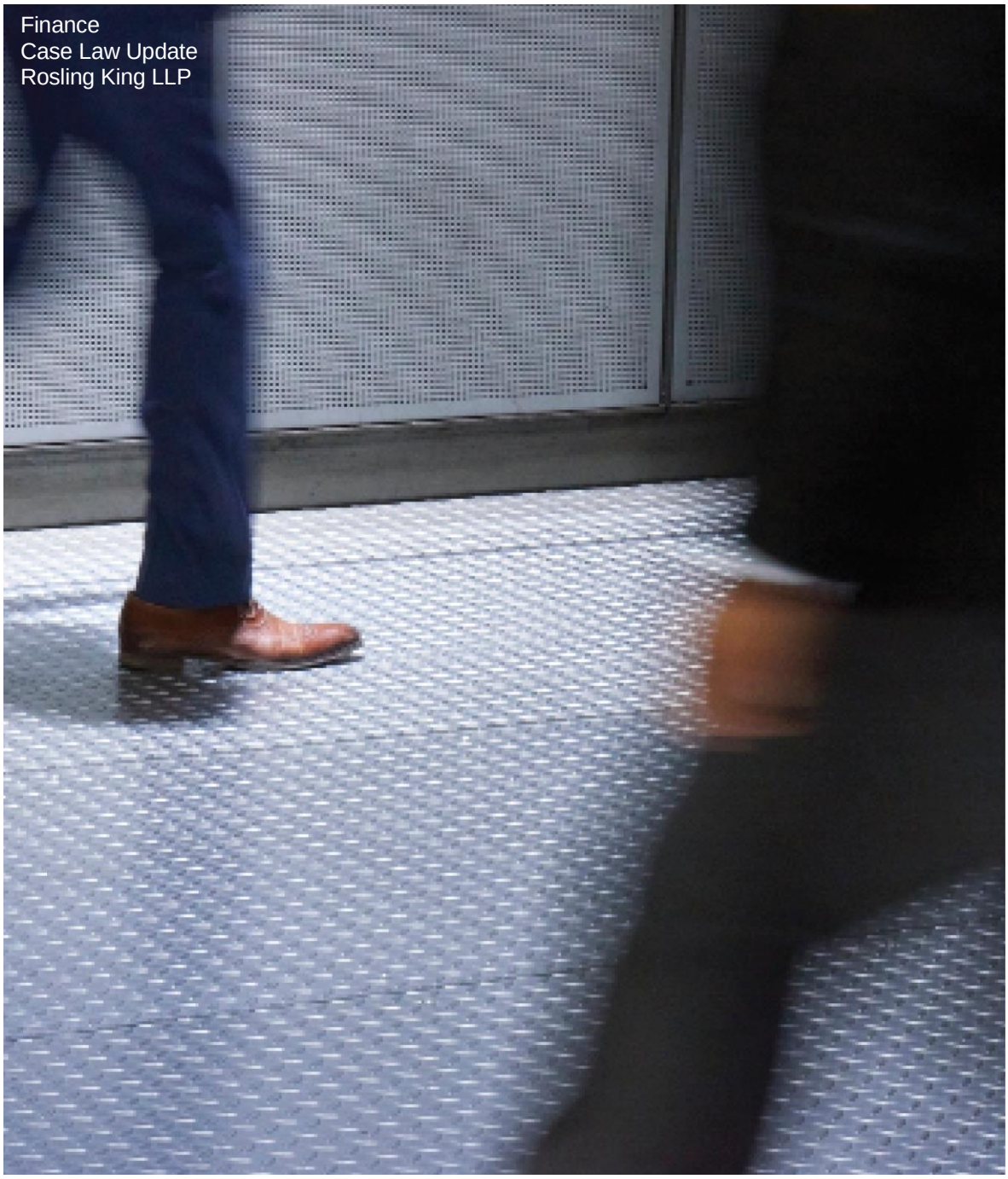
Finance
Case Law Update
Rosling King LLP

The First Instance Decision and Grounds for Appeal

The claimants were a syndicate comprising an Egyptian and two Nigerian banks (the "**Banks**") who entered into a facility agreement for US$150 million (the "**Facility Agreement**") with the first defendant, a Nigerian company engaged in oil exploration and production (the "**Borrower**"). The monies were to be used for refinancing and to fund oil exploration. The Borrower's liabilities under Facility Agreement were guaranteed by the second and third defendants who were a corporate affiliate and the president of the Borrower, respectively (the "**Guarantors**" and together with the Borrower, the "**Obligors**").

The Borrower defaulted on all its capital payment obligations under the Facility Agreement (other than making one repayment of US$6.1 million). The Banks accordingly accelerated the Borrower's entire debt so that it was immediately due and repayable, and made demands on the Guarantors under their respective guarantees.

In the High Court, the Obligors sought to argue that the Banks could not rely on the acceleration or the demands. This argument was rejected by the judge. The Obligors had also argued that they had counterclaims in the total sum of approximately US$1 billion ("**the alleged counterclaims**"), contending that they were entitled to set off the alleged counterclaims against their liabilities to the Banks under the Facility Agreement and so discharge those liabilities.

The Facility Agreement was based on a form of syndicated facility agreement drafted by the Loan Market Association (the "**LMA**") (a representative body for the syndicated loan market), the terms of which were subsequently negotiated and amended. With respect to the alleged counterclaims, the Banks sought to rely on the following provision of the Facility Agreement:

> *"All payments to be made by an Obligor under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim."*

The Banks' argument was therefore that summary judgment should be granted against the Obligors, regardless of whether the alleged counterclaims exist. In response, the Obligors contended that the Facility Agreement constituted the Banks' standard terms and conditions of business and were unenforceable for being unreasonable terms falling within the remit of the Unfair Contract Terms Act 1977. The judge rejected the Obligors' argument and granted summary judgment for the Banks.

Accordingly, on appeal the Obligors submitted that, among other things, the judge had:

1. adopted the incorrect starting point when considering whether a party was dealing on their standard terms of business or not. It was not a matter for which summary judgment could be made because it was in fact a complex area of law and not straightforward as the judge had suggested;

2. the Banks should have been required to provide some disclosure of their previous lending arrangements; and

3. where a party makes an allegation that a contract had been made on standard terms of business and the other party provides no evidence of any other similar contracts previously made, disclosure of such evidence should be required and thus such a claim would be unsuitable for summary judgment.

The Court of Appeal's decision

Firstly, the Court of Appeal deemed the complexity of standard business terms to be of no relevance to the granting of summary judgment. In respect of the Obligors' second and third submissions, the Court of Appeal felt that this position was unacceptable. Where a party alleges that an agreement has been made on the standard terms of business of the other party, the party making the allegation must produce some evidence of this. In the absence of such evidence, it could not be said that they had shown an arguable defence.

In addition, the Court of Appeal ruled that the decision of the High Court would be upheld in any event as detailed negotiations over the terms of the Facility Agreement had occurred. The Court particularly noted that looking at the 'redline' re-draft that was made by the solicitors acting for the Borrower, which showed the changes made to the initial draft supplied on behalf of the Banks, you could see how substantial the negotiation was and, although some of the proposed amendments were not agreed, many were. It was therefore 'impossible to say that either the LMA model form was, or the terms ultimately agreed were, the claimants' standard terms of business'.

Accordingly, the appeal was dismissed.

Commentary

The decision confirms the established position that if a party wishes to assert that they entered into a contract on another parties' standard terms, the burden is on them to show that this was the case before the reasonableness test can be applied under the Unfair Contract Terms Act 1977. In the context of a finance document, it should be more difficult for a borrower to argue they entered into the lender's standard terms where they have made extensive revisions to or negotiated the document; even when the document is based on the lender's own or industry standard terms (such as the LMA standard terms which are widely used).

For further information, please contact Alex Pelopidas or the Partner with whom you usually deal.