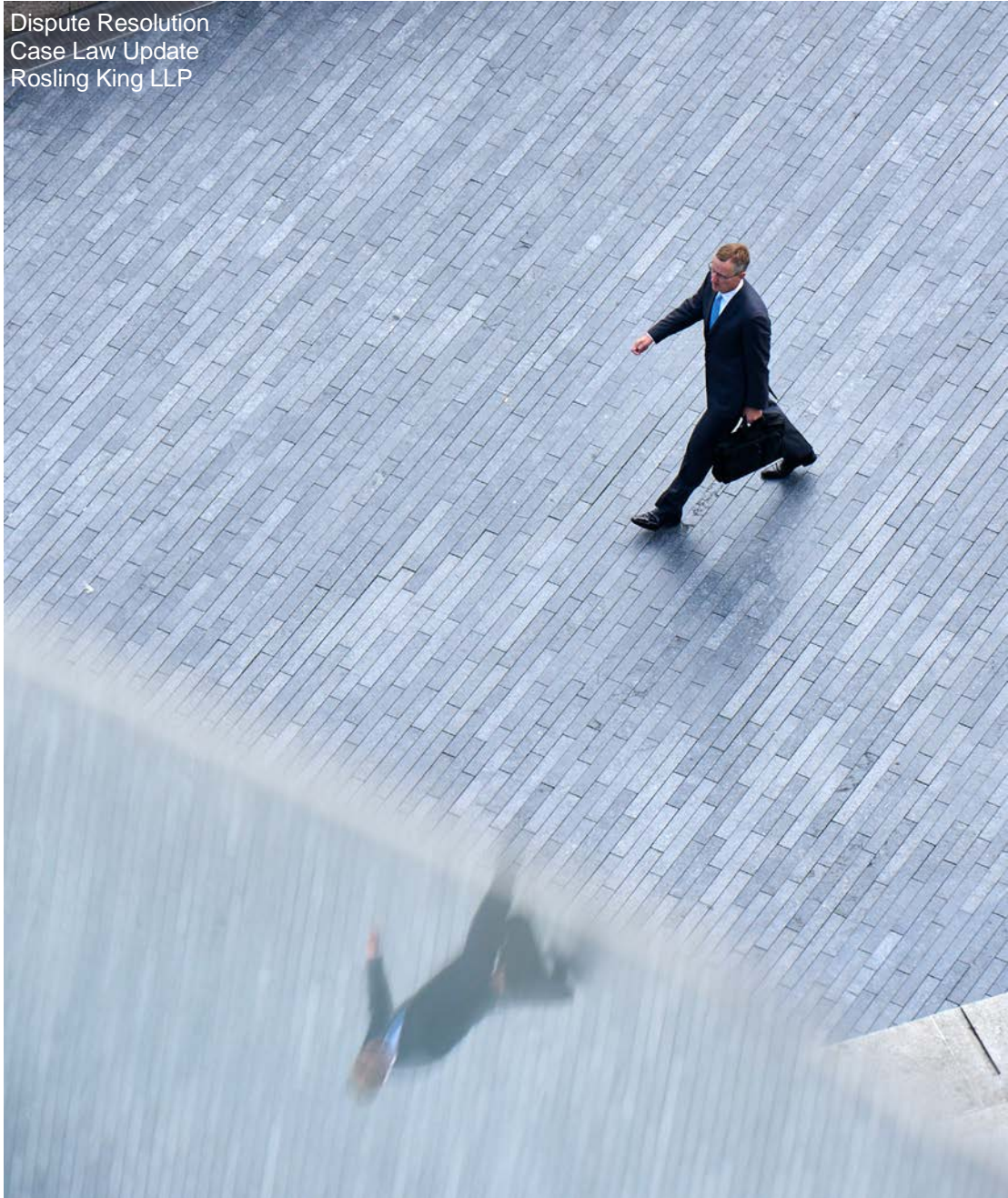


Dispute Resolution
Case Law Update
Rosling King LLP



Background

Mr Gough obtained financing from Clydesdale Bank plc (the “**Bank**”), which was secured by way of legal charge over two properties from which Mr Gough operated his farming and holiday lettings business. His wife, Mrs Gough, also provided a personal guarantee as security. Having agreed subsequent extensions to an overdraft facility the Bank demanded repayment of all sums outstanding, which totalled approximately £7,000,000 inclusive of interest, and demanded from Mrs Gough payment of £4,910,000 plus accrued interest (being the sum she had guaranteed). Receivers were subsequently appointed and the Bank sought possession of the two properties after the Goughs failed to repay the sums due.

The Arguments

Mr Gough’s complaint was that the appointment of Receivers was inconsistent with what he alleged was agreed with the Bank at the outset. Mr Gough alleged that, in the event Bank was not prepared to continue to support his business, it was agreed that he would have the opportunity to reduce his indebtedness to a sustainable level by the sale of assets. Mr Gough asserted that this alleged prior agreement gave rise to a promissory estoppel, which prevented the Bank from exercising its powers to appoint Receivers and to seek possession of the two properties.

Mrs Gough claimed that the personal guarantee was a credit agreement or linked transaction within section 140C(1) of the Consumer Credit Act 1974 (the “**1974 Act**”) and that the relationship between her and the Bank was unfair. It was however, difficult for the Judge to understand what her defence could be, as Mrs Gough also stated that she had no recollection of signing the personal guarantee, or receiving any independent legal advice in connection with it. However, she did eventually accept at the hearing that she had signed the guarantee and had received independent legal advice.

Decision

The Judge divided Mr Gough’s defence into the following five points:

1. Was there a clear and unequivocal promise that strict legal rights would not be insisted upon by the Bank (the “Representation Issue”)?
2. If there was any such representation, agreement or common understanding, did Mr Gough rely on such (the “Reliance Issue”)?
3. If there was reliance on any such representation, agreement or common understanding was that reliance to Mr Gough’s detriment (the “Detriment Issue”)?
4. If there was reliance on any such representation, agreement or common understanding and that reliance was detrimental, has the Bank reverted from the same by exercising its strict legal rights under the charges and appointing Receivers (the “Compliance Issue”)?

5. If there was reliance on any such representation, agreement or common understanding and that reliance was detrimental, was it unconscionable of the Bank to have reverted from the same by exercising its legal rights under the charges and appointing Receiver (the “Conscionability Issue”)?

Mr Gough’s defence failed at the first hurdle as the Court held that it was clear in the circumstances that the Bank would be relying on its charges; the basis on which the Bank was prepared to lend was because there were assets which could be sold, over which the Bank had taken charges.

In respect of Mrs Gough’s defence the Court held that it must fail. The reason for this is that the 1974 Act does not give the Court the power to consider whether the relationship between the Bank and Mrs Gough (which formed the basis of her pleaded case) is unfair. The Court only had the power to consider the relationship between Mr Gough and the Bank. In any event, the Court did not consider the Bank’s relationship with either Mr or Mrs Gough to be unfair. The Court went on to comment that Mrs Gough’s relationship with the Bank was not unfair because she obtained independent legal advice and, in the circumstances, the Bank was not under an obligation to identify to her the key onerous features of the personal guarantee (that was the role of her solicitor). The Court also held the Bank had not breached any representations to Mr or Mrs Gough at the time the personal guarantee was entered into.

The Court found in favour of the Bank and ordered that Mr and Mrs Gough pay the sums due under the agreements and guarantee. The Court also stated that a possession order should be made in respect of the two properties.

Commentary

The decision is another welcome one for lenders in respect of the approach that the Courts can take when faced with a common argument advanced by borrowers, namely that the lender agreed not to enforce its security. It is also a reminder as to the importance of ensuring that those who provide personal guarantees obtain independent legal advice, and the benefits of doing so.

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