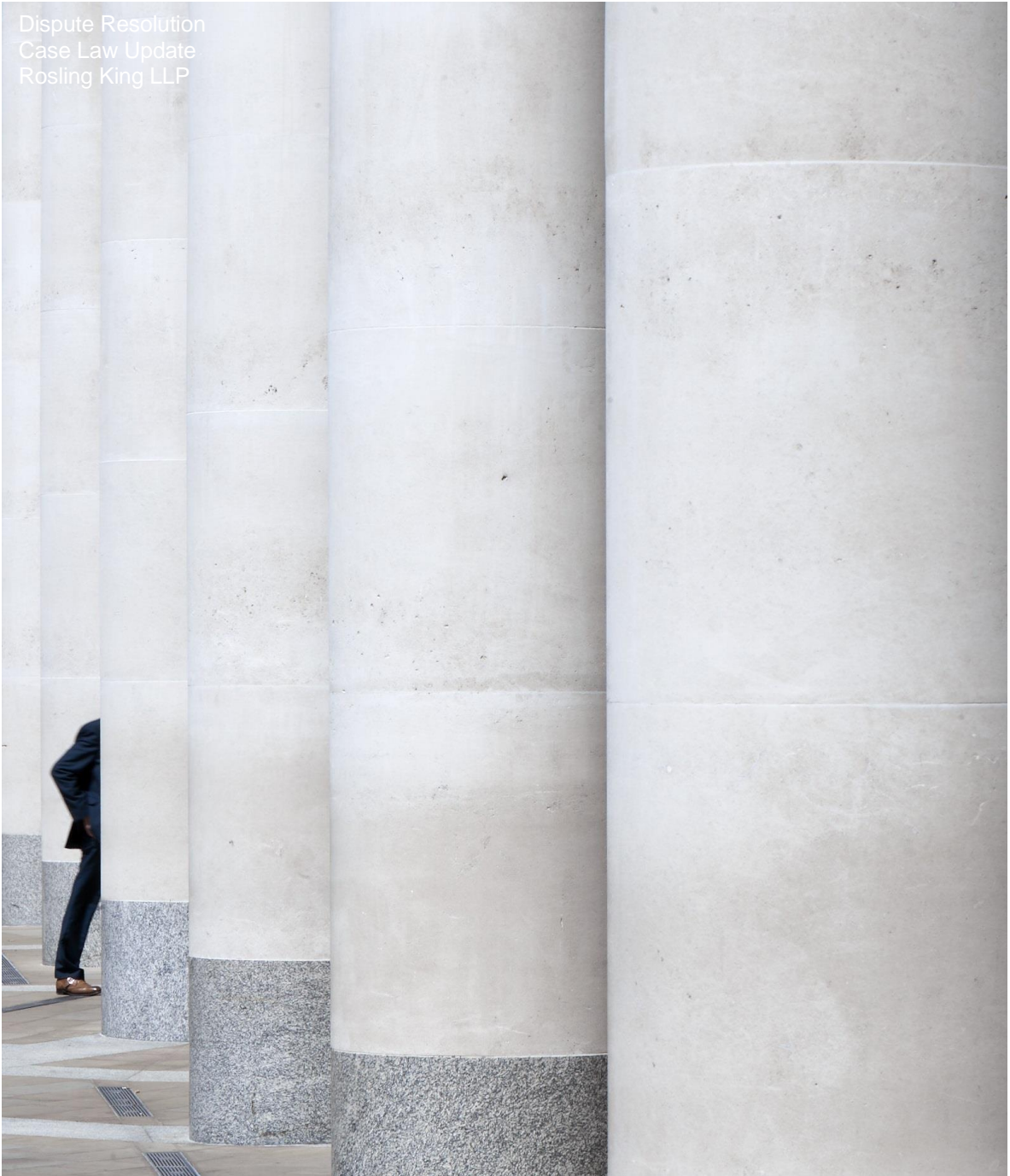


Dispute Resolution
Case Law Update
Rosling King LLP



Background

An initial claim was brought by Mr Ward, acting in his capacity as liquidator (the “**Liquidator**”) of Brady Property Developments Ltd (the “**Company**”) against Nicholas Hutt and David Loughlin (the “**Defendants**”), in their capacity as directors of the Company (the “**First Claim**”). The First Claim comprised of a preference claim and misfeasance allegations against the Defendants. On the second day of the trial of the First Claim, the Liquidator was cross-examined and accepted that none of the transactions he was complaining of had caused a loss. The trial was adjourned and, as a result of the fact there was no loss, a Notice of Discontinuance was served and the First Claim was brought to an end.

The day after the Notice of Discontinuance was served the Liquidator issued a fresh claim (the “**Second Claim**”). The Second Claim was again against the Defendants, but this time in their capacity as partners in a firm, as opposed to directors.

An application was issued by the Defendants to strike out the Second Claim on the basis of 3 grounds.

Ground 1: CPR 38.7

The first ground on which the application was made to strike out the Second Claim arises within CPR 38.7. The Judge held that CPR 38.7 was engaged because the Second Claim:

1. Was against the same defendant. The fact that the capacity in which the liability is alleged to have arisen is irrelevant. In both the claims the same defendant was alleged to be personally liable. This was sufficient to satisfy “the same defendant” criterion within rule 38.7(a); and
2. Arose out of substantially the same facts as the First Claim.

The Liquidator admitted he had not sought, or obtained, permission of the Court before he commenced the Second Claim. However, the Judge concluded, obiter, that the failure to obtain permission did not of itself invalidate this step. It was an irregularity rather than a nullity.

Ground 2: Henderson v Henderson

The *Henderson v Henderson* principle seeks to prevent the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. Since the First Claim was discontinued and therefore had not been decided, this principle did not apply. However, the Judge held that the protection afforded under CPR 38.7 was sufficient for the facts in this scenario.

Ground 3: Abuse of Process

The Defendants argued that even if the money claimed was recovered from them, it would simply be repaid to them in accordance with the statutory scheme of distribution (as partners of the firm). The only person who could benefit economically from this circular action was the Liquidator himself, who, when the money comes into his hands, would be able to pay his own outstanding fees before distributing the balance to the creditors (i.e. the Defendants). Accordingly, the Judge held that the Liquidator, whilst he was pursuing his statutory duties as a liquidator, cannot be said to be pursuing the claim in the interests of the creditors of the Company.

Accordingly, the Second Claim was struck out for the failure to comply with CPR 38.7 and a general abuse of process.

Commentary

The case demonstrates the importance for any claimant who discontinues a claim after a defendant has filed a defence, to seek permission of the Court to make a second claim against the same defendant under substantially the same facts. It is also a reminder that when a liquidator brings a claim they must not be the only person to benefit from the action.

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