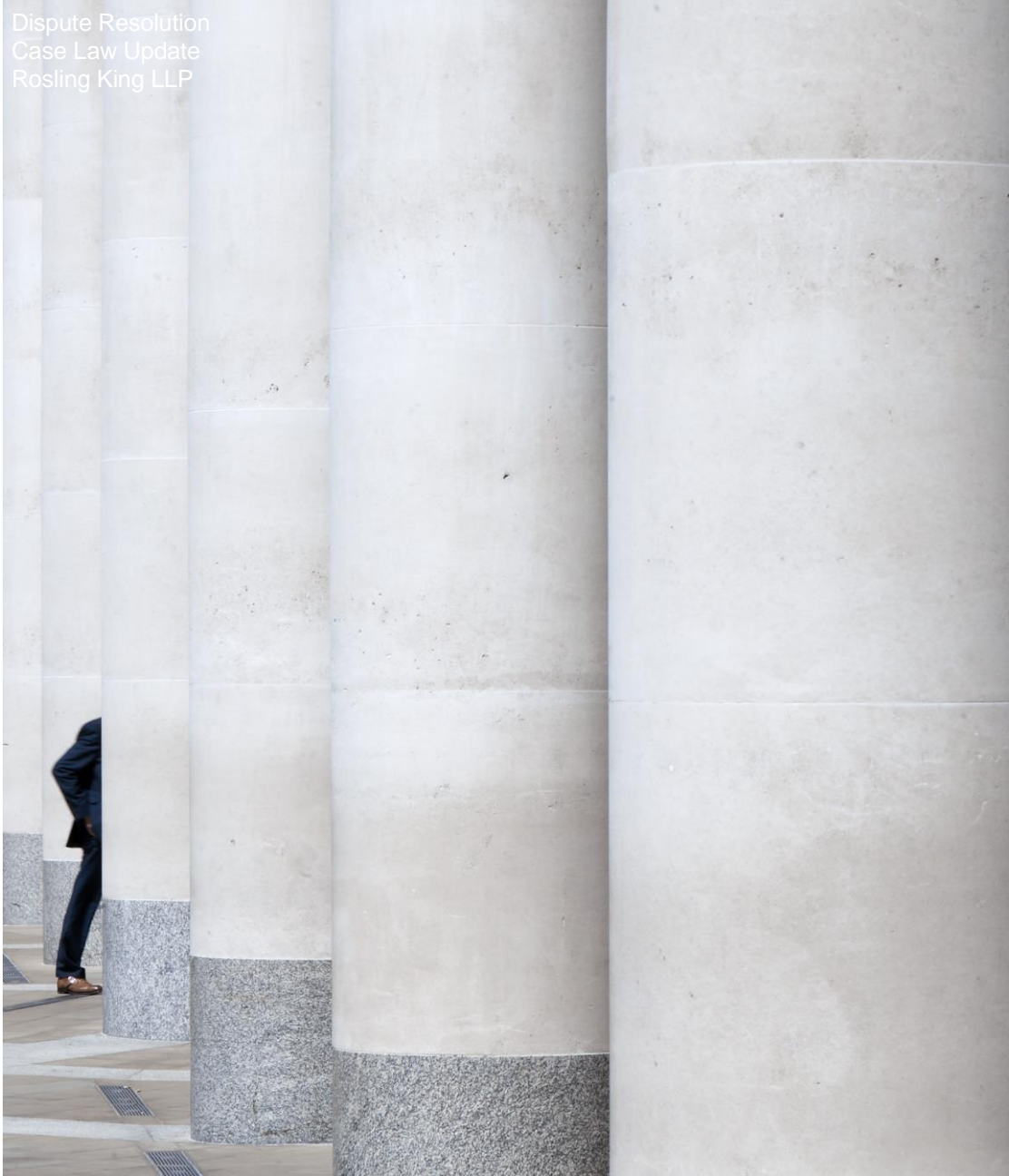


Dispute Resolution
Case Law Update
Rosling King LLP



Background

Mr Moore and Miss Hegelund, (the “**Respondents**”) purchased a flat for £135,000. Part of the purchase funds included a loan, secured by way of a mortgage with the appellant bank, National Westminster Bank (the “**Bank**”). The mortgage was for £81,000. As part of the application process, the Respondents indicated that they would like the Bank to obtain a Home Buyers Report. However, in error, the Bank did not commission a report. The Bank subsequently issued a Mortgage Offer which gave the Respondents the impression that the Bank had received a favourable Home Buyers Report.

In reality, the flat was in poor condition and needed extensive repair work. Following completion the Respondents could not afford the repairs and issued a claim against the Bank for breach of contract. The Bank denied that any contractual relationship existed. The Respondents submitted that if they had received a Home Buyers Report it would have alerted them to the issues and they would not have purchased the flat.

The Respondents contended that the correct measure of damages was the cost of repair, namely £115,000. The Bank considered that the true assessment of damages was to be found by analogy with the negligent surveyor cases in line with Court of Appeal authorities such as *Philips v Ward [1956] 1 All ER 874* which held that the correct measure of damages would be a sum equal to the decrease in value of the flat, the diminution in value approach. In this case, the diminution in value would be the difference between the purchase price of the flat and the true value of the flat taking into consideration the serious defects. The Bank relied upon expert evidence that the decrease in value was £15,000.

At first instance the Judge rejected the diminution in value approach, distinguishing this case from the negligent surveyor cases. The Judge found in favour of the Respondents and awarded them £115,000 in damages which was the cost of the repair.

The Appeal

The Bank appealed the decision on the basis that the correct assessment of damages was the diminution in value approach, rather than the costs of repair. The Bank contended that the true principle for assessment of damages was found by analogy of the negligent surveyor. The Bank contended that there was no sound basis for the Judge at first instance to depart from the diminution in value approach. Therefore, the Bank submitted that the award of the cost of repair should be set aside and damages of £15,000 awarded.

The appeal was dismissed.

The Decision

On appeal to the Technology and Construction Court (the “**TCC**”) it was held that the Judge at first instance had been wrong to distinguish this case from the negligent surveyor authorities. The TCC held that as in cases of a negligent surveyor’s report, the Bank ought to

have provided a Home Buyers Report to the Respondents which would have indicated to them that the flat had serious defects.

However, the Court dismissed the appeal and agreed with the Judge at first instance that the true extent of the loss was the cost of repair. On appeal, the Honourable Mr Justice Birss found that the Respondents would not have purchased the property, but for the Bank's breach and therefore, were entitled to damages. Birss J held that the Judge had been right to recognise that the diminution in value approach was a flexible rule and can, sometimes, be determined by cost of repair.

Birss J also found that it was open to the Judge to have taken a different approach and to come up with a different figure for the decrease in value, lower than the cost of repair, and award that. However, the TCC decided that the Judge's decision was not undermined as a result of him not electing to exercise his discretion and the Judge was entitled to find that the damages were £115,000.

Commentary

This judgment demonstrates that the diminution in value approach in *Philips v Ward* is a flexible one and that the decrease in value of a property could be determined by the cost of repair. It is also a reminder to lenders as to the potential consequences of failing to obtain a Home Buyers Report in circumstances where the borrower believes one to have been commissioned.

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