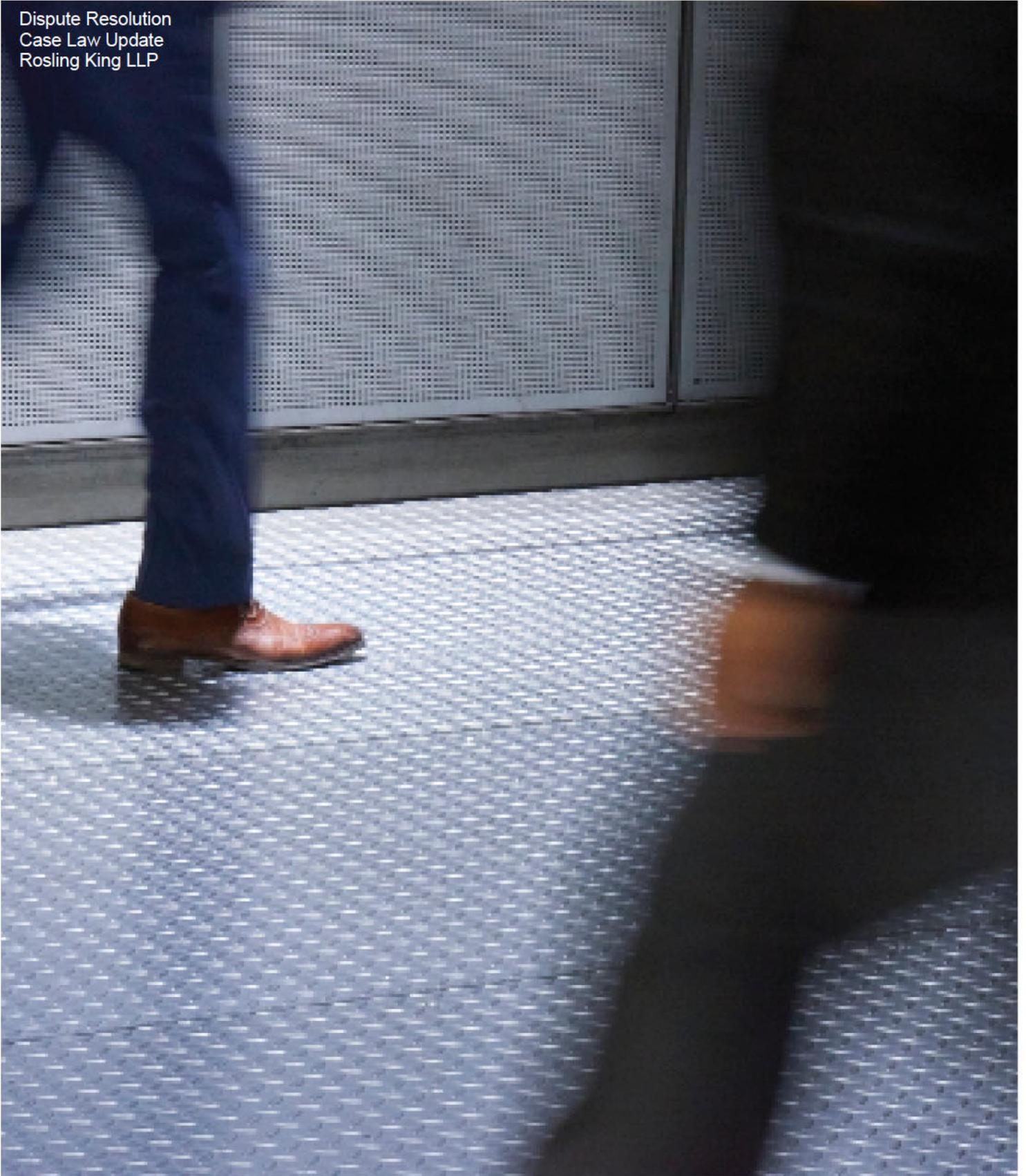


Dispute Resolution
Case Law Update
Rosling King LLP



The Background

The Defendant, (“**Rembrandt**”) is a company that sells dried egg based products in the US. In May 2015, following an outbreak of avian flu in the US, Rembrandt had to find a new supplier and entered into a contract (the “**Original Contract**”) with a Dutch supplier, BV Nederlandse Industrie Van Eiprodukten (“**NIVE**”). The Original Contract was conditional upon approval by the US regulatory authorities which was given in June 2015. At this point the Original Contract was renegotiated, and the price increased, to reflect the additional cost NIVE would incur to comply with the regulations (the “**Revised Contract**”).

However, following a sharp decline in the market price of eggs in the US and with NIVE beset with difficulties in supplying the product, Rembrandt re-evaluated the deal. Following an audit of NIVE’s production processes, Rembrandt concluded they did not comply with US regulations and in January 2016 rejected NIVE’s egg products. NIVE sought damages in the sum of €19 million for loss of profit under the Revised Contract.

Rembrandt denied liability on two grounds:

1. On the basis that NIVE had fraudulently misrepresented the costs of the additional regulatory burden when the parties renegotiated the price in June 2015; and
2. NIVE’s inspection procedures were such that NIVE was in breach of a number of warranties provided to Rembrandt.

Rembrandt also issued a counterclaim for €4.7 million in respect of re-sale losses incurred on those deliveries NIVE did make.

Fraudulent Misrepresentation

In order to prove fraudulent misrepresentation, Rembrandt needed to show that NIVE made an untrue statement of fact that induced Rembrandt to enter into the Revised Contract.

During negotiations for the increased price, Rembrandt was provided with an estimate of the increased costs of complying with the additional regulations and this was said to be based on a thorough calculation.

The Judge found that, although Rembrandt knew there was an element of price negotiation going on, NIVE represented to Rembrandt that the reason for the price increase was additional costs. The Judge held that the figures provided by NIVE was not a genuine estimate.

Turning to whether this induced Rembrandt to agree to the price increase, NIVE invited the Court to follow the decision in *Raiffeisen Zentralbank v Royal Bank of Scotland [2010] EWHC*. In that case it was held that a party must show, not only, the misrepresentation played a real and substantial part in inducing a contract, but also, “but for” the

misrepresentation the party would not have entered into the contract on the terms it did.

However the Judge found that where a fraudulent misrepresentation has been made, the requirement is weaker: it is sufficient to show that the representation was a factor in the parties' decision and that but for it he might have entered into it.

The Judge concluded the fraudulent misrepresentation was one of three reasons for Rembrandt agreeing to the price increase in the Revised Contract. At the very least, the representation was a matter which "supported or encouraged" Rembrandt to agree to the increased price.

The evidential burden therefore lay with NIVE. The presumption will only be rebutted, in a case of fraud, by showing that the representee would have entered into the contract had there been no representation. NIVE was unable to satisfy the Judge in this respect and the defence of fraudulent misrepresentation was accepted.

Rescission for fraudulent misrepresentation

As a result of the fraudulent misrepresentation the Judge ordered that the Revised Contract be rescinded, meaning that the only contract in force was the Original Contract.

The defence of breach of warranty failed on the facts in respect of the Original Contract. Accordingly, NIVE was entitled to recover damages from Rembrandt, assessed by reference to the prices agreed in the Original Contract. The damages awarded in respect of the Original Contract were €7,743,570.

However, because the Revised Contract had been rescinded Rembrandt was able to recover the additional sums it had paid under the Revised Contract. As a result the €7,743,570 awarded to NIVE was reduced by €1,594,750 being the additional amount Rembrandt had paid under the Revised Contract.

Impact

The High Court has decided that the correct test is a less demanding one for parties in cases where the misrepresentation is fraudulent. In such cases, it is sufficient for the party to show that the representation was a factor in its decision, and that but for that misrepresentation it might, rather than would, have acted differently.

The judgment demonstrates that the courts are unwilling to allow a party to benefit from making a fraudulent representation. The case also serves as a useful reminder to businesses during contract negotiations.

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