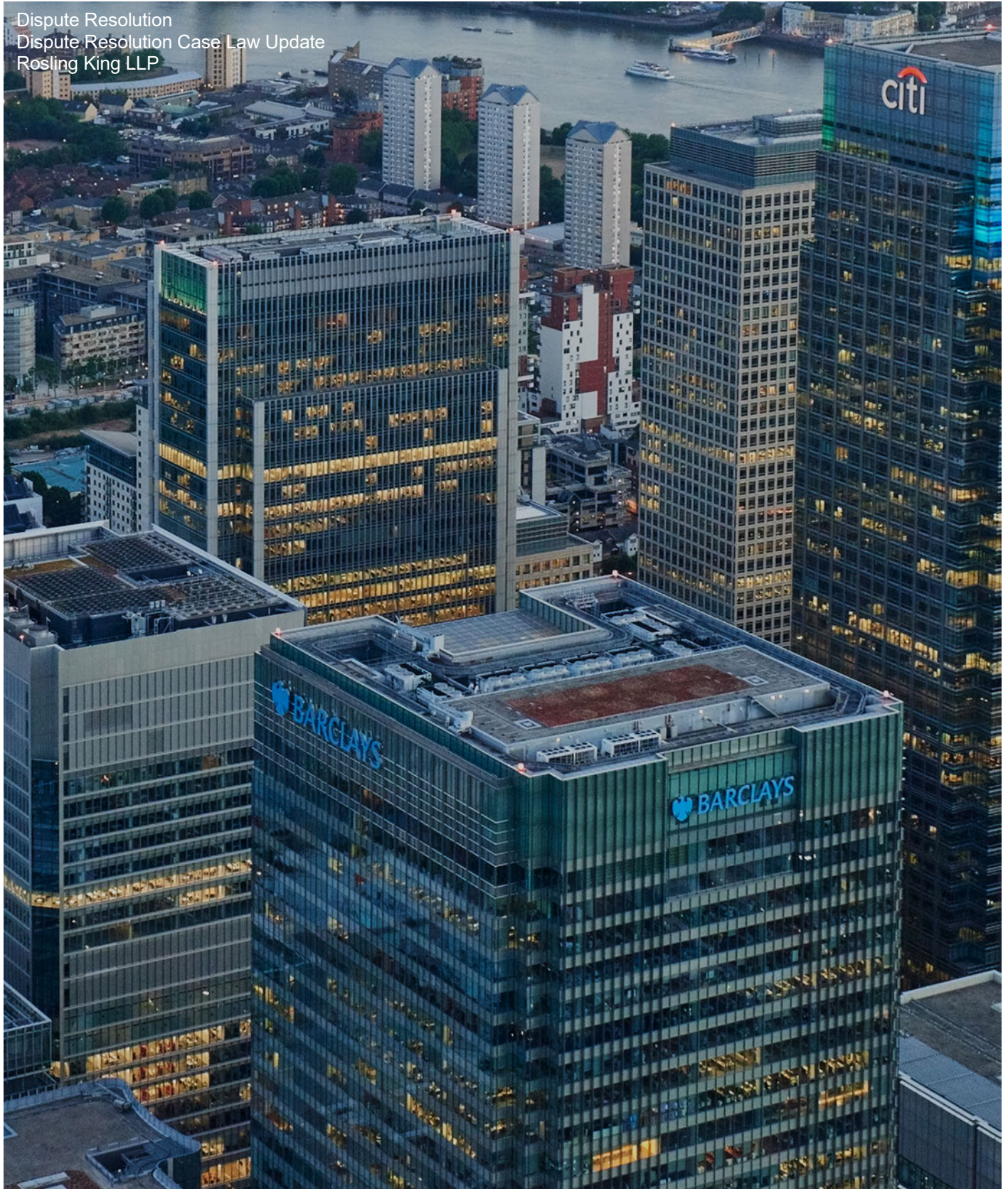


Dispute Resolution  
Dispute Resolution Case Law Update  
Rosling King LLP



### Background

Mr Perry was a miner who was afflicted by a condition known as White Vibration Finger caused by the effects of excessive drilling. Mr Perry, like many of his colleagues, sued the National Coal Board for damages. On the advice of his solicitors (“**Raleys**”), Mr Perry settled his claim for payment of general damages only. However, Mr Perry subsequently became aware that he could have also claimed for special damages under a scheme set up by the Department of Trade and Industry (the “**Scheme**”) to deal with the deluge of personal injury claims brought by former miners. Mr Perry calculated he could have received an additional £17,300.17 under the Scheme. Accordingly, he sued Raleys under the principle of loss of chance. Raleys admitted breach of duty but at trial the Judge concluded on the facts that the breach had not caused Mr Perry any loss.

Mr Perry appealed and the Court of Appeal reversed the Trial Judge’s decision on causation on the basis of two errors of law.

1. First, they held the Trial Judge was wrong to have conducted a ‘trial within a trial’ on the question of whether Mr Perry would (or could) have brought an honest claim under the Scheme, had he been given competent advice.
2. Secondly, they concluded the Trial Judge wrongly imposed a burden upon Mr Perry to prove on the balance of probabilities that he would have brought, not only an honest claim under the Scheme, but also a successful one. In the view of the Court of Appeal, this placed too excessive a burden on Mr Perry contrary to well established authority on causation.

Raleys appealed to the Supreme Court.

### The Law on Loss of Chance

The simple task of the Supreme Court was to determine what would have happened if the professional negligence hadn’t occurred. This involves determining what would have happened in the real world as opposed to a “what if” scenario commonly labelled the counter-factual. In general, case law has established that it would be unfair and inappropriate to conduct a trial within a trial where the question for the Court is one which turns on the assessment of a lost chance. However, it does not establish a principle that it is always wrong to try an issue relevant to causation in a professional negligence claim, merely because that issue would have fallen for determination in the underlying claim (lost due to alleged negligence).

The correct approach for a loss of chance claim was laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons*, which required a claimant to prove on the balance of probabilities they would have taken some positive step had they received competent advice. The balance of probabilities test gives rise to the all or nothing outcome. If a claimant proves by the narrowest of margins that they would have taken a positive step, they would suffer no discount in the value of the claim by reason of the considerable possibility they might not have taken the positive step. Since success or failure of proving on the balance of probabilities that they would have taken a requisite step is of such fundamental importance to the loss of

opportunity claim, there is no reason why either party should not be deprived the full benefit of a trial of that issue if it can be fairly tried.

### Judgment

The Supreme Court found the Trial Judge had not been wrong to conduct a trial within a trial on the question of whether Mr Perry would (or indeed could) have brought a claim, if given competent advice by Raleys. That was something Mr Perry had to prove on the balance of probabilities and Raleys were able to challenge the alleged facts relevant to this question.

To this the Trial Judge had added it must be an honest claim. The Supreme Court was satisfied there must be an honest claim requirement giving three reasons. First, a claimant honestly describing their condition to a solicitor would not be advised to bring a claim if the facts so described did not give rise to a claim. Secondly, a Court may fairly presume that the claimant would only make honest claims. Thirdly, the Court simply has no business in rewarding dishonest claimants.

The second causation issue was whether it was correct to place the burden on Mr Perry of proving whether he would have brought a successful claim for the damages under the Scheme. Viewed across the generality of claims that may never be pursued because of professional negligence, the Supreme Court deemed it probable that the burden of proving that the claim would have succeeded is higher than the burden of proving a claim could or would have been honestly made. This is because there will be a raft of factual and legal matters all of which will be subjected to full adversarial examination at trial. The Supreme Court agreed that it was unfair to place this burden on Mr Perry. In fact, it was evident the Trial Judge had not determined this in his judgment, contrary to the view of the Court of Appeal. In addition, the Supreme Court believed the Court of Appeal had wrongly interfered with the Judge's factual findings stating the very stringent test for an appellate court interference had not been met in this case.

The Trial Judge's order was restored.

### Commentary

This decision provides important guidance on how loss of a chance cases should be approached. It identified what a Claimant in a loss of a chance case must prove before the assessment of the lost chance takes place and represents an important clarification of the burden of proof in such claims. Further, the Supreme Court confirmed the limits of appellate courts when considering findings of fact, including those that rely upon credibility.

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