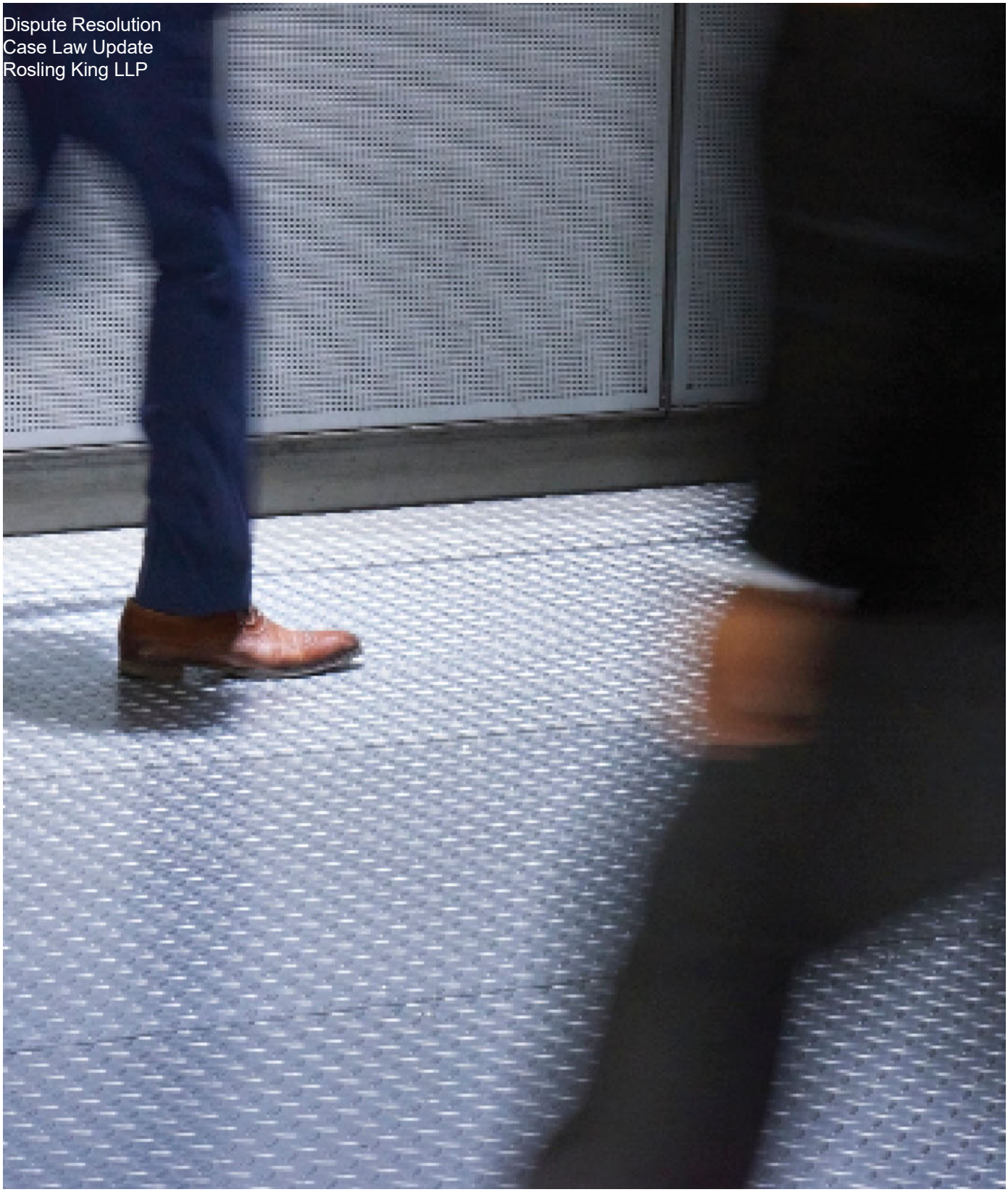
Dispute Resolution
Case Law Update
Rosling King LLP



Background

In a recent decision forming part of a wider saga of ongoing litigation surrounding Tesco's 2014 accounting scandal, the High Court dismissed Tesco's application to withdraw an admission made in its defence in two different sets of proceedings. The admission related to a trading statement made by Tesco on 29 August 2019 (the "August Statement") and the allegation that this statement was untrue and/or misleading as it misstated the expected trading profit for the first half of the 2014/2015 financial year. Tesco wished to withdraw the admission and advance a defence that the statement wording which forecast profits "in the region of £1.1bn" was not of itself untrue or misleading as the resulting trading profits amounted to £1.024 billion.

Tesco had made the admission within its defence to proceedings brought by two different groups of claimants, the "SL Claimants" and the "MLB Claimants" (together the "Claimants"). A further issue faced by Tesco was referred to in the judgment as the "Gateway Point". Tesco had to make clear in its arguments that the application was not in any way an attempt to resile from its acceptance of findings of market abuse by the FCA, nor was it an attempt to circumvent the Deferred Prosecution Agreement ("DPA") it had signed relating to charges of false accounting. Tesco made it clear that if the Court found that the withdrawal of the admission was in any way inconsistent with what Tesco had already formally and publicly accepted, Tesco would withdraw its application.

The Decision

Mr Justice Hildyard dismissed Tesco's application. Hildyard J separated his judgment into two parts, the first examining the abovementioned Gateway Point and the second considering how the Court should exercise its discretion when deciding whether to permit the withdrawal of an admission.

On the Gateway Point, it was Hildyard J's view that Tesco had to demonstrate that there was a workable space in which it could stand by what it had publicly accepted, but also plead its new position by amendment. Hildyard J saw no issue in accepting that there was a separation between the conclusion that the August Statement was misleading, as already accepted by Tesco, from the particular reason why it was so, now disputed by Tesco. Hildyard J did have issue with the concluding sentence or "punchline" which when stripped down pleaded that "accordingly, the August Statement was not an untrue or misleading statement". In Hildyard J's view, this conclusion was plainly inconsistent with Tesco's previous public position. Consequently, even though the withdrawal of the admission was not inconsistent with what had already been accepted by Tesco, Hildyard J still "closed the gate" on the conclusion Tesco wanted to draw from it.

Hildyard J went on to consider how the Court should exercise its discretion when deciding whether to permit the withdrawal. Applying the observations of Briggs J in *Kojima*, the power of the Court to permit a withdrawal is discretionary, exercised within the criteria set out in paragraph 7.2 of CPR PD14, and depends on the circumstance the case. Hildyard J's responses to the criteria of 7.2 were as follows:

7.2 (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

Hildyard J considered that permitting an amendment so late in proceedings would lead to further pleadings and create a need for expert evidence which, so close to trial, would destabilise proceedings.

7.2 (b) the conduct of the parties, including any conduct which led the party making the admission to do so;

Hildyard J felt that Tesco had approached proceedings in a constructive and reasonable way and so did not consider this criterion a "material point in the balance".

7.2 (c) the prejudice that may be caused to any person if the admission is withdrawn; & 7.2 (d) the prejudice that may be caused to any person if the application is refused;

Hildyard J also considered that without the "punchline" a similar conclusion would inevitably be reached through the Claimants amending their pleadings to say that other elements relied on by the FCA and DPA were false or misleading.

7.2 (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

Hildyard J did not consider that the withdrawal would cause the loss of the trial date, nor add length to the trial in a way that could not be accommodated. However, Hildyard J did think that it would destabilase the final phase of the trial preparation. Hildyard J again considered the balance to be against Tesco on the basis that Tesco waited so long to dispute the falsity of the August Statement.

7.2 (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and

Hildyard J considered the prospects of Tesco's potential new case to be frail. Tesco would still be bound to accept that overall the August Statement was false and/or misleading and the overstatement made by Tesco was still a shortfall of 6.9% and not necessarily "within the region" of £1.1 billion.

7.2 (g) the interests of the administration of justice.

In Hildyard J's view, it did not matter that the point was technically arguable, the interest of the administration of justice required the Court to prevent a potentially disruptive change of position.

Hildyard J took all of the above criteria above into account. He considered them to be analytical guides to what ultimately had to be an overall assessment. Hildyard J concluded that Tesco should not be permitted to deny that the August Statement was false or misleading at this late stage in proceedings by withdrawing its admission. He also concluded that it would be too disruptive to permit Tesco to plead that the profit was "in the region" of £1.1 billion.

Commentary

The High Courts' decision in relation to the Gateway Point shows that once an admission has been relied upon in any proceedings, the Court will not generally allow that party to amend its admission in a different set of proceedings. When a party applies for permission to withdraw an admission, even when armed with clever arguments showing that there are no inconsistencies with what has already been accepted, the Court will still not allow you to interfere with conclusions that had already been drawn from that admission.

In considering how the Court should exercise its discretion, Hildyard J made it clear that all the factors in paragraph 7.2 CPR Practice Direction 14 will be considered. Parties should on the whole be particularly careful in what they might choose to admit when engaging in litigation, in any form, as withdrawing that admission can be difficult. Should parties find that they have inadvertently made an admission, or, if additional information comes to light which could be grounds to amend an admission, action should be taken immediately. It is clear from the above decision that the likelihood of a successful application for permission is increased the earlier it is made after the admission. Applying Hildyard J's reasoning above, the earlier a party seeks permission to withdraw an admission, the less disruption the application will cause, and the more likely the Court will be to will grant the application.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.