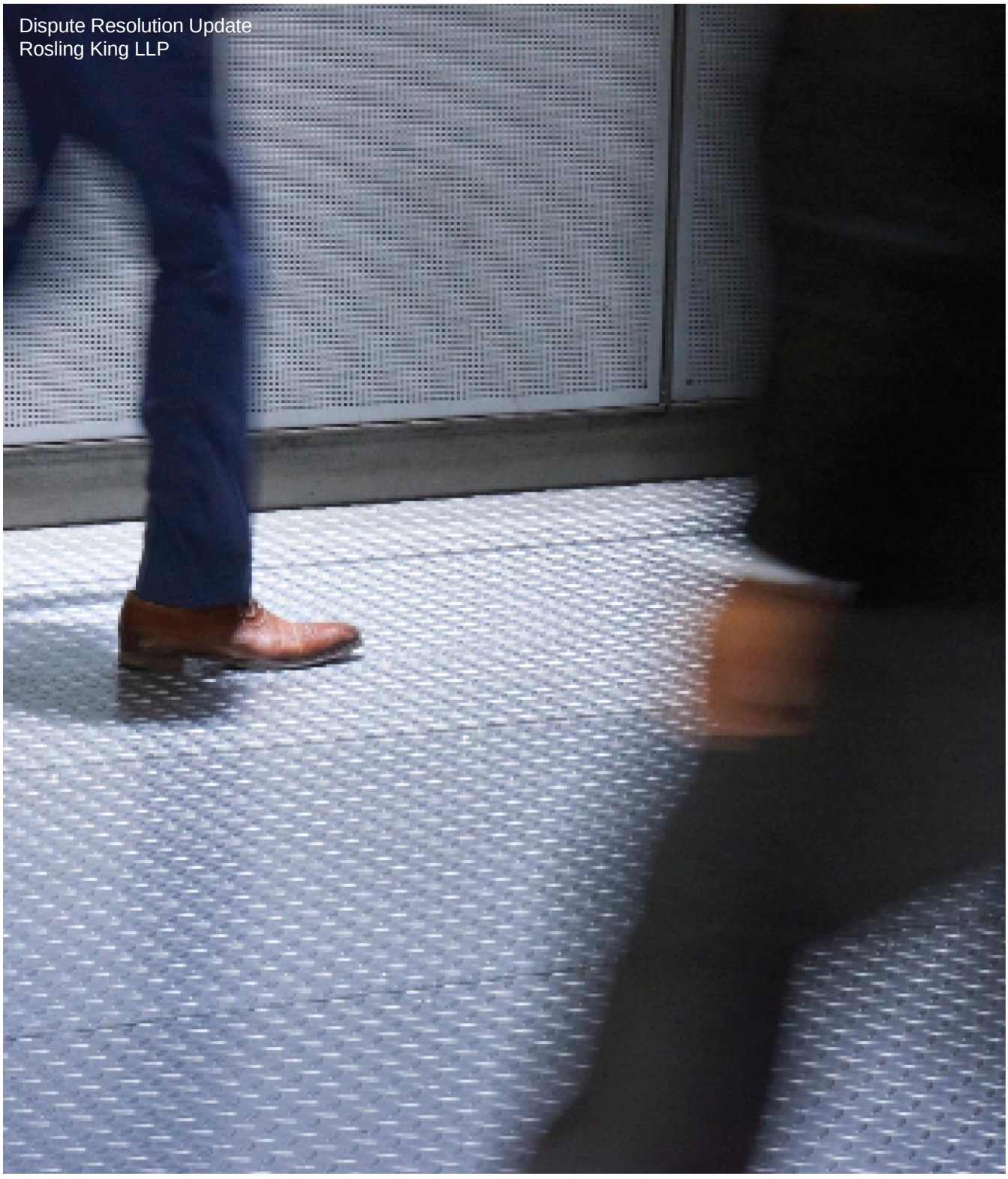
Dispute Resolution Update
Rosling King LLP

Background

UK Acorn Finance Limited (UKAF), represented by Rosling King LLP, sought to recover two judgment sums obtained against Colin Lilley Surveying Limited (CLS), from CLS's professional indemnity insurer Markel (UK) Limited (Markel) under the Third Party (Rights Against Insurers) Act 1930.

It should be noted that the insurance policies in this case were not covered by the Insurance Act 2015, as they predated it. The issue of interest is the application of the Braganza test to rights under contracts, including contracts of insurance.

CLS had originally been instructed by UKAF, an agricultural bridging finance lender, now in run-off, to value agricultural properties during 2010 to 2012. UKAF relied on the valuations to make loans. It brought claims against CLS for overvaluations of the properties.

CLS had the benefit of professional indemnity insurance from Markel since 2003. However, the professional indemnity policies in question related to the 2013 and 2014 policy years (the Policies). Following receipt of the preliminary notifications and an investigation by Markel, Markel avoided the Policies in February 2016. Shortly thereafter CLS went into liquidation and UKAF obtained judgments in respect of its claims.

UKAF then brought the present claim against Markel utilising the Third Party (Rights Against Insurers) Act 1930 to step into the shoes of the insolvent CLS and challenge Markel's avoidance of the Policies.

The facts

Markel maintained that it was entitled to avoid the Policies as a result of misrepresentations and non-disclosures contained in the risk profile documents which were generated by Markel prior to the renewal of each of the Policies.

The Policies themselves contained an unintentional non-disclosure (UND) clause which provided *"In the event of non-disclosure or misrepresentation of information to Us, We will waive Our rights to avoid this Insuring Clause provided that (i) You are able to establish to Our satisfaction that such non-disclosure or misrepresentation was innocent and free from any fraudulent conduct or intent to deceive"*

It was not disputed that Markel could avoid the Policies only if the misrepresentations relied on by the Markel were not innocent and free from any fraudulent conduct or intent to deceive.

The question the Court had to determine was whether the determination of CLS's conduct and representations should be judged by the Court on the basis of the evidence led before it by the parties or whether the Court's ability to intervene was confined to an investigation of Markel's decision making processes.

Findings

Markel submitted that the Court's role should be limited to determining whether Markel's decision to avoid the Policies was one that was open to a reasonable decision maker on the basis of the facts and matters such a decision maker was entitled to take into account in arriving at such a decision. HHJ Pelling agreed with this submission, noting in his judgment that the wording *"… to Our satisfaction…"* made the decision maker Markel. HHJ Pelling refers to Lady Hale's observation in Braganza v BP Shipping Limited [2015] that *"It is not for the courts … to substitute themselves for the contractually agreed decision-maker …"*.

In applying Braganza, HHJ Pelling held that Markel was not permitted to make decisions that were arbitrary, capricious or irrational and implied these terms into the UND clause (but accepted that at times this can be so obvious it goes without saying). This itself resulted in the application of the Wednesbury principles set out in Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] which were also applied in Braganza.

In considering Markel's decision-making process, on the evidence adduced to the Court by their decision maker, HHJ Pelling found that Markel failed to approach the issue of dishonesty correctly in the manner required by Braganza and failed to take account of facts and material points that should have been considered. HHJ Pelling concluded stating *"I have asked myself whether I could safely conclude that the outcome would have been the same had the errors [by Markel] to which I have referred not been made. I am not able to reach such a conclusion."*

Commentary

The Braganza test is a constituent part of all decision making by all those given the right to make contractual decisions. It reminds the decision maker that they must ensure that they take into account all relevant factors in making their decision, not just a selection. They must also not take into account matters which they ought not consider, and they must not come to a conclusion that no reasonable decision maker could have reached. As the Judge said, it is crucial such a test is implied into contracts to eliminate the possibility of arbitrary, capricious or irrational decisions and the necessity of this implied test is so obvious that it goes without saying.

For further information, please contact Georgina Squire at Rosling King LLP.