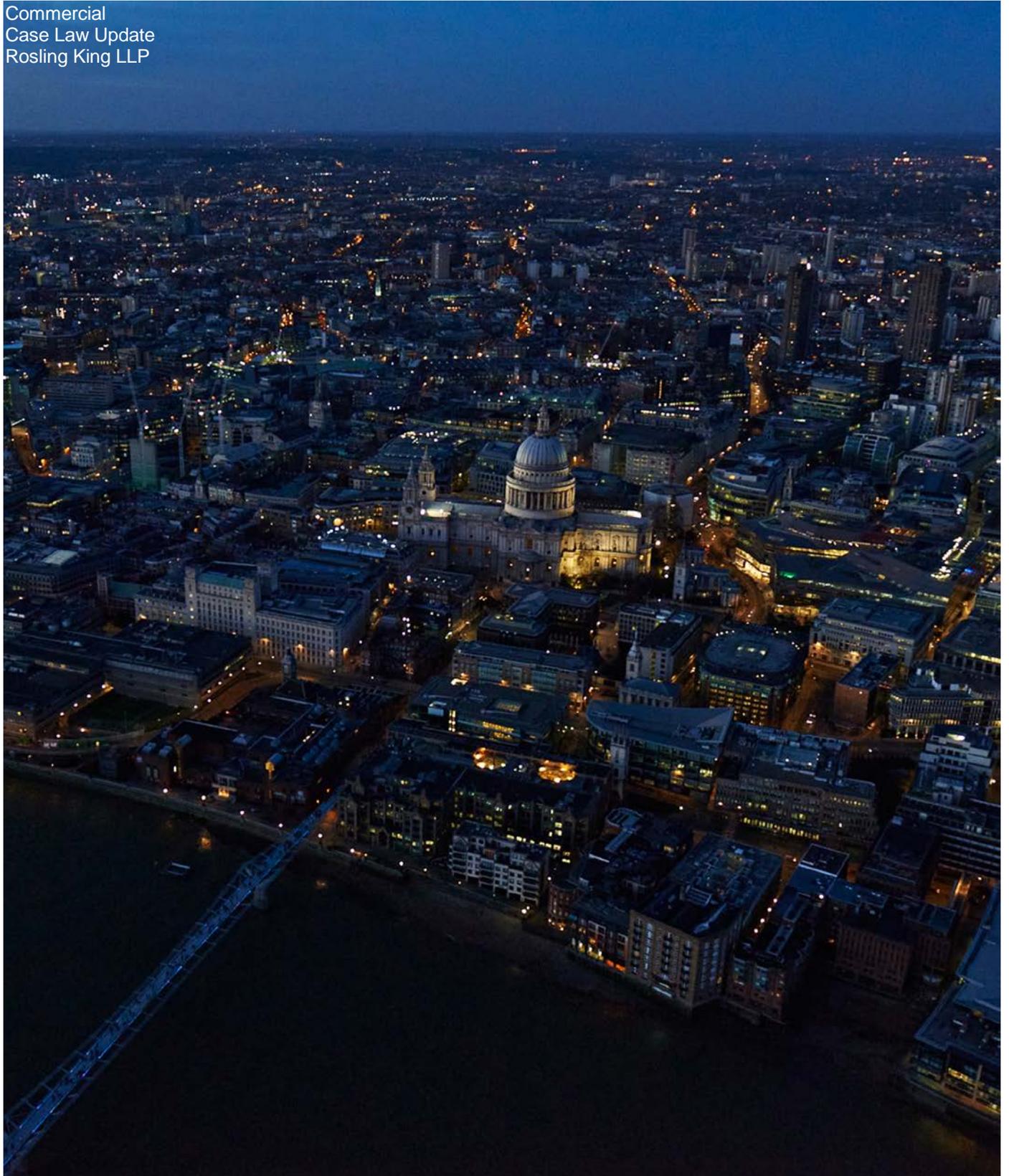


Commercial  
Case Law Update  
Rosling King LLP



February 2015  
Page 2

In this recent case, the High Court considered the meaning of "materiality" in deciding whether a termination event had occurred under an exclusivity agreement of unlimited duration.

### Background

This decision concerns a claim brought by Decura IM Investments LLP and others (together "Decura") against UBS AG, London Branch ("UBS"). The action arises out of an agreement between Decura and UBS dated 31 May 2012 which was known as the Introduction and Outsourcing Agreement (the "Agreement").

Pursuant to the terms of the Agreement, UBS agreed that it would cease to develop internally or source from third parties (with limited exception) financial products and services defined in the Agreement as "Exclusive Business Services" ("EBS") and to acquire from Decura any EBS products required for UBS Investment Bank ("IB") or its clients.

Though the Agreement was of unlimited duration, certain termination events were provided for. Clause 20.3 of the Agreement, specifically, permitted termination where UBS "... ceases to carry on a material part of its UBS IB business at any time" and "... such cessation... has a material adverse effect on UBS IB's ability to market the Exclusive Business Services".

On 30 October 2012, UBS made a public announcement of a strategy referred to as "Project Accelerate". The issue before the Court was whether there was a change made to IB as a result of Project Access which constituted a termination event in accordance with clause 20 of the Agreement.

The questions for determination by the Court were summarised by Mr Justice Burton as follows:

- (1) What was the effect and meaning of the word "material" in clause 20?
- (2) Did Project Accelerate have the effect that UBS ceased to carry on a material part of its business?
- (3) If there was such a cessation of a material part of its business, did that have a material adverse effect on UBS's ability to market the EBS?

### The Decision

With regard to the first issue, the Court found itself in agreement with both parties' submissions that the term "material" meant "significant" or "substantial" within the matrix of the Agreement. In reaching this opinion, the Court made reference to the decisions in *Pan Atlantic Insurance Company Ltd v Pine Top Insurance Company* [1995] 1 AC 501 and *Grupo Hotelero Urvasco SA v Carey Value Added* [2013] EWHC 1039, amongst others.

As for the second issue for determination, it was averred by Decura that UBS had ceased to carry on a material part of the IB business as a result of Project Accelerate. Though it was accepted by the Court that Project Accelerate involved "significant changes" and a "shrinking"

February 2015  
Page 3

of the IB business, the Court found that "... there was no cessation of a part of the business of UBS IB" and no need "... to address the question of materiality", owing to the "... many different aspects to... [IB's] business".

Since the second issue was resolved by the Court in favour of UBS, the Court assessed the third issue on a hypothetical basis only. On the facts, the Court considered Decura to have failed to evidence that there would have been a material adverse effect on UBS's ability to market the EBS even if the second issue was proved.

#### Commentary

This decision illustrates the approach the Courts are likely to adopt in interpreting the meaning of "materiality" in a contract. It also serves as a reminder of the need for watertight drafting of terms incorporated into agreements which are terminable in a limited number of prescribed circumstances.

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