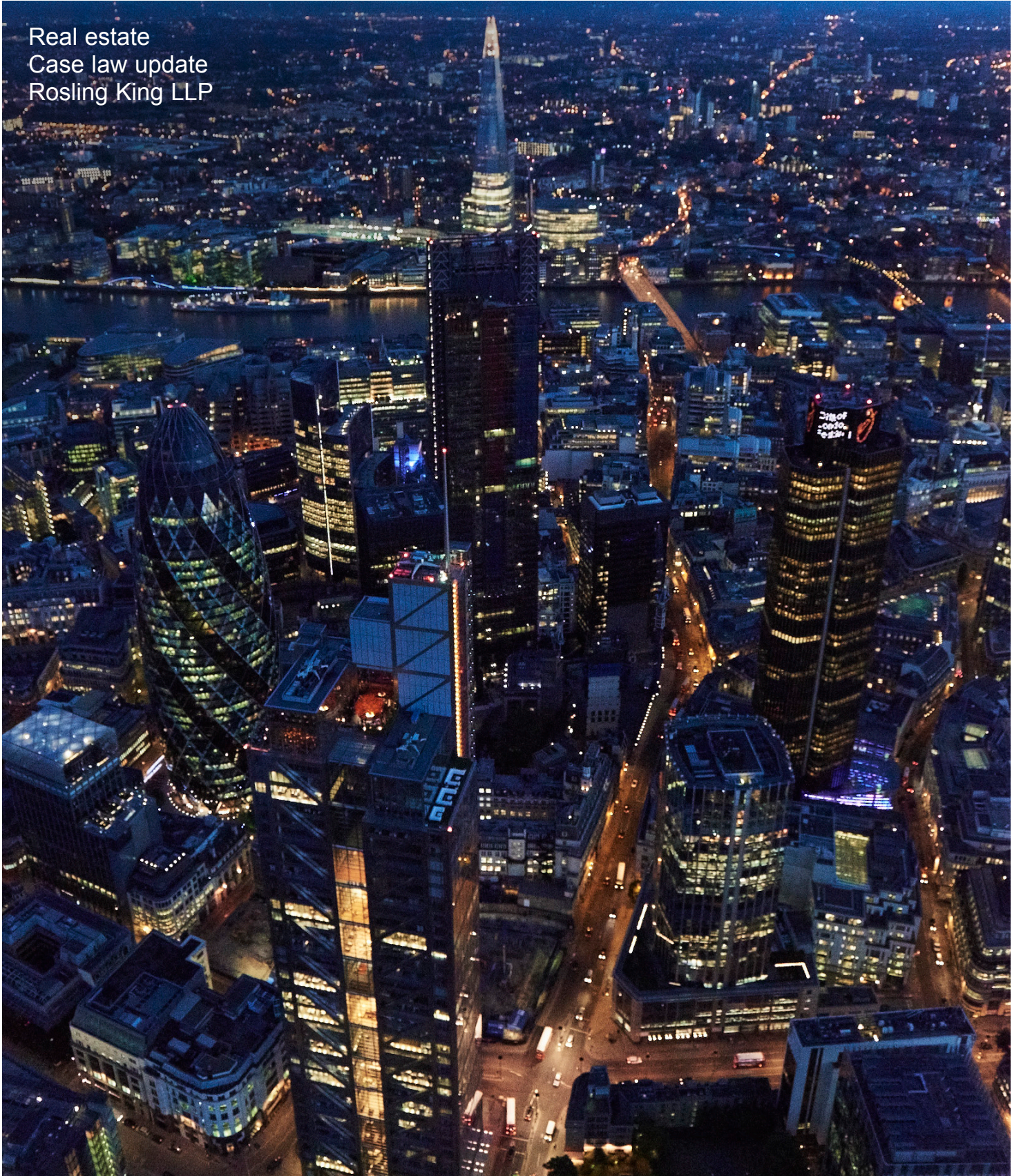


Real estate
Case law update
Rosling King LLP



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This decision of the Court of Appeal looks at what factors the Court will consider in deciding whether to grant relief from forfeiture. It confirms that a windfall to a landlord on forfeiture of a lease does not automatically mean relief will be granted. Rather, the Court will consider all the facts of the case and will carry out a balancing exercise in deciding whether to grant relief from forfeiture.

The Facts

The Appellant/Claimant was a tenant of seven commercial units. The Appellant, in breach of the terms of the lease and without the consent of the landlord, granted a sub-lease of one of the units. As a result, the Respondent/Defendant forfeited the head-lease and the Appellant applied for relief from forfeiture. Relief was refused twice at first instance, but later granted on appeal to the Court of Appeal.

The Decision at First Instance

The Judge at first instance declined to grant relief from forfeiture primarily on the basis of the Appellant's conduct and "their cynical disregard for their obligations under the lease". In relation to the test to apply in deciding whether to grant relief, the Judge held that "he should take into account that it might be disproportionate to refuse relief where the landlord might receive a windfall...but he saw that as a fact which should make the tenant more punctilious about performing his obligations".

The Decision on Appeal

In its judgment, the Court of Appeal confirmed that relief from forfeiture is a discretionary remedy, not to be subjected to rigid rules. The Court held that the conduct of the tenant is a relevant consideration when determining whether to grant relief but, relying on the decision of *Southern Depot Co Ltd v British Railways Board* [1990] 2 EGLR 39, relief from forfeiture may still be granted even where a breach is deliberate and special circumstances do not have to be shown. The Court also held that the value of the leasehold interest is a relevant consideration in deciding whether to grant relief from forfeiture. A windfall to the landlord does not automatically mean relief will be granted, but should be considered as part of the balancing exercise to be undertaken by the Court.

The Court of Appeal held that the first instance Judge failed to appreciate that the value of the leasehold interest was a separate advantage that the landlord would obtain on forfeiture and that this should be considered separately, against all the other circumstances. The Court held that considering whether it was appropriate to allow the landlord a windfall as a result of forfeiture was a matter of proportionality, to be considered on its own merits and weighed against the tenants' conduct. The Court of Appeal held that the first instance Judge failed to consider this issue separately and, on the facts of this case, relief should be granted for the purposes of, and conditional upon the sale of the head-lease within 6 months.

Commentary

This case is a useful reminder to both landlords and tenants of the factors that the Court will look at when deciding whether or not to grant relief from forfeiture. It confirms that whilst it is a consideration for the Court when exercising their discretion, a windfall to a landlord will not automatically result in a successful application for relief. Given this uncertainty, tenants, particularly those with a valuable leasehold interest, are always advised to fully observe the covenants so as to safeguard their assets and avoid an action for forfeiture.