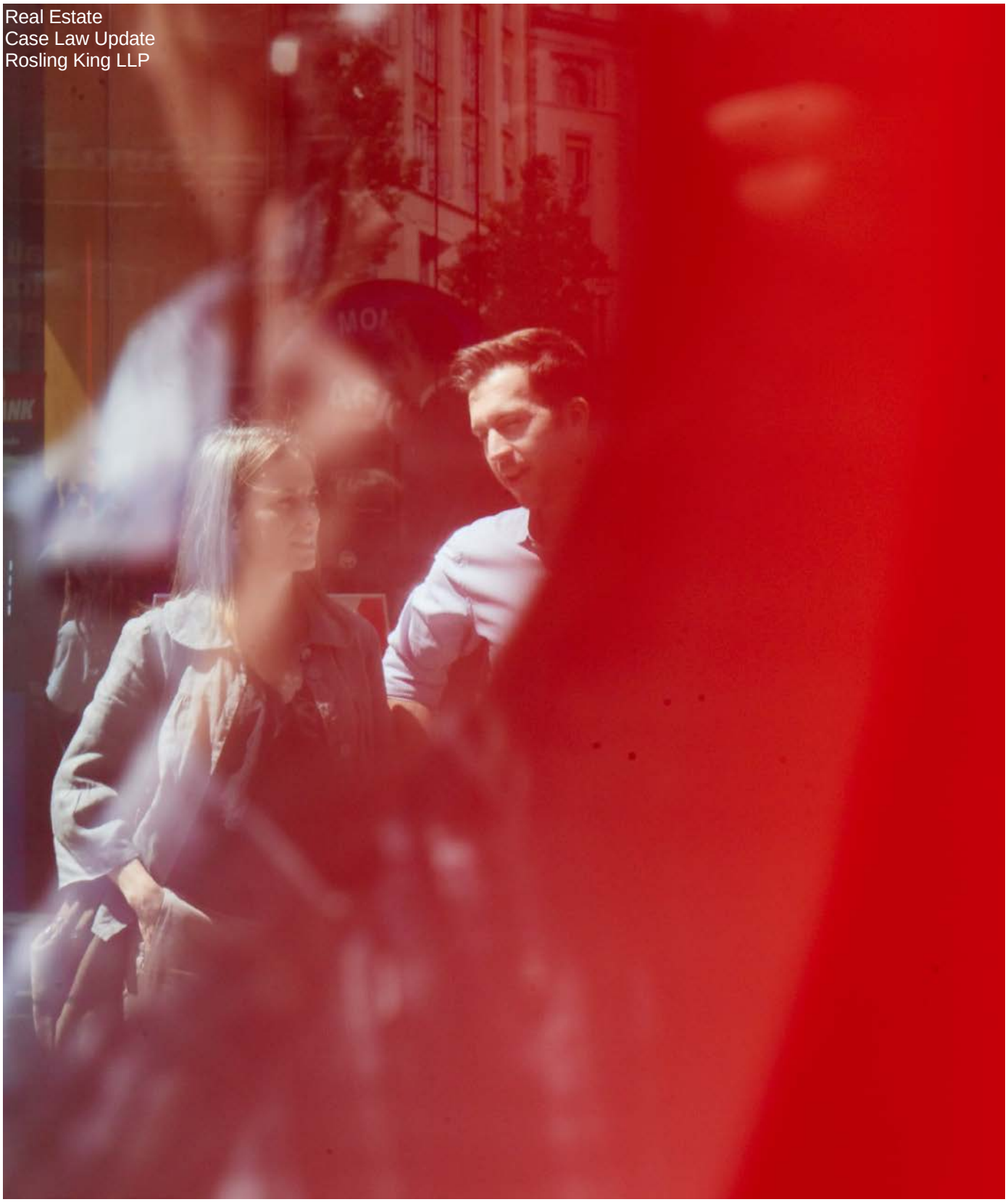
Real Estate
Case Law Update
Rosling King LLP



In this case the Upper Tribunal (Lands Chamber) considered whether, in a claim for a new lease under the Leasehold Reform, Housing and Urban Development Act 1993 (the "Act"), the service charge provisions of the existing lease should be amended because the total percentage of the service contributions from all the tenants exceeded 100% of expenditure.

The Facts

The Crown Estate Commissioners were the freehold owners of a building located in Westminster. A headlease had been granted to Whitehall Court (Investments) Limited. The property was divided into flats which were sold on long leases subject to a fixed service charge contribution which together constituted the full expenditure incurred. The properties within the building were altered which resulted in the aggregate of the service charge contributions pursuant to the leases totalling over 100% of the expenditure. However, in practice, the service charge was administered so that the service charge collected was the total of what was spent.

Mr Rossman was the tenant of one of the flats in the building and in March 2011 served notice under section 42 of the Act requesting a new lease. Whilst the claim to a new lease was accepted, the service charge provisions could not be agreed and Mr Rossman applied to the First Tier Tribunal for determination.

Subsequently, in August 2011, the other tenants in the building applied to the Leasehold Valuation Tribunal to vary the service charge provisions in their leases, submitting that the contributions should be calculated based on the floor area of each property. The Leasehold Valuation Tribunal refused to order any variation and adopted a minimalist approach stating that, as the service charge was operated in practice in a manner that resulted in the service charge contributions covering only the appropriate amount of expenditure incurred, there was no defect and no intervention was necessary.

Following the decision of the Leasehold Valuation Tribunal the First Tier Tribunal in Mr Rossman's claim stated that Mr Rossman's lease should contain the same terms as the existing lease unless the parties agreed a variation. The First Tier Tribunal concurred with the Leasehold Valuation Tribunal's reasoning and held that the service charge provisions in the existing lease did not amount to a sufficiently serious defect within the meaning of section 57(6)(b) of the Act. Mr Rossman then appealed to the Upper Tribunal (Lands Chamber).

The Decision

The Upper Tribunal (Lands Chamber) overruled the decision of the First Tier Tribunal and held that the fixed service charge contribution was a sufficiently serious defect that would require amendment. There was no justification for the fixed service charge percentage. The existence of the voluntary abatement scheme to mitigate the effect of the current service charge provisions demonstrated that the current service charge provisions should be amended.

However, the Upper Tribunal (Lands Chamber) found that Mr Rossman's proposed floor area calculation to be inserted in the leases was not fair to all tenants and concluded that any

amendment must resolve the unfair defect in the lease provisions. The case was therefore remitted to the First Tier Tribunal to decide the new formulation for the service charge.

Commentary

This case demonstrates that even if in practice lease provisions are exercised so as to avoid prejudice, if the provisions of the lease are themselves prejudicial and out of date then the tribunal should utilise its discretion under section 57(6) of the Act and amend the new lease accordingly. It is wrong to perpetuate defective provisions.

For further information, please contact Simon Geoghegan, Peter Lewis or the Partner with whom you usually deal.