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Legal alert

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Break clauses – Supreme Court confirms no refund for tenant

In the recent case of Marks and Spencer Plc v BNP Paribas [2015] UKSC 72 the Supreme Court has confirmed the strict line on break clause apportionments taken by the Court of Appeal in this case. That's bad news for tenants (and their solicitors), but good news for landlords.

The Supreme Court's judgement in this protracted saga confirms the long-standing principle that, if a break clause is exercised, the tenant is not entitled to a refund of any rent payment due before the break date that relates to any period after the break date.

For example, consider a lease under which rent is payable in advance on the usual quarter days. It also contains a tenant's right to break the lease on 1 July 2014. Unless expressly dealt with in the lease, case law dictates that, if the tenant exercises the break, the tenant is not entitled to a refund of a proportion of the quarterly rent that the tenant would have paid on 24 June.

The point was lost on the solicitors acting for Marks & Spencer when M&S entered into four leases of offices premises in the building in Paddington, London known as The Point.

M&S subsequently exercised a mid-quarter break clause in all four leases. It then argued for repayments of rent, service charges and car park licence fees totalling £1.1 million.

In the High Court, Morgan J, was sympathetic to M&S's plight. Although he acknowledged the long-standing common law principle, Morgan J nevertheless implied a term into the leases that the tenant should be entitled to a refund. He said that such a term would be "eminently reasonable" and "necessary to give business efficacy to the lease". The M&S break clause wording provided for payment by the tenant on exercise of the break of a premium equivalent to a year's rent. That, concluded Morgan J, made it unlikely that the parties also intended the landlord to be entitled to retain the full quarter's rent.

However, the High Court decision was overturned by the Court of Appeal, saying that an implied term could not reasonably be implied in this case. It would not have passed the officious bystander test (i.e. that the term was necessary to give business efficacy to the contract).

The Court of Appeal's decision has now been ratified by the Supreme Court, confirming the long-standing principle.

Tenants must therefore continue to ensure that any break clause expressly provides for rent to be appropriately apportioned on exercise of the break. If not, they must ensure that the break, if exercised, brings the lease to an end on the last day of a quarter.