

## Commercial Landlord & Tenant: Break Clauses and a Tenant's Right to a Refund (Part II)

### The Case of Marks and Spencer Plc -v- BNP Paribas [2014] EWCA Civ 603

#### Introduction

On 12 June 2013, we posted a review of the High Court's decision in the case of *Marks and Spencer Plc v BNP Paribas* [2013] EWHC 1279 (Ch). However, BNP Paribas subsequently appealed against the High Court's decision that went in favour of Marks and Spencer Plc and the Court of Appeal handed down its reserved Judgment on 14 May 2014. This case review deals with the Court of Appeal's Judgment.

#### The Facts

As a reminder, the factual circumstances of the case are as follows:

Marks and Spencer Plc ('the Tenant') held a lease in respect of four floors of an office building in Paddington, London known as 'the Point' for a term expiring on 2 February 2018 ('the Lease'). BNP Paribas was the Tenant's landlord ('the Landlord').

Rent payable under the Lease was to be '*... paid yearly, and proportionately for any part of the year, by equal quarterly instalments in advance on the usual quarter days ... without any abatement, set-off, counterclaim or deduction whatsoever ... and so that the Landlord shall receive the full value in cleared funds on the date when payment is due*'.

The Lease also contained a break clause that stated:

- 8 Option to Determine
- 8.1 ... the Tenant may determine this Lease on [24 January 2012] by serving on the Landlord written notice on or prior to [24 January 2012].
- 8.2 The Tenant may determine this Lease on [24 January 2016] by serving on the Landlord written notice on or prior to [24 January 2016].
- 8.3 This Lease shall only determine as a result of the notice served by the Tenant under clauses 8.1 or 8.2 if, on the break date, there are no arrears of Rent ...
- 8.4 This Lease shall only determine as a result of the notice served by the Tenant under clause 8.1 if, on [24 January 2012], the Tenant pays to the Landlord the sum of £919,800 plus VAT.

8.7 If the provisions of this clause are complied with then, on the break date, this Lease shall determine but without prejudice to the rights of either party in respect of any previous breach by the other.

On 7 July 2011, the Tenant served a notice on the Landlord to determine the Lease on 24 January 2012 which was in the middle of the quarter period beginning on 25 December 2011 and ending on 24 March 2012. Whether the Lease would actually determine on 24 January 2012 depended on whether the Tenant would comply with the conditions set out in the break clause.

On or around 25 December 2011, the Tenant paid rent for the full quarter beginning on 25 December 2011 and ending on 24 March 2012 and, on 18 January 2012, the Tenant paid the break premium in the sum of £919,800 plus VAT. In the circumstances, the Tenant had complied with the conditions set out in the break clause and the Lease duly ended on 24 January 2012.

On 9 February 2012, the Tenant wrote to the Landlord asking for a repayment in respect of the excess rent it paid for the period after the Lease ended on 24 January 2012 to the end of the quarter on 24 March 2012.

The Landlord refused to make a repayment and so the Tenant issued proceedings on 20 April 2012 claiming a repayment of the excess rent (a) pursuant to the express terms of the Lease or (b) pursuant to the implied terms of the Lease or (c) because there had been a total failure of consideration. The Landlord defended the Tenant's claim.

#### The High Court's Decision

Mr Justice Morgan heard the case on 17 April 2013 and his Judgment was handed down on 16 May 2013.

The Judge found that the express terms of the Lease did not permit the Tenant to recover part of a quarter's rent from the Landlord despite the express words said rent would be paid '*proportionately for any part of the year*'. Nevertheless, the Judge found the implied terms of the Lease permitted the Tenant to recover the excess rent it paid for the period after the Lease ended on 24 January 2012 to the end of the quarter on 24 March 2012. (Having decided the Tenant was permitted to recover the excess rent pursuant to the implied terms of the Lease, it was unnecessary for the Judge to consider whether the Tenant could have done so because there had been a total failure of consideration).

The Landlord appealed against the Judge's decision. The Court of Appeal heard the Landlord's appeal on 25 March 2014 and, as stated above, its Judgment was handed down on 14 May 2014.

#### The Court of Appeal's Judgment

The Court of Appeal allowed the Landlord's appeal and overturned the Mr Justice Morgan's Judgment. In the circumstances, the Landlord was not obliged to repay the excess rent for the period after the Lease ended on 24 January 2012 to the end of the quarter on 24 March 2012.

The Court of Appeal's starting point was that, if there is no express term, none should be implied because if the parties intended that a particular term should apply to their relationship they would have included a term to that effect rather than leave it to implication (especially if it could have been easily drafted).

The Court of Appeal added that it will not imply a term as a matter of interpretation unless it is necessary that the agreement should contain such a term to achieve the parties' express agreement i.e. the term went without saying, was a term necessary to give business efficacy to the contract or which, though tacit, formed part of the contract which the parties made for themselves.

The Court of Appeal was also influenced by the fact that, on the last quarter day before the break date, it was uncertain as to whether the Lease would actually terminate on the break date because the Tenant had not by then complied with the requirement to pay the break premium. The Court of Appeal believed the Landlord could and should be compensated for that uncertainty.

That said, the Court left open the possibility of the Tenant not needing to pay the full quarter's rent on the last quarter day before the break date if, by then, it had already paid by the break premium thereby making it certain the Lease would terminate on the break date. The Court of Appeal stated:

1. *"I proceed on the basis (without deciding the point) that [the Tenant] could make a proportionate payment of rent on the last quarter day if he had by then also paid the break premium: that would seem to be correct but the point was not fully argued before us".*
2. *"If I am right in saying there is a distinction between the cases where the break premium is paid on or before the last quarter day and cases where is not paid until after that date, the assumption that the break premium should be full compensation is undermined".*
3. *"Had I found an implied term in this case, it would have arisen from the special provisions of the break clause. Thus it may have been correct to say that forfeiture [cases] could be distinguished".*

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