Commercial Landlord & Tenant: Break Clauses and a Tenant's Right to a Refund

The Case of *Marks and Spencer Plc -v- BNP Paribas* [2013] EWHC 1279 (Ch)

The Facts

Marks and Spencer ('the Tenant') held a lease in respect to 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 a quarter period. Whether the Lease would actually determine on 24 January 2012 then 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 2012 and ending on 24 March 2012.

On or around 18 January 2012, the Tenant paid the sum of £919,800 plus VAT.

In the circumstances, the Tenant complied with the conditions set out in the break clause and the Lease 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 decision was published 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 that the implied terms of the Lease did permit 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. The Judge was influenced by the following factors:

1. Had the Lease ended on the expiry of its term on 2 February 2018, then on 25 December 2017 – being the last quarter day before the Lease ended on the expiry of its term – the Tenant would only need to pay rent in respect of the period from 25 December 2017 to 2 February 2018 (and not for the full quarter ending on 24 March 2018).

2. Had it been certain on 25 December 2011 that the Lease would definitely end on 24 January 2012, then the Tenant would only need to pay rent in respect of the period from 25 December 2011 to 24 January 2012 (and not for the full quarter ending on 24 March 2012). (In this case, however, it was unknown on 25 December 2011 whether the Tenant would comply with the conditions set out in the break clause).

3. Clause 8.4 of the Lease provided for the Tenant to pay a sum of money to the Landlord as condition of exercising the break clause and as compensation for the fact that, after 24 January 2012, the Landlord would have an empty property and no rental income despite the Lease that was not supposed to end until 2 February 2018.

   (The weight to be attached to this factor is uncertain because (a) the Tenant would not have been liable to pay any compensation to the Landlord if the Tenant chose to end the Lease on 24 January 2016 being the second break date and (b) the Judge also decided the Tenant was entitled to recover excess car parking fees paid for the period after the Lease ended on 24 January 2012 despite there was no compensation payable by the Tenant in respect of car parking fees).

4. The Lease expressly stated that rent would be payable as '*instalments*'.

5. The implied term satisfied the requirement that it was '*necessary to give business efficacy*' to the Lease and the requirement that it was '*so obvious that it went without saying*' as explained by Lord Hoffman in the Privy Council case of *A.G. of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

6. The implied term did not contradict any express term contained in the Lease.

Having decided the Tenant was permitted to recover the excess rent it paid for the period after the Lease ended on 24 January 2012 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. Nevertheless, the Judge went on to express his view on this point.

Although the Judge's view was that, in this case, the Tenant could not recover the excess rent it paid on the ground that there had been a total failure of consideration, the Judge referred to the possibility of a tenant being able to do so in a case where the landlord unilaterally takes back premises from the tenant where there was no fault on the part of the tenant.

The Message

It is perhaps surprising that this appears to be the first reported case in England and Wales that fully considers whether a repayment term should be implied into a lease in these circumstances.

Former tenants who have previously exercised break clauses should review the payments they made to their former landlords in order to bring their leases to a premature end and then consider whether a request should be made for a refund.

Landlords who receive requests from former tenants for refunds should seek advice on whether or not a refund should be given.

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