



The extent of implication: Break clauses and reimbursement of rent in commercial leases

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The recent decision of the Supreme Court of England and Wales in the case of Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Limited and another poses important points to be considered by commercial landlords, tenants and agents; and reinforces the importance of clear and precise wording in commercial leases.

In a series of leases where the rent was payable on the usual quarter days, M&S sought to recover the rent they had paid after exercising a break clause and seeking to terminate their lease mid-quarter.

As the lease did not include a specified term, they were unable to recover the rent they had paid after the break date to the next rent date.

On appeal to the Supreme Court, the court found that as there was no clear wording and the break date was a conditional break, it had to consider whether it could imply apportionment. The court ruled that implying terms was only possible if the contract could not function without that term or it was so obvious that it goes without saying.

In the circumstances reimbursement of the rent was not permitted.

Collas Crill's Pan Island Head of Property, Jason Green commented: "In today's challenging economic climate, with landlords anxious to maintain rental income, it is not surprising that break clauses have resulted in an increase in litigation in recent years. This case highlights the need for careful and consistent drafting that covers all the points agreed between the parties. You cannot rely on the court to imply a term – it needs to be there in black and white if you want to rely on it. This case also has ramifications for all contracts - not just leases."

Paul Harben, Partner and Head of Jersey Property said: "It's vital when drafting and negotiating a break clause to include an express term regarding the reimbursement of rent and to leave no ambiguity as to when the break date is. Otherwise, a tenant can be faced with the options of facing the financial sting of paying for premises they have given up or breaching their lease terms, neither represent a particularly equitable or practical solution."

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