

MONEY BACK - GUARANTEED?

PART II - NO IMPLIED TERM IN TENANT BREAK OPTION

The Court of Appeal has overturned a decision of the High Court which implied a term into a lease by which a tenant could recoup "overpaid" sums after exercising its break option.

The High Court's original decision did not entitle tenants to apportion payments due before the break date. However, the introduction of the implied term created a degree of uncertainty for landlords and tenants. Was this a term to be implied into all leases or just that lease?

Effect of the decision

The Court of Appeal's decision reinforces best practice:

- (1) If parties want to be able to claim back "overpaid sums", then they should ensure the lease includes apportionment or recoup provisions that entitle them to do so.
- (2) Parties exercising break options should follow the terms of the break option to the letter.
- (3) If you are in any doubt as to what is required to exercise a break option and/or your rights after the break date, seek specialist legal advice.

Key facts

- The tenant ("T") had a break option conditional upon there being no arrears of rent as at the break date and payment of a sum equivalent to one year's rent.
- The break date was in the middle of a quarter.
- T paid the full quarter's rent as it fell due and the break payment in time to operate the break option.
- T sought repayment of the "overpayment" element of the quarter's rent for the period after the break date.

The Court of Appeal's decision

The Court of Appeal decided that the lease, read as a whole against the relevant background, would not reasonably be understood to include a term entitling T to recoup the "overpayment":

- a party seeking to imply a term into an agreement must show not simply that the term *could* be a part of the agreement but that the term *would* be part of the agreement;
- the court will not imply a term into an agreement unless it is necessary to do so to achieve the parties' express agreement;
- the principle that a tenant should not pay for services for a period after the expiry of its lease does not provide the basis for a general principle that a tenant should only pay for what it receives. While service charges are compensatory, the same cannot be said to be the sole purpose of rents;
- the words "*proportionately for any part of a year*" and the quarterly payment of rent are not sufficient grounds for implying a term entitling T to reclaim "overpaid" sums.

- Where a break clause is conditional, there is uncertainty as to whether the lease will terminate until all conditions have been met.
- The payment of a break premium may indicate that the parties had considered what the landlord should receive by way of compensation for the operation of the break option. However, some cases would see the premium paid before the rent fell due and other cases after the rent fell due. The presence of a break premium would not necessarily mean a term could or should be implied entitling the tenant to recoup "overpaid" sums.

Marks and Spencer plc -v- (1) BNP Paribas Securities Services Trust Company (Jersey) Limited (2) BNP Paribas Securities Services Trust Company Limited
[2014] EWCA Civ 603

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