2 December 2015

M&S's appeal dismissed

Tenant not entitled to refund of apportioned rent from break date

On the exercise of a break clause that took effect in January 2012, M&S was not entitled to a refund of the relevant proportion of the quarter's rent that it had paid in advance. The judgment, published by the Supreme Court today, upheld the Court of Appeal's finding in favour of the landlord in this case, BNP Paribas.

M&S'S BASIC RENT CLAUSE

The lease stated that the rent was payable "yearly and proportionately for any part of a year by equal quarterly instalments in advance on the usual quarter days."

The matter initially came to court following service by M&S of a break notice on BNP. The pre-conditions for the break were that:

- there were no arrears of rent owing on the break date; and
- M&S paid BNP a sum of £919,800.

Both of these pre-conditions having been satisfied, the relevant lease came to an end on 24 January 2012. M&S brought a case for the refund of the apportioned rent in respect of the period from 25 January to the March quarter day. M&S contended that there should be an implied term in the lease that such a refund would be made. The express wording of the relevant lease term is in the column to the right. M&S made the same claim in respect of the car parking licence fee, insurance rent and service charge.

The Supreme Court disagreed with M&S. The Apportionment Act 1870 (the "Act") provides that all rents are apportionable from day to day but courts have interpreted this to apply only to rent payable in arrears. The court, citing a 115 year old case, argued that the Act did not apply to rent payable in advance. This, said Lord Neuberger, is the same as the courts' position on forfeiture where an entire quarter's rent is due if it is payable in advance, despite the termination of the lease.

The Supreme Court's press summary of the case says:

"(1) Given the clear, general understanding that neither the common law nor statute apportion rent payable in advance on a time basis, it would be wrong, save in a very clear case, to attribute to a landlord and a tenant,

(2) particularly where they have entered into a full and professionally drafted lease,

an intention that the tenant should receive back an apportioned part of rent payable and paid in advance."

We have broken that down into the two points. On the first of these points, what Lord Neuberger actually said was since 1900 "...the Court of Appeal held that the 1870 Act did not apply to rent payable in advance and, ever since then, it has been assumed that this was the law."

It seems a shame that the Supreme Court specifically chose on this occasion to perpetuate that interpretation.

On the second point, it does seem reasonable that where the lease in question is professionally drafted and given that whether one agrees with it or not, the law has been interpreted in this way for 115 years, the parties should have explicitly included such wording if that is what they meant to agree.

TREATMENT OF THE SERVICE CHARGE

The Supreme Court afforded the car park licence fee and insurance rent the same treatment. Re-enforcing their argument that if the parties wished to make provision for apportionment they should have said so, the Supreme Court treated the service charge differently. In contrast to the drafting of the basic rent clause, provision *was* made in the lease enabling the service charge to be apportioned through the medium of a payment to the tenant, and Lord Neuberger pointed out that the service charge was not analogous as it is paid for various ongoing services rather than as a one-off contribution to a single payment.

THE EFFECT IN PRACTICE

This case will have a lasting impact for tenants. The Supreme Court may not be inclined to permit the issue to be considered again in the near future on the same or similar points. Tenants' solicitors must seek to include careful drafting in any break clause if it is their clients' wish that such apportionment should be made, but landlords may be feeling robust in rejecting such a stance, following the outcome of this case.

Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Limited & another [2015] UKSC 72

If you would like to raise any questions on this or related topics please contact Anthony Judge or your usual contact at Travers Smith.

Anthony Judge
Partner

E: anthony.judge@traverssmith.com
T: +44 (0) 20 7295 3237