SQUIRE SANDERS

TOUGH BREAK FOR TENANTS SEEKING RECOVERY OF RENT

Last week the UK Court of Appeal handed down its decision in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & Anor* [2014] EWCA Civ 603.

In a judgment welcomed by landlords, the court held that in the absence of express wording to the contrary a landlord is entitled to retain rent paid in advance that relates to the period after the exercise of a tenant's right to break.

Facts

M&S took up occupation of four floors of a block in Paddington in 2006, pursuant to four subleases. Under the leases, rent was payable in advance on the usual quarter days and was expressed to be payable "proportionately for any part of a year".

The leases all contained a right to break which could first be exercised on 24 January 2012. To effectively operate the break right M&S was required to pay all rents due under the lease *and* pay a substantial break premium equalling one year's rent.

As M&S complied with the above pre-conditions prior to the break date the four leases terminated on 24 January 2012.

Following the exercise of the break, M&S sought to recover the rent relating to the period after the break date (referred to in the judgment as "the broken period"). In response, the Landlord refused to give any refund, on the basis that the lease did not oblige it to do so.

At first instance, the High Court found in favour of M&S. It held that the parties could not have intended the rent for the broken period to be payable in addition to the break premium. Therefore, a term should be implied into the lease requiring the landlord to repay to the tenant the rent relating to the broken period.

In addition to the above, the High Court held that the wording of the rent clause, which included the phrase "proportionately for any part of the year", evidenced the parties' intention that rent should be apportioned for the period the tenant actually occupied the premises.

Court of Appeal

Following an appeal by the Landlord the claim was referred to the Court of Appeal which, as expected, reversed the first instance decision and held that no term could be implied.

The court reached this conclusion on the basis that a reasonable person, having knowledge of the background, would conclude that if the parties had really intended the tenant to be entitled to a refund, they would have made an express provision for it. As a result M&S were unable to recover any sums from the landlord.

Lessons to Learn

Whilst the judgment is certainly bad news for tenants it does provide some legal consistency in an area that is notoriously fraught with risk.

The decision draws a line under any potential rights of recourse for tenants who are obliged to effectively overpay rent, in some cases in addition to a break premium, in order to exercise a break option.

In light of the judgement, it is essential that tenants consider the implications of a break clause before entering into a lease. To guarantee the return of any rent overpayments the lease must contain an *express* provision to that effect. Though there may no longer be a possibility of such a term being implied, it may prove more difficult for a landlord to resist such a term at the drafting stage if requested. An alternative, and arguably neater, solution is to ensure that all break dates fall in line with the rent quarter days, thereby removing the need for an overpayment of rent.

Contact

Anna Beaumont
Associate
T +44 113 284 7589
E anna.beaumont@squiresanders.com

13304/05/14