

## Breaking news: M&S loses break clause appeal

### **Tenants cannot recover any rent paid in advance when they exercise a break clause. This was the conclusion of the Supreme Court in the final chapter of the long running Marks and Spencer break clause case. Mathew Ditchburn reports on the judgment**

You may recall that in May 2014 the Court of Appeal overturned a High Court decision that M&S was entitled to be reimbursed rent it had paid in advance relating to the period after it had broken its lease. M&S had been required to pay the full quarter's rent in order to exercise the break, even though the break date was part way through the quarter. There was no express provision in the lease entitling M&S to a reimbursement.

The High Court took into account that the break conditions included the payment of a penalty by the tenant, which had been satisfied. It concluded that the parties could not have intended that the landlord should keep the excess rent as well. Therefore, there was an implied term that the excess rent should be repaid.

The Court of Appeal disagreed, saying that any such intention would have manifested itself as an express term and should not be implied.

On 2 December 2015 the Supreme Court agreed, unanimously dismissing M&S's appeal.

The judgment sets out the correct approach to implying contractual terms: a term will only be implied if it satisfies the test of business necessity or it is so obvious that it goes without saying.

It is well-established that rent payable in advance is not apportionable under case law or statute. So, for example where a lease is forfeited in the middle of a quarter, the tenant is not entitled to a return of any of the rent paid in advance.

That being so, the Supreme Court found that it would be wrong, save in a very clear case, to infer that a landlord and tenant intended something different, and that the tenant should receive back an apportioned part of the rent paid in advance. This did not give rise to any anomaly that made the lease unworkable or commercially or otherwise absurd.

The decision sends out a clear message: if a tenant wants to get back rent it pays in advance relating to periods after a break date, it must write that requirement clearly and unambiguously into the lease. The courts will not fill in the blanks.

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



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