

### LANDLORD & TENANT

Supreme Court

#### **Lease of commercial premises – break clause – tenant paying full quarter's rent in advance – whether entitled to repayment of rent for part of quarter falling after break date**

\*\*\*MARKS & SPENCER PLC V BNP PARIBAS SECURITIES SERVICES TRUST CO (JERSEY) LTD [2015] UKSC 72; [2015] PLSCS 341 – Decision given 02.12.15

**Facts:** BNP (the respondent) was the landlord and M&S (the appellant) the tenant under leases, expiring in 2018, of four floors of an office building in London W2. The 'basic rent' was £919,800 pa plus VAT payable 'yearly and proportionately for any part of a year by equal quarterly instalments in advance on the Quarter days'. M&S was also liable to pay a car park licence fee, insurance costs and a service charge. In July 2011 M&S gave notice to BNP to terminate the lease in January 2012 pursuant to a tenant's break clause, the successful exercise of which depended on the fulfilment of certain conditions including the absence of any arrears of rent at the break date and payment to BNP of a break premium amounting to a year's rent. In order to comply with those conditions M&S paid a sum for insurance for the period from July 2011 to June 2012, plus a full quarter's basic rent, car park licence fee and service charge for the quarter commencing December 2011, and the break premium.

**Point of dispute:** Whether to allow M&S's appeal against the ruling of the Court of Appeal that it was not entitled to repayment of the basic rent, insurance charges and car park fees insofar as they related to the period after the lease had been terminated. At first instance the claim had succeeded, the judge ruling that a term should be implied that BNP would repay an apportioned part of those sums for the period after the break date. That decision was reversed by the Court of Appeal ([2014] EWCA Civ 603).

**Held:** The appeal was unanimously dismissed.

- i. A term would only be implied into a contract if it satisfied the test of business necessity, or was so obvious that it went without saying. Although these tests were alternatives, in practice they generally went together. The proposed term had to be reasonable and equitable. The test for business efficacy involved a value judgment – it was not one of absolute necessity but of whether, without the term, the contract would lack commercial or practical understanding.
- ii. The test of necessity was not diluted if the court took the approach of asking whether a reasonable reader of the contract, knowing all its provisions and surrounding circumstances, would understand a term to be implied. The traditional, highly restrictive approach to implication of terms had not been diluted by the 2009 Privy Council case of *Attorney General of Belize v Belize Telecom*.
- iii. Under common law rent payable either in advance or in arrears was not apportionable in time. That position had been varied by the Apportionment Act 1870, but that applied only to rent payable in arrears and not to rent payable in advance. Save in a very clear case it would be wrong to attribute to a landlord and a tenant, who had entered into a professionally drafted lease, an intention that the tenant should receive an apportioned part of the rent payable and paid in advance when it was long and clearly established law that such rent could not be apportioned. To imply a term to the contrary would require express wording in the lease, and refusing to imply the term in this case would not render the contract unworkable or lead to a result that was absurd, commercially or otherwise.



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## Abbreviations

The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

## The star system

Cases are marked with one, two or three stars as follows:

- \*\*\* Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.
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- \* Interesting but non-essential reading.

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