The Court of Appeal has provided landlords with some relief with their decision in *Marks and Spencer PLC v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2014] EWCA Civ 603. This matter initially came before the High Court in 2013 and the decision was subsequently overturned by the Court of Appeal.

In this case the tenant exercised a break clause in their commercial lease, ending the lease early. They then proceeded to seek a refund of parts of payments made in advance in respect of rent, service charges, car parking and insurance charges which related to the period following the break. This was a conditional break clause and the conditions were satisfied in full upon the termination. It is worth noting that the issue of the refund for the service charge had been disposed of between the parties during the course of the High Court proceedings in accordance with the established practice under *Brown’s Operating System Services Ltd v Southwark Roman Catholic Diocesan Corporation* [2007] EWCA Civ 164. Here it was stated that rent payments were of a significantly different nature to service charge payments.

Initially the High Court held that overpayments were due to the tenant and implied a term obliging the landlord to return them. However the Court of Appeal took a different view and in this case their decision now obliges the tenant to repay refunded rents to the Landlord. These rents included the overpayment of rent, car parking licence fees and insurance rent. The Court did not accept as a general principle that a tenant should only pay under a lease for what the tenant actually received. It is worth noting that despite the significance of this judgment in favour of the landlord this decision is limited in effect. It is based on the specific terms of the lease, the fact that a deed of variation was completed between the parties where they could have easily added wording to cover such an event.

This decision has highlighted that the following should be considered on behalf of a tenant when negotiating the terms of a lease with a break clause;

- The break date is the last day of a rent payment;
- The lease expressly provides for a repayment of rent and any other payments from the break date to the next payment day.

This case has restored the view that in the absence of an express provision, a tenant should not be entitled to a refund of any rent paid that relates to the period after a break date, a fact that most tenants may find surprising.

Kathryn Collie, Director

Please note; the content of this article is for information purposes only and further advice should be sought from a professional legal advisor before any action is taken.

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