2 December 2015

PRESS SUMMARY

Marks and Spencer plc (Appellant) v BNP Paribas Services Trust Company (Jersey) Limited and another (Respondents) [2015] UKSC 72
On appeal from [2014] EWCA Civ 603

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwarth, Lord Hodge

BACKGROUND TO THE APPEALS

In 2006, BNP granted to Marks & Spencer ("M&S") sub-underleases of four different floors in a building known as The Point in Paddington Basin, London W2 from 25 January 2006 to 2 February 2018.

Any difference between the sub-underleases is irrelevant for the purposes of the appeal, so it is only necessary to refer to one of them ("the Lease"). Under the Lease, the rent payable comprised a "basic rent" of £919,800 plus VAT which was payable "yearly and proportionately for any part of a year by equal quarterly instalments in advance on the usual quarter days", and a car park licence fee of £6,000 per annum also payable by equal quarterly instalments in advance. The Lease also provided for the landlord to recover, by way of rent, (i) a "fair proportion" of the costs of insuring the building and (ii) a service charge in respect of services provided to the building.

Clause 8 entitled M&S to determine the Lease on 24 January 2012 by giving BNP six months' prior written notice (a "break notice"). A break notice would only have effect to determine the Lease on 24 January 2012 if: (i) there were no arrears of rent on that date (clause 8.3); and (ii) M&S paid BNP the sum of £919,800 plus VAT (clause 8.4).

On 7 July 2011, M&S served a break notice on BNP. Shortly before 25 December 2011, M&S paid BNP the basic rent due on that date for the period from 25 December 2011 up to and including 24 March 2012. On or about 18 January 2012, M&S paid BNP £919,800 plus VAT. As a result of these payments, the break notice was effective and the lease determined on 24 January 2012.

M&S subsequently brought a claim for the return of the apportioned basic rent in respect of the period from 25 January to 24 March 2012, contending that there should be implied into the Lease a term that, if the tenant exercised the right to determine the Lease on 24 January 2012, it should be entitled to a refund from the landlord of the proportion of the basic rent paid in respect of the period from the date of determination up to and including 24 March 2012. Similar claims were made by M&S in respect of the car park licence fee, the insurance rent and the service charge. The High Court held that M&S was so entitled. The Court of Appeal subsequently allowed BNP's appeal. M&S appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses M&S's appeal. Lord Neuberger writes the leading judgment, with which Lord Sumption and Lord Hodge agree. Lord Carnwath and Lord Clarke both write concurring judgments.

REASONS FOR THE JUDGMENT

The test for implication of contractual terms

The judicial approach to the implication of contractual terms represents a clear, consistent and principled approach **[21]**. A term will only be implied if it satisfies the test of business necessity or it is so obvious that it goes without saying **[17-18]**; it will be a rare case where only one of those two requirements are met **[21]**. The implication of a term is not critically dependent on proof of the actual intention of the parties. If one approaches the question by reference to what the parties would have agreed, one is concerned with the hypothetical answer of notional reasonable people in the position of the parties at the time they were contracting **[21]**. It is a necessary but not sufficient condition for implying a term that it appears fair or that one considers that the parties would have agreed it if it had been suggested to them **[21]**. The judgment of Lord Hoffmann in *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988 did not dilute the test for the implication of contractual terms **[24, 57-74, 75-77]**.

Application to the facts

It is well-established that rent, whether payable in arrear or advance, is not apportionable in time in common law **[44]**. Section 2 of the Apportionment Act 1870 provides that all rents and other periodical payments should be considered as accruing from day to day and be apportionable in respect of time accordingly **[44]**. There is no doubt that section 2 applies to rent payable in arrear **[45]**. The conclusion of the Court of Appeal in *Ellis v Rowbotham* [1900] 1 QB 740 that the 1870 Act did not apply to rent payable in advance, is correct **[45-46]**. This mirrors the position on a forfeiture, where a landlord who forfeits a lease under which the rent is payable in advance is entitled to the payment of the whole of the rent which fell due on the quarter day preceding the forfeiture **[48]**.

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, 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 **[47, 51]**.

M&S argued that, had it paid the sum of £919,800 plus VAT due under clause 8.4 before 25 December 2011, it would have been known at that date that the lease would come to an end before 25 March 2012 and thus BNP would only have been due an appropriate portion of the basic rent on 25 December 2011, and that commercial common sense therefore mandated that it should be in the same position whether it paid the £919,800 plus VAT before or after 25 December 2011 **[35-36]**. This argument is rejected. Any anomaly in the working of the lease does not establish that the contract is unworkable or that the result is commercially or otherwise absurd **[52]**.

The same conclusion applies to the car park licence fee and the insurance rent, but not to the service charge, in respect of which there is specific provision which contemplates repayment **[55]**.

References in square brackets are to paragraphs in the judgment