

High Court concludes that Brexit is not frustrating

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While for most, Brexit is becoming a frustrating political saga, the High Court has concluded that the United Kingdom's decision to leave the European Union is not enough to frustrate a lease. The facts of the case are specific, but the judgment in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) provides an indication of how the courts might apply the doctrine of frustration in future contract disputes.

The Facts

The European Medicines Agency (EMA) is an institution of the European Union formed under European Treaties. On 21 October 2014, it entered into a 25-year lease of premises in Canary Wharf, expiring in June 2039. The lease did not contain any option to break within the fixed term.

Following the referendum result on 23 June 2016 confirming the UK's decision to leave the European Union and the UK government invoking Article 50 on 29 March 2017, an EU regulation was passed requiring the EMA to re-locate its headquarters from London to Amsterdam so as to remain within a Member State.

With no option to unilaterally terminate the lease within the fixed term, and faced with the prospect of a multi-million pound rent liability for a premises it was unable to use, EMA wrote to its landlord on 2 August 2017 stating that: "Having considered the position under English law, we have decided to inform you that if and when Brexit occurs, we will be treating that event as a frustration of the Lease".

Unsurprisingly, the landlord was unimpressed and sought a declaration that Brexit would not cause the lease to be frustrated, and that EMA would continue to be bound by all its covenants and obligations under the lease.

EMA argued that when the parties negotiated the lease in 2011, neither party anticipated the UK's withdrawal from the European Union and that such an event therefore was sufficient to frustrate the lease.

The Doctrine of Frustration

Frustration is a principle of English law which allows for an entire contract to be discharged when an unforeseeable event occurs following the formation of the contract. The unforeseeable event renders the contract and either:

- the unforeseeable event renders the contract physically or commercial impossible to fulfil; or
- the obligations under it are so radically altered from those which the parties covenanted to undertake at the time which they entered into the contract.

EMA advanced a number of "Frustrating Grounds" in essence, they were:

The UK's decision to leave the EU created supervening illegality to use the premises and performance of the obligations by EMA was ultra vires. This consequently frustrated the lease. EU regulations made it unlawful to operate outside of a Member State, so it had no option but to relocate to Amsterdam. This argument was rejected by the court.

One of the purposes of the lease was to provide a permanent headquarters for the next 25 years and if this could not be achieved, the common purpose of the lease would fail. This argument was also rejected. The court concluded that both parties to the lease had different and divergent purposes for entering the lease.

The court considered the doctrine of frustration in some detail but concluded that a multi-factorial approach is required to consider the question of whether performance of the contract was rendered "radically different" by a fundamental change in circumstances. This approach requires consideration of the terms of the contract; the factual context; and the parties' knowledge, expectations, assumptions and contemplations at the time of the contract.

The Decision

In handing down his judgment, Marcus Smith J was unequivocal that "the lease will not be frustrated on the withdrawal of the United Kingdom from the European Union. This is neither a case of frustration by supervening illegality nor one of frustration of common purpose. The Lease will not be discharged by frustration on the United Kingdom's transition from Member State of the European Union to third country nor does the EMA's shift of headquarters from London to Amsterdam constitute a frustrating event. The EMA remains obliged to perform its obligations under the Lease."



Comment

The court concluded that Brexit was not a foreseeable event when the parties negotiated the lease in 2011. A referendum on the UK's membership of the European Union only became Conservative party policy after David Cameron's Bloomberg speech on 23 January 2013. However, this argument would only hold weight where it could be demonstrated that a common purpose of their contract specifically depends upon the UK remaining as a Member State.

It is clear from the court's approach that it will not allow the doctrine of frustration to be used by a party to a contract to escape a bad bargain. Even the EMA's special status as an EU institution was not sufficient for it to establish frustration.

Mr Justice Marcus Smith granted EMA permission to appeal to the Court of Appeal on 1 March 2019, with the appeal likely to be heard in mid-March 2020.

} Maples Teesdale advise on all aspects of dispute resolution. Should you need advice on these matters please contact Partner [Dellah Gilbert](#).

