

Brexit Frustration—High Court Rules on Important Landlord and Tenant and Commercial Case

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The High Court in London has recently given judgment in one of the first UK cases to grapple with the commercial ramifications of the UK's departure from the European Union.

In *Canary Wharf (BP4) T1 Limited & Ors v. European Medicines Agency* [2019] EWHC 335 (Ch), the Court held that Brexit would not bring to an end the European Medicines Agency's (EMA) 25-year lease of its headquarters (HQ) in London; Brexit would not frustrate the lease, even though the UK's decision to leave the EU has prompted the EMA (an agency of the EU) to move its HQ to Amsterdam. Instead, the EMA will have to pay the rent and perform the tenant's covenants throughout the lease.

What Is the Doctrine of Frustration?

A contract may be discharged on the ground of frustration when something occurs after the contract's formation, rendering it physically or commercially impossible to fulfil the contract, or transforming the obligation to perform into a radically different obligation from that undertaken at the contract's initiation.

The EMA's Argument

The EMA claimed that Brexit had frustrated their lease in broadly two ways. The first was that that Brexit was a case of supervening illegality because the EMA (as an agency of the EU) would lose its power to deal with real estate in the UK and perform its obligations under the lease once the UK ceases to be a Member State of the EU.

The Judge rejected this argument, finding that the EMA did not have to relocate to Amsterdam as a matter of law and that Brexit would not affect the EMA's capacity to perform the lease covenants. He also concluded that even if Brexit imposed constraints on the EMA's capacity, it would be irrelevant as such constraints were not matters that the doctrine of frustration took into account. (He also held that even if that point was wrong, the frustration would have been self-induced because the legal effects of Brexit upon the EMA could have been, but were not, ameliorated by the EU).

The EMA's second argument was that this was a case of frustration of common purpose because both parties to the lease had intended the premises to be used as the EMA's HQ. The Judge rejected this submission on the basis that the EMA's departure from the premises, even if due to circumstances beyond its control, was not only merely envisaged but expressly provided for in the lease because the lease contained alienation provisions dealing with assignments and sub-lettings. The EMA, he held, "cannot not say this is not what it bargained for".

Finally, the EMA also contended that the case's relative justice operated in its favour. It argued that it would suffer more if the lease remained in place than the landlord would suffer if the lease fell away because the landlord could find a new tenant, whereas the EMA would be left with a long, expensive lease of a property it could no longer use. When addressing this point the Judge considered the allocation of risk in the lease and held that "the EMA chose to enter into a long-term relationship, with long-term obligations. It played a role in framing those obligations: it could have opted for different premises, with a shorter lease; it could have negotiated a break and paid a (far) higher price and forgone the inducements it received. It did none of those things, but instead accepted provisions contemplating its departure from the Premises and providing for this case".

The Significance of the Judgment

Some financial services companies are already shifting resources out of the UK to other EU Member States ahead of Brexit. If the EMA had won this case, such a ruling would potentially have led to many other organisations using Brexit to attempt to end their leases. Equally, such a decision may have led to arguments concerning the frustration of other types of contract.

Although all cases on frustration turn on the specific facts and contractual terms, the case illustrates that the Courts apply the doctrine of frustration narrowly, especially in respect of leases. It therefore represents good news for UK landlords and creates a degree of certainty about the impact of Brexit on existing contractual arrangements.

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