

## BREXIT WILL NOT FRUSTRATE THE EUROPEAN MEDICINES AGENCY'S LEASE AT CANARY WHARF

The case of *Canary Wharf (BP4) T1 Limited & ors v European Medicines Agency* [2019] EWHC 335 (Ch) provides commercial certainty for contracting parties bracing themselves for Brexit across England and Wales, at a time where uncertainty is otherwise rife. The English High Court rejected the European Medicines Agency's case that their 25-year lease of premises in Canary Wharf would be discharged by way of frustration on the UK's withdrawal from the EU – Brexit did not legally frustrate their contract. The judgment will discourage other contracting parties from claiming that Brexit frustrates their contracts.

**Clifford Chance's Property Litigation Team (led by Director Ben Hatton and Associate Adam Eagle) acted for Canary Wharf Group in their successful claim for a declaration of the High Court.**

### BACKGROUND

The European Medicines Agency ("**EMA**"), an agency of the EU, is a tenant of Canary Wharf Group ("**CWG**") at 25-30 Churchill Place in Canary Wharf, London. The Lease, which was the subject of the dispute, was entered into in 2014 and runs for a term of 25 years up to 2039 with no break clause. The EMA asserted that if and when Brexit occurred the EMA would be treating that event as frustrating their Lease. CWG's position was that Brexit would not result in a frustration of the Lease and commenced proceedings seeking a declaration that "*the withdrawal of the UK from the EU and/or the relocation of the EMA will not cause the Lease to be frustrated*".

In arguing that the Lease would be frustrated, the EMA relied upon two types of frustration:

1. **Frustration of Common Purpose** - The EMA contended that both parties to the lease intended the premises to be used throughout the term as the EMA's headquarters and that Brexit would thwart this common purpose.

### Key issues

- The Judge decided that any frustration would have been self-induced such that the EMA could not rely on it, "*considering the EMA in its constitutional context in the EU*". This was because the Judge decided that this was a case where the legal effects on the EMA of the UK's withdrawal from the EU could have been, but were not, ameliorated by the EU.
- A unique consideration was that at the time of the Judgment, the UK's withdrawal from the EU was and remains a future event. The Judge undertook an analysis of five various possible 'scenarios' that might pertain upon Brexit, coming to the firm conclusion that regardless of which scenario pertains the EMA's lease would not be frustrated.

2. **Frustration by Supervening Illegality** - The EMA claimed that after the withdrawal of the UK from the EU it would no longer be lawful for the EMA to make use of the Premises, and therefore to pay rent to CWG pursuant to the Lease, as the EMA would be acting ultra vires or without capacity.

## JUDGMENT

The High Court rejected both of the argued grounds of frustration.

On frustration of common purpose, the Judge found that the Lease expressly provided for the EMA ceasing to occupy the premises and the reasons why the EMA needed to cease occupation were irrelevant. In particular, the presence of various provisions in the Lease, including the provisions allowing for assignment or subletting of the whole, accounted for the EMA's ability to leave the premises. In any event, the Judge ruled that there was no common purpose between the parties outside the terms of their Lease, the parties had diverging interests and bargained as counterparties to get what they each wanted.

In relation to the question of supervening illegality, the Judge comprehensively rejected the EMA's contentions that the EMA would lack capacity upon the UK's exit from the EU. As a matter of EU law, Mr Justice Marcus Smith found that the EMA clearly had the legal capacity to maintain and/or wind down its premises in London, notwithstanding the UK ceasing to be a Member State of the EU. The Judge further ruled that even if there were constraints on the EMA's capacity or vires, any such constraints were matters of foreign law and therefore were not matters which the English law of frustration could take into account as a supervening event. As such, even if the EMA had lacked capacity to comply with the terms of the Lease (the Judge found it did not), that lack of capacity was irrelevant to the question of frustration by reason of supervening illegality.

The Judgment means that Canary Wharf Group were successful in their claim for a declaration of the High Court that Brexit will not frustrate the Lease and that the EMA will remain bound to perform the Lease terms.

## WHY COMMERCIALY IMPORTANT?

- **Market Certainty** - The Judgment will no doubt be welcome news in the market. The case has garnered significant interest in the press due to the potential implications of the EMA's argument had it been successful. Many commentators said that the EMA's claim would have opened the 'flood gates' potentially paving the way for many similar claims of legal frustration resulting from the impact of Brexit, in relation to all types of contract.
- **Relevant to all Contracts** - The conclusive Judgment of the Judge provides some much-needed clarity and reassurance in the lead up to Brexit both for businesses and the UK's property market. The Judgment should dissuade other parties, who might otherwise have been keen to argue that Brexit frustrates their commercial contracts. In its ruling, the Court placed weight on the fact that the parties were advised by sophisticated law firms and that the contract in question was complex and detailed, accounting for many eventualities.
- **Legal Position Post-Brexit** - The case is the first to discuss the legal implications of the EU (Withdrawal) Act 2018 which will be the default legal position if the UK withdraws from the EU without any further



agreement between the UK and the EU. The EU (Withdrawal) Act 2018 incorporates certain types of retained EU law into English law after Brexit, although with the effect that there are two bodies of EU law after UK withdrawal: the law of the EU as it applies in the territories of the Member States; and the law of the EU as incorporated into English law.

- **Privileges** - The Judge considered the EMA's privileges and immunities in the case of a "no deal" Brexit and how the EU (Withdrawal) Act 2018 would operate to preserve them. He determined that, contrary to the EMA's arguments, the Act would preserve these protections in some form. The Judge accepted that it was unclear how some of these protection provisions, which depend on the Court of Justice of the EU for their operation, would operate under the Act and agreed that generally the protections provided would be diminished.
- **No CJEU Reference** - The Judgment considered the circumstances in which a case should be referred to the CJEU. The EMA contended that the Judge must make a reference to the CJEU on the question of the vires or capacity of the EMA (and EU entities more generally), particularly given the very limited period in which it would be possible to make further references to the CJEU. The Judge was "completely confident" that he did not need to make any reference to the CJEU and the limited period available did not persuade him otherwise, despite the EMA's arguments. This will be of great interest to parties engaged in litigation involving points of EU law prior to Brexit.
- **No New Remedy** - Separately to the EMA's arguments on frustration, the EMA contended as a separate point that if the Lease is not frustrated, then there is a self-standing rule of EU law that serves to absolve the EMA of its obligations under the Lease. This was on the basis that it was in principle wrong for English law to compel the EMA to act ultra vires. The Judge refuted this point and concluded that no such legal proposition exists - it would be wrong for a claim of frustration of contract to be approached differently simply because one party was an agency of the EU when compared to a case involving, for example, an English Limited Company.

## APPEAL OUTSTANDING

The EMA have been granted permission to appeal and on 15 April 2019 filed their appeal papers with the Court of Appeal - watch this space.

The Clifford Chance team are confident that the EMA will fail in their appeal and that the Court of Appeal will agree with the High Court's Judgment that Brexit does not frustrate the lease.

**If you would like to discuss the Judgment and how it may impact your business' risk analysis in the lead up to Brexit, please contact: [Ben.Hatton@CliffordChance.com](mailto:Ben.Hatton@CliffordChance.com) and [Adam.Eagle@CliffordChance.com](mailto:Adam.Eagle@CliffordChance.com). Our Property Litigation Team would be happy to assist.**

Clifford Chance's experienced Property Litigation Team act on the full range of property and contract disputes in Courts, Tribunals, Expert Determinations and Arbitrations. The team also advises clients on property litigation risk avoidance in transactions.



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