

Brexit Essentials

Born of frustration

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So far as the property industry is concerned, the impact on market conditions has always been of far greater significance than the purely legal implications of Brexit. The fear has always been whether the UK (and London in particular) will continue to attract inward investment and retain its appeal as a country in which to do business and where people from around the world want to live and work. However, a recent application to the High Court has raised the question as to whether Brexit might frustrate existing leases. The outcome of the case could have far reaching implications for a number of institutional landlords.

The European Medicines Agency is responsible for approving drugs for the EU member states. The EMA has made it clear that it will leave its London headquarters and relocate to a new European home in Amsterdam when the UK leaves the EU. This, of course, means that the EMA will need to do something with its existing offices at 30 Churchill Place in Canary Wharf. It could negotiate a surrender with its landlord, Canary Wharf, or apply for consent to assign or underlet. Or could

Frustration

Frustration is a common law concept which provides an exception to the doctrine of absolute contracts. A frustrating event is one that renders further performance of the contract impossible, illegal or significantly different to that contemplated by the parties. For example, a licence to use a room on Pall Mall to watch King Edward VII's coronation was frustrated when the King fell ill and the procession was cancelled. However, it is not easy to prove frustration and the doctrine is not commonly used. In particular, the courts will not allow it to be used by a party to avoid a bad deal. Historical doubt as to whether a lease could be frustrated was resolved in 1981 when Lord Hailsham confirmed that the doctrine could, in principle, apply to leases. Although the courts have considered circumstances that might amount to frustration, for example where the only permitted use becomes illegal or where the demised premises are consumed by nature, there has yet to be a case where a lease has been held to be frustrated. Canary Wharf will be hoping to preserve that record.

it argue that Brexit frustrates the performance of the lease entitling it to walk away without any further liability for rent or the other tenant covenants? Canary Wharf has pre-empted the issue by making an application to the High Court for a declaration that Brexit will not frustrate the EMA's lease. If the application is successful, the EMA will remain liable as tenant for premises that political circumstances have rendered surplus to its

requirements. If Canary Wharf is unsuccessful, Brexit will terminate the EMA's lease and may frustrate a range of leases and other contracts. Indeed, with such a seismic event as Brexit, it is not difficult to predict a surge in popularity for the doctrine of frustration as parties seek to avoid liabilities under contracts which have become less favourable to them.

The UK will leave the EU on 29 March 2019 and Canary Wharf's application is due to be heard before then. Canary Wharf has taken a calculated gamble. In our view the risk of the High Court finding that Brexit is a frustrating event is low. Having headquarters outside of the EU would undoubtedly be very inconvenient for the EMA, but it seems unlikely to be sufficient for a court to rule that it would be just for it to avoid its obligations.

This is a contract that has simply become a bad bargain as opposed to one that has been frustrated. The EMA can, of course, continue to use the premises or it can market them to a suitable assignee or undertenant. There was no guarantee that the UK would remain in the EU throughout the term of the lease and the parties could have provided the EMA with flexibility to end the lease with a break clause. Although the court will undoubtedly reconsider the old cases on frustration, Brexit is unlikely to extend the doctrine.



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