

Brexit Essentials

Not so frustrating

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Whether remainder, leaver, business or private individual, it is difficult to find anyone who is not finding the Brexit process frustrating. However, the High Court has ruled that a lease of office premises at Canary Wharf will not be frustrated when the UK leaves the EU. The decision has offered landlords some certainty in these uncertain times and may have application to a wider range of contracts where one party's position has been adversely affected by Brexit.

Canary Wharf and the European Medicines Agency entered into a pre-let of significant office space at 30 Churchill Place in 2011. The EMA is the EU agency responsible for the approval of drugs and medicines for member states and it is clearly important for the Agency to have its headquarters located within the EU. Following completion of the development in 2014, a lease was granted to the EMA for a term of 25 years. The agreement for lease and lease were carefully drafted documents that had been entered into following comprehensive negotiations. Significantly, Canary Wharf had resisted the inclusion of a tenant's break clause, but the lease contained comprehensive alienation provisions and the EMA had been given an inducement package to sweeten the deal. Following the outcome of the 2016 referendum, the EMA made it clear that it

The Doctrine of Frustration

The doctrine of frustration seeks to mitigate the injustice of enforcing a contract where a significant change in circumstances has rendered performance radically different. A frustrating event is one that makes performance significantly different from that contemplated by the parties when the contract was entered into, or renders performance impossible or unlawful. However, the courts will not allow the doctrine to be used to relieve a party of what has turned out to be a bad deal. Although frustration can, in principle, still apply to leases, there has still to be a case where the doctrine has been pleaded successfully. The EMA has been given permission to appeal to the Court of Appeal.

would need to leave its London headquarters and relocate to a new home within the EU. The EMA had sought unsuccessfully to dispose of its lease and had informed Canary Wharf "if and when Brexit occurs, we will be treating that event as a frustration of the lease". This would mean that the EMA would be able to walk away without any further liability to pay the rent or to comply with the other tenant covenants. Canary Wharf took the initiative and applied to the High Court for a declaration that Brexit will not frustrate the lease and that it can continue to look to the EMA for payment of the reported £13 million annual rent.

SLAUGHTER AND MAY

The High Court considered the background to Brexit and the deal negotiated between the parties. As at 5 August 2011, when the EMA became bound to take the lease, the withdrawal of the UK from the EU was a theoretical possibility; any member state could trigger Article 50 and the nature of the UK's membership was seldom far from the political agenda. However, Brexit was not "relevantly foreseeable" when the agreement for lease was entered into.

The negotiations between the parties did not give rise to a common purpose that Canary Wharf was to remain the EMA's permanent home until 2039, when the lease expired. The possibility of the EMA needing to relocate had been addressed by the terms of the lease, and in particular the comprehensive alienation provisions that permitted assignment and sub-letting, subject to Canary Wharf's consent and a number of other conditions. The EMA had consciously entered into a long lease without a break clause and had contractually assumed the risk of subsequent events. Any circumstance where the EMA sought to leave the premises would be dealt with in accordance with the terms of its contract with Canary Wharf. In addition, the EMA had the legal capacity to enter into the documents and to submit to the jurisdiction of the English Courts.



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The Agency's relocation to Amsterdam, although highly desirable, was not required as a matter of law. Brexit was clearly adverse to the EMA's interests, but it did not render the performance of its obligations under the lease radically different. The parties had considered how the risks over the 25-year term were to be allocated and the alienation provisions clearly contemplated the possibility of the tenant needing to relocate.

The EMA had committed to a long-term contract governed by English law, which it had both the capacity and the authority to do so. Brexit is undoubtedly a seismic event that had not been contemplated by the parties but it will not frustrate the lease. Subject to the outcome of its appeal, the EMA remains liable to pay the rent and to perform its other contractual obligations for the remainder of the term.

The decision is undoubtedly good news for Canary Wharf and may have wider application to a range of other leases and contracts. Just because a contracting party's position is rendered less favourable by Brexit, will not, it would seem, entitle that party to avoid what has merely become a bad bargain. Although the result was widely anticipated, news that the EMA has been given permission to appeal to the Court of Appeal means that uncertainty remains.