ENGLISH HIGH COURT GIVES DECISION ON IMPACT OF BREXIT ON FRUSTRATION OF COMMERCIAL ARRANGEMENTS

Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency [2019] EWHC 335 (Ch) (20 February 2019)

Introduction

In a decision handed down on 20 February 2019 in *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch), the English High Court declined to find that Brexit constituted a frustrating event for the purposes of a lease between the parties and held that despite Brexit, the respondent party was still obliged to perform its obligations under the lease.

The judgment will be welcomed by landlords finding themselves facing similar challenges from those tenants looking to move out of the UK after Brexit, and may have wider application in the context of commercial arrangements impacted by Brexit should the UK leave the EU on 29 March 2019 or at some later date.

Background

The European Medicines Agency (the "EMA"), an agency of the European Union, holds a 25 year underlease of a property in London. In a letter dated 2 August 2017, the EMA wrote to the landlords, CW, 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."

CW commenced proceedings seeking an early resolution of the matter to address the commercial uncertainty caused by EMA's position. CW sought a declaration that "the withdrawal of the United Kingdom from the European Union and/or the relocation of the [EMA] (whether inside or outside of the United Kingdom) will not cause [the Lease] to be frustrated and that the [EMA] will continue to be bound by all of its covenants and obligations in the Lease and all related documents including (but not limited to) payment of the full rents under the Lease throughout the Term of the Lease unless released by law upon a lawful assignment of the Lease properly made in accordance with its terms."

The EMA put forward five grounds (the “Frustrating Grounds”), relied upon individually and collectively, as to why the lease would be frustrated in the event of Brexit:

> (1) "Ground 1": The loss, to the EMA, of the protection conferred on it pursuant to Protocol 7 to the Treaty on the European Union and the Treaty on the Functioning of the European Union. Protocol 7 confers certain privileges and immunities on the EMA which, according to the EMA (a) are necessary to the proper functioning and independence of the EMA; and (b) will be lost – or, at least, will cease to be guaranteed or will apply only in very modified form – once the United Kingdom withdraws from the European Union.
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> (2) "Ground 2": The legal inability (on the part of the EMA and any other European Union entity) to use the property in London - the EMA contends that, after the withdrawal of the United Kingdom from the European Union, as a matter of law neither it – nor any other agency of the European Union – can use (in this case, meaning to be lawfully located in) the Premises.
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> (3) "Ground 3": The legal inability on the part of the EMA to make use of the London property – in contrast to Ground 2, which was the point that neither the EMA nor any other European Union entity could themselves use the property, the substance of Ground 3 is that the "EMA will…be unable safely or legally to make profitable use of the Lease". The lease contains provisions entitling the EMA to assign or transfer the lease. The substance of the EMA's point is that after the withdrawal of the United Kingdom from the European Union, the EMA will be unable (as a matter of law) to exercise the rights conferred on it by the lease.
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> (4) "Ground 4": Predicated on the success of one or more of grounds 1-3, the EMA contended that the future performance of the EMA's obligations under the lease would be ultra vires and unlawful. The EMA contends that it will have no power to meet its future obligations under the Lease – including the obligation to pay rent under the lease – once the United Kingdom has withdrawn from the European Union.
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> (5) "Ground 5": Future payment of "double rent" would impair the EMA's capacity, effectiveness and independence. As with Ground 4, this Ground is predicated upon the success of one or more of Grounds 1 to 3. By this Ground, the EMA contends that if it is obliged to rent alternative premises within the European Union and is also obliged to maintain its obligations under the lease, then "the EMA will be placed in a situation in which it cannot avoid paying "double rent" for headquarters buildings, one of which it can use (in Amsterdam) and one of which it cannot (in London). This would seriously impair the EMA's capacity, effectiveness and independence."

Ultimately, EMA’s counsel accepted that the Frustrating Grounds were essentially “five faces of one overarching point, which was that the withdrawal of the United Kingdom from the European Union would cause the Lease to be frustrated because the United Kingdom's withdrawal would trigger a number of legal changes relating to the EMA's legal capacity to continue with the Lease.”

EMA also sought to argue in its written opening submissions that “if, as the EMA contends, it will lack power to maintain its obligations under the Lease or make effective and profitable use of it after Brexit, then the EMA respectfully submits that the Court is bound by EU law to fashion a remedy to give effect to that lack of power. The Court cannot and should not hold the EMA to a lease in which it has no power

to continue. This part of the EMA's case applies regardless of whether the English law doctrine of frustration is or is not engaged: the EMA's contention is simply that it cannot and should not be held to a contract the performance of which is ultra vires."

In response to the Frustrating Grounds, CW's primary position was that – even if established – none of the Frustrating Grounds could amount to a frustrating event because the United Kingdom's withdrawal from the European Union and/or the relocation of the EMA away from London could not (whatever the consequences) amount to an event capable of frustrating the lease.

Decision

The High Court (Mr Justice Marcus Smith) held that the Lease would not be frustrated on the withdrawal of the United Kingdom from the European Union, concluding "*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*."

At Part B of his judgment, Mr Justice Marcus Smith set out the principles applicable to the doctrine of frustration, including Bingham LJ's statement in *J Lauritzen AS v. Wijsmuller BV, The "Super Servant Two"* in which he identified five propositions, established by the highest authority, which he considered were not open to question:

> (1) The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and equitable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.
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> (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine must not be lightly invoked and must be kept within very narrow limits.
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> (3) Frustration brings the contract to an end forthwith, without more and automatically. It does not require an act by the parties to the contract.
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> (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.
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> (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

Mr Justice Marcus Smith also identified certain of the various classes of frustrating events, specifically setting out those relied upon by EMA: (1) Frustration of common purpose; (2) Subsequent legal changes and supervening illegality. In the circumstances, neither of these operated to frustrate the lease.

- On supervening illegality, there were no constraints on the EMA's capacity or vires such as to cause the Lease to be frustrated; even if there were, they were irrelevant to the question of

frustration; and thirdly, the legal effects on the EMA of the United Kingdom's withdrawal from the European Union could have been, but were not, ameliorated by the European Union, and such failure to do so was relevant to the question of frustration and renders the frustration of the lease self-induced.

- On common purpose, Mr Justice Marcus Smith considered (1) the matters relevant to the parties' expectations as to risk as these stood at the time of the conclusion of the Agreements (including the foreseeability of the UK's withdrawal from the EU, ; (2) the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances; and (3) whether, the supervening event and the parties reasonable and objectively ascertainable calculations render the parties' performance something "radically different". In the circumstances, there had been no frustration of common purpose.

Concluding Observations

It remains to be seen whether the decision is appealed against. The core point to be derived from the decision is that English Contract Law holds parties to their "bargains" (contracts) and exceptional factors are required to constitute frustration. In this case, there was no legal impediment to the property lease rights being exercised by the EMA (even if that meant keeping possession of potentially empty premises for the remainder of the lease term).