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Frustrated by Brexit? Too high a hurdle to overcome for the EMA

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One of the multitude of uncertainties currently facing commercial parties potentially affected by Brexit is the effect on their existing commercial contracts, specifically whether the new circumstances of Brexit provide a "get out" from their bargain. Some welcome clarity has now been provided by the English High Court's recent judgment in *Canary Wharf (BP4) T1 Limited and others v European Medicines Agency*[1], although how that decision will be applied in future cases remains to be seen.

Summary

In *CW v EMA*, the High Court was faced with the question of whether Brexit would constitute a frustrating event under a 25-year English law-governed lease between the European Medicines Agency (the "**EMA**") and its Canary Wharf landlords in respect of the premises of the EMA's London headquarters (the "**Lease**").

As of 30 March 2019, the EMA will be required by the 2018 Regulation[2] to relocate its London headquarters to Amsterdam in order to remain in a Member State after Brexit. In a letter to its landlords (collectively "**CW**") in August 2017, the EMA contended that Brexit (if and when it occurred) would 'frustrate' the Lease, thereby releasing the EMA from its obligations under the Lease. CW disagreed and sought a declaration from the High Court that the parties' agreement would not be frustrated by the United Kingdom's withdrawal from the European Union and therefore the EMA would continue to be bound by its obligations under the Lease.

The High Court determined that in the particular circumstances of the parties, the Lease will not be frustrated by Brexit. While the decision could be seen as providing clarity that Brexit does not frustrate a contract, the true positon is more nuanced. The Court's decision does not, and cannot, settle the question as to whether Brexit will or will not in all circumstances constitute a frustrating event. As ever, 'frustration' will require a case-by-case analysis.

The Decision

'Frustration' in the legal context arises where a supervening event occurs, without the fault of either party, that transforms the outstanding contractual obligations the parties have undertaken into something radically different from what the parties could have reasonably contemplated at the time of execution of their agreement, such that it would be unjust to hold the parties to their remaining obligations in the new circumstances. The effect of 'frustration' is therefore to release the parties from the further performance of

1 [2019] EWHC 335 (Ch).

2 Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018.

their contractual obligations. Unsurprisingly, therefore, the law has kept the doctrine within very narrow limits and accordingly, the English courts have historically been slow to find that a contract has been frustrated.

When considering the application of the doctrine of frustration, the Court adopted the multi-factorial approach as set out by Rix LJ in *The Sea Angel*[3], which involves a consideration of:

"the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then 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."

The EMA's submissions centred on two types of frustrating event: (i) supervening illegality; and (ii) frustration of a common purpose.

Frustration by supervening illegality

The EMA's primary argument was that after the withdrawal of the United Kingdom from the European Union, it would no longer be lawful for the EMA to pay rent to CW pursuant to the Lease because, in doing so, the EMA would be acting *ultra vires*, or without capacity. The basis for this argument was because of the following changes in law:

i. The 2018 Regulation, which relocates the EMA's headquarters from London to Amsterdam with effect from 30 March 2019;

ii. The EMA's loss of the immunities and protections it enjoyed under Protocol 7[4] (which conferred protections on the EMA akin to the sort of protections conferred on international organisations and the embassies of foreign states); and

iii. The EMA's loss of the benefit, conferred by Article 72(2) of the 2004 Regulation,[5] of tortious claims being heard by the Court of Justice of the European Union.

The EMA therefore submitted that it was not within the EMA's legal capacity to make rental payments for a property that it could not use.

Considering the EMA's case in the context of a "*no-deal Brexit*"[6], the High Court found that:

i. Brexit did not have the effect that, under EU law, the EMA would not have capacity to perform its obligations under the Lease. Even in the event of a "no-deal Brexit", the EMA would still have capacity to deal with immovable property it held in a third country (and, as a matter of capacity, maintain its headquarters in London). This was the case even though the Court recognized that the EMA's protections under EU law would be substantially degraded by virtue of Brexit; and

ii. Even if the EMA did lack the capacity to continue performance by reason of supervening illegality, this illegality was a matter of EU law and (with limited exceptions) the English doctrine of frustration discounts supervening illegality arising as a matter of foreign law. The High Court found that the doctrine of frustration cannot be extended to have regard to the law of incorporation where that affected the capacity of a party to continue to perform its obligations (under a transaction lawfully entered into by it).

Nonetheless, the Court stated *obiter* that had it decided differently on points (i) and (ii) immediately above, it would have found that by reason of supervening illegality the EMA would have been deprived of substantially all of the benefit from the Lease whilst remaining obliged to pay its rent, and therefore the Lease would have been frustrated. However, even if that were the case, such frustration would have been "self-induced" as the

3 [2007] EWCA Civ 547.

4 Protocol 7 to the Treaty of the European Union and the Treaty on the Functioning of the European Union.

5 Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004.

6 Namely where no withdrawal agreement is reached and the scenario in which, according to Mr Justice Smith, the consequences of the United Kingdom's withdrawal from the European Union would be "*most stark*".

legal effects on the EMA of the UK's withdrawal from the EU could have been, but were not, ameliorated by the EU. For example, the 2018 Regulation could have gone further in making arrangements for EMA's departure from London but did not do so.

Frustration of a common purpose

In the alternative, the EMA argued that there had been frustration of a common purpose, *i.e.* that the parties had a shared intention at the time of contracting that the leased premises would be the EMA's headquarters for the next 25 years, and that shared intention would be frustrated by Brexit.

On the EMA's alternative argument, the Court found no common purpose between the parties beyond the purpose of the agreement derived from the terms of the Lease: the parties held competing interests as landlord and tenant. Although Brexit itself was not "*relevantly foreseeable*" in 2011 (the year that the "Agreement for Lease" was concluded between the parties), the parties had expressly catered for the possibility that there might be some event requiring the EMA's involuntary departure from the premises owing to circumstances beyond the EMA's control (*e.g.* by agreeing subletting and assignment provisions). The EMA, having "*quite consciously entered into the Lease without a break clause*" had accordingly assumed the risk of change over the 25-year life of the Lease, having recourse only to the (admittedly onerous) alienation provisions expressly provided for in the Lease in the event of its involuntary departure.

Comment

In delivering its 95-page judgment, the High Court provided notable guidance on the application of the relevant principles to determining whether Brexit is likely, in a particular case, to constitute a frustrating event in contracts governed by English law.

The Court's judgment is a timely reminder of the high hurdles a party claiming frustration of their contract must overcome, and provides some welcome clarity on the effect of Brexit on pre-existing contractual relationships. Certainly, the High Court has made it clear that where a party has simply made a bad bargain (as it seemed the EMA ultimately had with little protection in such a long lease), Brexit will not provide a convenient "get out" clause. The high bar that the doctrine of frustration requires be met will continue to apply to commercial contracts, whatever the trigger for a claim for frustration.

It is important, however, to note that the judgment does not lay down a general principle that Brexit will not constitute a frustrating event under English law. It did not on this particular occasion; it may do on different facts (although any party claiming frustration is likely to face an uphill struggle). What is clear is that each case will require a careful analysis of its particular facts in line with the multi-factorial approach set out by Rix LJ.

A consequentials hearing is listed on Friday 1, March, during which the EMA is said to be seeking permission to appeal the judgment.

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