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Brexit and Frustration

Canary Wharf (BP4) T1 Limited and others v European Medicines Agency [2019] EWHC 335 (Ch)

April 4, 2019

EU Dispute Resolution

In a much-anticipated decision, the English High Court has confirmed that Brexit (in whatever form it may take) will not frustrate a long-term lease for the European Medicines Agency's headquarters in London. The decision is of broad significance in the context of commercial contracts post-Brexit, although the case will not answer every instance of the question "will Brexit frustrate my contract?"

The Dispute

Canary Wharf Group ("CW"), entered into a 25-year lease of premises at Canary Wharf in London with the European Medicines Agency ("EMA") in October 2014 ("the Lease"). The EMA is an agency created by European Union law that has the function of facilitating patient access to medicine. The premises were intended to serve as the EMA's headquarters over the long-term.

Following the Brexit referendum and the UK government's decision to trigger Article 50 of the Treaty on European Union, the European Union decided to change the EMA's seat. On November 16, 2018, the European Parliament and Council enacted Regulation ("EU") 2017/1718 (the "2018 Regulation"). The 2018 Regulation provides that, as of March 30, 2019, the EMA's seat would be Amsterdam. Moreover, it provides that the EMA should be able to move its headquarters permanently to a location in Amsterdam by no later than November 16, 2019.

Due to the need to move its headquarters to the Netherlands, the EMA sought to exit the Lease early. In correspondence with CW, the EMA said "*if and when Brexit occurs, we will be treating that event as a frustration of the lease.*" This created commercial uncertainty for CW and its lenders, and so it sought a declaration that Brexit would not cause the Lease to be frustrated.

Frustration is a common law principle by which certain events will result in a contract coming to an end and both parties being discharged from any further performance of their contract.

The EMA's case was that Brexit would give rise to a supervening illegality which would frustrate the Lease. The EMA said that it would not be able to perform the Lease because it would be prohibited by EU law from occupying the premises, as they would be situated in a non-EU country. Initially, the EMA said that payment of rent under the Lease would also be illegal under EU law, but this aspect of the case was not pursued by the EMA at trial.

The Court's Judgment

The Court acknowledged that the form of Brexit is not yet clear, and could take the form of a "no deal" or "hard" Brexit, or a Brexit with a trade deal with the EU which provides for a greater or lesser extent of economic integration. For the purpose of its analysis, the Court assumed a hard Brexit. The Court found that even such a Brexit would not frustrate the Lease.

It rejected the EMA's case on three principal bases.

First, it rejected the suggestion that the EMA would lack capacity to occupy the premises or otherwise perform its obligations under the Lease. The Court said at paragraph 160:

> "*…I am completely confident that the EMA's capacity to deal with immovable property in what has become a third country remains and that the European Union itself has the capacity to maintain the headquarters of one (or more) of its agencies in a third country. I entirely accept that there are many and good reasons why the European Union would choose not to do so, but these reasons have nothing to do with the capacity of either the EMA or the European Union. In other words, the capacity of the EMA to deal with immovable property in what has become a third country and the capacity of the European Union to maintain the headquarters of one (or more) of its agencies in a third country is most likely to be deployed in the winding down of such a third country presence.*"

As a result, the argument of supervening illegality failed, as there was no such illegality resulting from Brexit.

Second, even if EU law did prohibit the EMA from occupying the premises or performing its obligations under the Lease, the Court found that this could not amount to frustration because supervening illegality will only amount to frustration if the illegality arises under the governing law of the contract or renders performance of the obligation illegal in the place of performance. In the event that EU law made it illegal for the EMA to perform its obligations under the Lease, for example paying rent, this would not affect the legality of performance under English law (as the governing law), or in England (as the place of performance). Illegality, in the sense of a change in the law of incorporation that affects the capacity of a party to continue to perform its obligations, is not enough.

Third, even if Brexit could amount to a frustrating event, the Court found that this was a case of self-induced frustration, as it was the EU itself that moved the EMA's seat to Amsterdam: "*I find that the move from London to Amsterdam was not required as a matter of law: but it is readily understandable given the nature of the EMA's functions and the essential desirability of having the EMA located within the territory of a Member State of the European Union*." (Paragraph 234).

Importantly, the Court considered whether the UK's withdrawal from the EU was foreseeable. It concluded that, as at the date April 5, 2011, the withdrawal of the UK from the EU was foreseeable as a theoretical possibility but was not relevantly foreseeable (in other words, sufficiently foreseeable to meet the legal test for frustration): *"the mainstream of the debate turned on the relationship of the United Kingdom with Europe as a Member State and not as a third country"* (Paragraph 216(c)).

The Court also noted that it had been foreseen in the Lease that the EMA might involuntarily need to leave the premises during the term, and this had been provided for in the lease:

> "*Were the EMA entirely to divest itself of the Premises that inevitably means that the Premises would cease to be the EMA's headquarters. The parties agreed exactly what would happen in such a case: the EMA would assign the Lease – pursuant to the terms of the Lease – or sub-let the whole – again, pursuant to the terms of the Lease. If it could neither assign nor sub-let the whole according to the terms of the Lease, it would retain the Premises, whether it wanted to or not, and would be obliged to pay the rent.*"

Implications of the Court's Decision

The Court has carefully and thoroughly rejected the claim of frustration in this case.

Although the facts are unusual and are unlikely to recur in future (except perhaps in the case of the EU Banking Authority, which will relocate to Paris), the decision has broad significance for commercial parties, confirming that it will be very difficult to get out of a contractual arrangement on the basis of Brexit being a frustrating event.

There will be some circumstances where Brexit can operate as such, but the Court will require clear evidence of illegality under the governing law or the law of the place of performance, in accordance with established principles.

The judgment also gives a helpful steer as to when Brexit became foreseeable, determining that this was at some point later than April 5, 2011. When the line is crossed into foreseeability (presumably between that date and the referendum on June 23, 2016) may need to be determined in another case.

The Court's judgment may not be the last word on this case. The EMA has been granted permission to appeal to the Court of Appeal and has until April 15, 2019 to do so. In light of the sums in dispute (approximately £500 million), the unusual factual matrix, and the relative scarcity of decisions on frustration, any appeal will be of interest to many.

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