

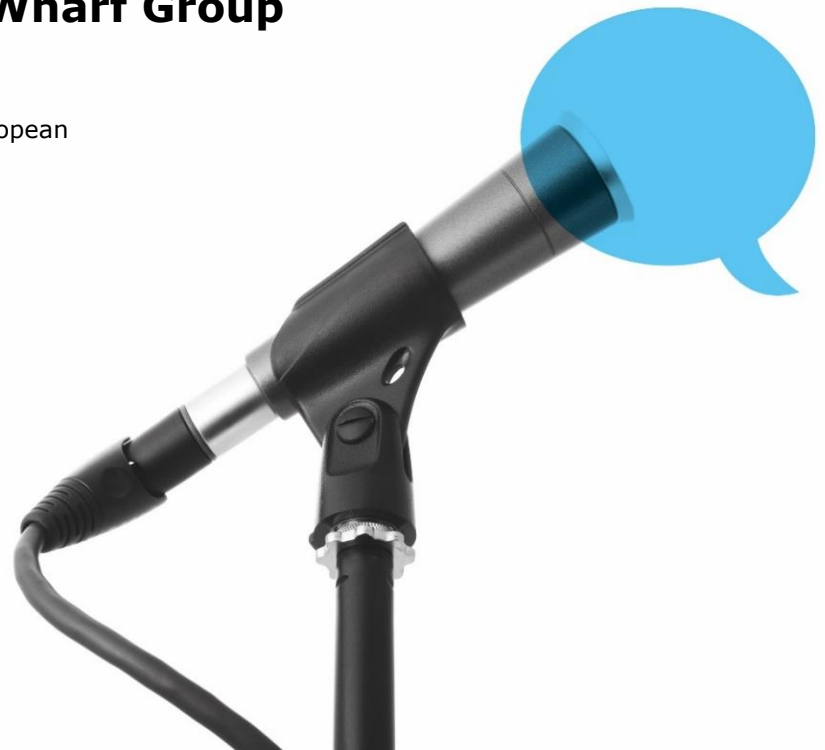
Legal Updates from the Eversheds Sutherland Lawyer Development Team

B-Brief

Brexit will not frustrate a contract: EMA withdraws appeal of High Court decision in dispute with Canary Wharf Group

11 July 2019

Canary Wharf Management Limited v European
Medicines Agency [2019] EWHC 335 (Ch)



Background

- Defendant (EMA) is a medicines regulator responsible for authorising and monitoring medicines in EU
- Claimants (CW) and EMA entered into agreement for lease for, then unbuilt, premises in Canary Wharf in 2011 and subsequently a 25-year lease for those premises in October 2014
- In the June 2016 referendum the UK voted to leave the EU and in March 2017 it served notice under article 50 of its intention to leave on 29 March 2019
- EMA wrote to CW in August 2017 saying that *"if and when Brexit occurs, we will be treating that event as a frustration of the Lease"*
- Canary Wharf commenced proceedings for a declaration that the lease would not be frustrated by Brexit
- In November 2018, by *Regulation (EU) 2018/1718* the EU ordered the EMA to relocate its headquarters to Amsterdam
- EMA argued that Brexit would have the effect of frustrating the Lease on the basis:
 - of a "supervening illegality" - following the 2018 Regulation the EMA would not have the legal capacity or power to perform its obligations under the Lease; and
 - that in entering into the Lease the EMA and CW had a "common purpose" - that the Premises should be the EMA's headquarters - which was thwarted by Brexit

The High Court's decision

- In a landmark ruling which followed established law on the doctrine of frustration, in February 2019, Mr Justice Marcus Smith held that Brexit did not frustrate the lease
- It was not sufficient to argue that Brexit was not reasonably foreseeable when the lease was agreed in 2011
- Nor was it sufficient that EMA could not maintain its headquarters in London without losing certain protections it would enjoy if headquartered in an EU Member State

The “supervening illegality” argument

- EMA argued that it would no longer have capacity to continue with the lease after Brexit because the relevant EU laws had been modified to provide that, in the event of Brexit, the EMA’s headquarters would move from London to Amsterdam
- The Court acknowledged the reasons why the EU would prefer agencies such as the EMA to be headquartered in EU Member States and the protections the EMA would enjoy if it was headquartered in an EU Member State
- However, the Judge found that on the proper construction of the relevant laws, there were no legal constraints on the EMA’s capacity or power to perform its obligations under the lease
- Even if constraints (which would otherwise be sufficient to frustrate the lease) existed, they had effectively been self-imposed: it was the EU’s response to Brexit (by ordering that EMAs headquarters should move to Amsterdam) that created the issue, rather than Brexit itself

The “common purpose” argument

- EMA argued that the parties had shared a “common purpose” (that the premises would constitute the EMA’s headquarters) and that once EMA was no longer able to use the premises for that purpose, the lease would be frustrated
- The court dismissed this argument – there was no such “common purpose”
- The interests of the parties were fully addressed in the lease
- Outside this the parties’ purposes were not common
- In particular the lease contained a alienation and sub-let provisions which indicated the parties contemplated the possibility that EMA would leave the premises before the 25 years expired
- EMA had also sought to negotiate a break clause, but failed
- As such the parties must have foreseen the possibility that EMA would vacate the Premises
- Although Brexit was unforeseen*, there was nothing to suggest that the parties had intended this eventuality to be treated differently

*Unforeseen, but not unforeseeable – the court held that as at August 2011 the withdrawal of the United Kingdom from the EU was foreseeable as a theoretical possibility

What happened next?

- EMA sought permission to appeal the high court decision
- Meanwhile it moved premises in March 2019 with an outstanding bill for the remainder of the lease in the region of £500m
- During the court process, it also held discussions with multiple potential occupiers to take on its lease
- It was announced this week that EMA has agreed a deal with WeWork to take over the entire premises up until the lease expiry date in 2039
- EMA will now withdraw its appeal to the Court of Appeal and the High Court ruling that Brexit does not frustrate a lease still stands
- Had EMA won on appeal it could have opened the floodgates for similar claims arising out of Brexit – the confirmation that the appeal is being withdrawn provides welcome certainty to the market generally
- Although the decision concerns a commercial lease, analogy can be drawn to commercial contracts generally

Learning points

- The judgment is a reminder of the high bar set by the courts for frustration of contracts
- The doctrine of frustration is unlikely to provide an easy 'get out' for parties whose contracts appear less attractive in light of Brexit
- The judgment considers, but does not expressly answer, when Brexit could constitute a frustrating event –the possibility is therefore not ruled out altogether
- The Judge's ruling on supervening illegality suggests that for a claim for frustration based on Brexit to succeed, parties will need to be able to show that Brexit itself is the relevant supervening event, rather than their decisions taken in response to Brexit
- The Judge's analysis of the common purpose argument illustrates the difficulties any party to a sophisticated, negotiated, commercial agreement would face when arguing a shared purpose which is not addressed in the contract but so important that its frustration should discharge the parties' obligations

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WARNING

- B-Brief is a selective signposting tool, the purpose of which is to highlight the main aspects of a case and consider the key learning points.
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