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Official: Brexit is not a Frustrating Event

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The European Medicines Agency (EMA) is liable for the early termination of its lease in Canary Wharf, London as it relocates to Amsterdam.

The High Court in London has held that the EMA's 2011 lease contract for its headquarters in Canary Wharf had not been "*frustrated*" by the UK's withdrawal from the EU.

The EMA had argued that Brexit had constituted an unforeseen event which changed the nature of the outstanding contractual rights and obligations to something "radically different", and that it was therefore not liable for the remainder of the 25 year lease it had subscribed.

The EMA's case to support *frustration* was put forward mainly on two arguments. Firstly, that the lease contract had suffered a "supervening illegality" whereby continued performance of the contract would have provoked an illegality, and secondly that there had been a "common purpose" that both parties had held, and that that common purpose had ceased to exist with the UK's notification to withdraw from EU membership.

1. Frustration by Supervening Illegality.

The EMA had alleged that it no longer had legal authority to occupy the premises and that following the approval of the 2018 Regulation relocating the EMA's headquarters to Amsterdam, it would have been illegal to occupy Canary Wharf.

The judge, Mr Justice Marcus Smith, concluded that there was no supervening illegality for three reasons:

— Firstly, that on the evidence provided, the EMA's authority or capacity had not been constrained;

— Secondly that even if it had been constrained, this would only be relevant if it had arisen before the contract had been made in 2011, and not subsequently;

— And thirdly, that in any event, the EMA might have chosen to ameliorate the circumstances of its withdrawal – for example by influencing the drafting of the 2018 Regulation executing the relocation the EMA's headquarters to Amsterdam – but chose not to, and to that extent, the consequences, and any alleged frustration therein, were self-induced. This is in line with the jurisprudence in *The Super Servant Two (1990) 1 Lloyd's LR 1 at 8* where Lord Justice Bingham provided that:

    — frustration should not be due to the act *or election* of the party seeking to rely on it; and that

    — the frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

The judge stressed that the allegedly frustrating event in this case should not be considered to be Brexit in itself, but the *need* for relocation and early termination of the lease by EMA, made following the withdrawal notification, something much more foreseeable.

2. Frustration of a Common Purpose.

For a contract to be held to be "frustrated" it is essential that the supervening event was not foreseeable by the parties at the time the contract was made. Mr Justice Smith was grateful to the expert witnesses for reminding the court of the political consensus at the time in August 2011. He noted that whilst the Brexit-oriented UK Independence Party already existed, the political debate at that time however, focussed merely on the relationship of the UK within Europe as a member state, and not as a third country or even a prospective third party. The judge therefore held that Brexit in itself was not foreseeable, for the purposes of frustration, in 2011.

On the contrary however, the judge did hold that it was foreseeable that the EMA might at some time wish to relocate – within the UK or outside – for any one of a number of reasons. Not only was this foreseeable, but it had been specifically provided for in the lease agreement. Provisions for assignment and subletting the premises were included in the lease – albeit on onerous terms unattractive to the lessor, the EMA. There was specifically no "break clause" in the agreement allowing early termination, and the judge held that this had been specifically negotiated and agreed by the EMA on this basis for commercial reasons; It is possible for a lessor to insert such

a clause, but this inevitably comes at a cost, and the court took the view that this effectively meant that the EMA was willing to assume the financial risks of early termination in return for the acceptable financial terms agreed.

Also considered was the fact that the lessor, the EMA, had adopted a limited number of bespoke construction elements in the building, but those did not materially prejudice the potential use of the building by another lessor, thereby reducing the argument of "common purpose".

The judge concluded that contrary to the requirement in the case law on frustration, in this case there was no single common purpose which had ceased to exist, but rather diverging interests of the parties, and that the contractual risk of potentially needing relocation and premature termination of the lease had already been apportioned and specifically provided for in the contract in its commercial terms.

The interesting and perhaps surprising part of this first instance judgment is that the court held that in August 2011, Brexit in itself was not considered to be a foreseeable event. This means that the door may still potentially be ajar for others to allege that the circumstances of Brexit might vitiate other contracts entered into on the presumption of continued EU membership. In the meantime however, this case remains just one the overwhelmingly long list of cases where frustration is considered not to apply to existing contractual liabilities.