BRIEFING

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EMA v Canary Wharf : Brexit and Leases

The High Court has ruled that a lease between an European Union (EU) agency and its landlord at Canary Wharf is not frustrated by Brexit and that the tenant is still required to perform its obligations under the lease.

Background

The European Medicines Agency (EMA) is an EU agency responsible for the supervision of medicines used by humans and animals. In 2011, it agreed to take a 25-year lease of ten floors of a 20-storey tower at Churchill Place, Canary Wharf. In 2014 the lease completed and the EMA moved in.

Following Brexit, EU regulations were made to move the EMA to Amsterdam. The London office now lies mostly empty, however the lease did not contain a break clause and the term expires in 2039. Over the remaining 20 years, the EMA is liable to pay approximately £500m in rent and other charges.

Keen to avoid this, the EMA claimed that Brexit frustrates the lease and it should therefore automatically terminate on 29th March 2019. Canary Wharf Group disputes this and sought a declaration that Brexit does not amount to a frustration of the lease and that the EMA is no different to an ordinary tenant seeking to move out of its property.

"It was not this that I promised to do"

Generally, the law will not step in to protect a party that cannot perform its contractual obligations. This doctrine of absolute contracts means that a tenant must suffer the consequences of any adverse market conditions or poor bargaining. However, the doctrine of frustration allows for the termination of a lease or contract automatically and with immediate effect if an unforeseen, supervening event:

- Makes it impossible for a party to fulfil its obligations; or
- Transforms the obligations into something so radically different that the initial purpose of the lease or contract is no longer valid.

As frustration will kill a lease, the courts have interpreted it narrowly and it is not easy to invoke. The courts are unwilling to correct a bad bargain.

The case

The EMA argued that as a result of the move to Amsterdam and the new regulations passed, paying rent and using the property would be beyond its powers and therefore unlawful.

The Court disagreed. It held that although there are many good reasons for the EMA not to be headquartered in London, there was no legal necessity to move to Amsterdam and it still has the legal capacity to deal with property in a non-EU country. The lack of legal necessity to move meant the changes were not fundamental enough to frustrate the lease.

The Court also found that the alienation provisions of the lease indicated that it was foreseen that the EMA may not be the tenant for the full term.

Therefore, although Brexit was not foreseeable, the possibility that the EMA may involuntarily leave the premises was considered and provided for. Although the provisions were onerous, they were what the EMA had agreed to.

The Court stated EMA was aware that it was entering into a 25 year lease without a break clause. In doing this, it had assumed the risk that

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there may be some change beyond its control that would require the EMA to leave the property. Inconvenience and cost were not enough to frustrate the lease.

What next?

Permission to appeal the decision to the Court of the Appeal has been granted on all grounds. A successful appeal could have huge implications for landlords and tenants in the coming weeks and months.

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