


Tenant's lease not frustrated by Brexit: Canary Wharf Ltd v European Medicines Agency

 03 April 2019

The High Court has ruled in a highly significant case that a tenant's lease is not frustrated by Brexit.

Facts

The European Medicines Agency is an agency of the European Union (EU) and the tenant of a property at Canary Wharf under a 25 year lease running until 2039 (with no break clauses) at a current passing rent of £13m a year. After the United Kingdom (UK) decided to leave the EU, a 2018 EU Regulation was passed requiring The European Medicines Agency to relocate to Amsterdam. It purported to terminate its lease on the basis that the lease was frustrated by Brexit.

The landlord sought a declaration that the lease had not been frustrated and remained in force.

Issues

1. Did Brexit cause The European Medicines Agency's lease to be frustrated by supervening illegality?
2. Alternatively, was this a case of frustration of a common purpose?

Decision

1. The lease had not been frustrated by supervening illegality. Despite Brexit, The European Medicines Agency retained capacity to deal with immovable property in a third country (i.e. one outside the EU) and to pay rent or assign or sub-let according to the lease. Moreover, the EU had power to maintain the headquarters of its agencies in a third country (although there are obvious political and logistical reasons for not doing so).

In any event, even if it had been illegal for The European Medicines Agency to retain and deal with the lease under EU law, it would not have made any difference to the outcome, since the doctrine of frustration under English law considered whether performance of a contract would be unlawful according to the law of the place of performance, not according to the law of the place of incorporation.

Even if The European Medicines Agency's lease was frustrated, the frustration would have been self-induced. The EU could have done more than order The European Medicines Agency's relocation to Amsterdam by the 2018 Regulation. For example, it could have included provisions for the winding down of The European Medicines Agency's position in the UK and its departure from London.

2. The lease was not frustrated by the failure of a common purpose. There had been no mutual contemplation that the purpose of the lease was to provide The European Medicines Agency with headquarters for 25 years. Even if Brexit had not been reasonably foreseeable at the time the parties entered into an agreement for lease in 2011, it had been foreseeable that, over 25 years, some development might require The European Medicines Agency to leave the premises involuntarily and the parties had expressly catered for that by the alienation provisions in the lease. The lease represented the outcome of negotiations between the parties with different (not common) objectives (The European Medicines Agency wanted bespoke premises, flexibility as to terms and the lowest rent possible and the landlord wanted long-term cash flow, at the highest rent possible).

Points to note/consider

1. A contract may be discharged for frustration when something occurs after its formation that makes it impossible to fulfil the contract or transforms the obligations under the contract into radically different obligations from those undertaken at the time the contract was entered into. Although in theory the doctrine of frustration can apply to leases, there are no reported cases where it has been successfully argued.
2. In this case, The European Medicines Agency had been unable to negotiate for the inclusion of a break clause in the lease (presumably preferring instead the financial inducements that it received from its landlord of over £40m). It had opted to rely on the alienation provisions in the lease and they must now do their job. However, the case does at a basic level illustrate for tenants the importance of including break clauses in long-term leases to preserve flexibility.
3. This decision has been greeted with much relief by landlords, investors and lenders. Had the decision gone the other way, the uncertainty it would have produced could have had a significant unsettling effect on the UK commercial property market (at a time when we really do not need any more uncertainty). Tenants (and other parties to commercial contracts) may well have thought that if The European Medicines Agency can use frustration to escape its contractual commitments, then so can they.
4. The European Medicines Agency has been given leave to take this case to the Court of Appeal, so it does not sound like we have heard the last of this matter.

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