

Comments by **Scott Goldstein, Dispute Resolution Associate at Payne Hicks Beach**, first published in Property EU online on 28 March 2019 and is reproduced with kind permission <https://propertyeu.info/Nieuws/MAGAZINE-Canary-Wharf-versus-European-Medicines-Agency/68675279-5770-4a53-ae1d-bb0183529886>



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MAGAZINE: Canary Wharf versus European Medicines Agency



A landmark judgement in favour of London's Canary Wharf in its £500 mln lease dispute with tenant EMA is a victory for commercial landlords amid the Brexit uncertainty.

The European Medicines Agency (EMA) has lost its case against landlord Canary Wharf Group (CWG) and must comply with the terms of the 25-year lease for its London offices despite the UK's departure from the European Union, a High Court judge ruled in February.

Mr Justice Marcus Smith found in favour of CGW, rejecting the EMA's case that its £13 mln a year lease for its London headquarters would be legally 'frustrated' as a result of Brexit.

The judgement said: 'The lease will not be discharged by frustration on the United Kingdom's transition from member state of the European Union to third country nor does the EMA's shift of headquarters from London to Amsterdam constitute a frustrating event. The EMA remains obliged to perform its obligations under the Lease'.

The property industry released a collective sigh of relief on the news as it had been nervously awaiting the ruling because the case had the potential for much wider implications, opening the door to similar claims of 'legal frustration' because of Brexit.

Ben Hatton, director of property litigation at law firm Clifford Chance who led the team in representing Clifford Chance, said: 'We are pleased to secure this victory for Canary Wharf Group. The judge has ruled that Brexit does not amount to an event of frustration of the EMA's lease and this result will be welcome news in the property and legal market, bringing greater certainty as to the impact of Brexit on contracts.'

Commercial uncertainty

CWG brought the case, which hinged on the rarely used legal doctrine of 'frustration', against its tenant EMA because of the 'commercial uncertainty' that the EMA has caused the financial district owners and its lenders.

The judge also ruled on the EMA's case that any frustration would have been self-induced, because it was the EU regulation passed in November 2018 that required its relocation from London.

David Payton, partner in Dentons' UK real estate litigation team, said: 'This is a victory for the status quo: at least one certainty in an uncertain time. This judgement gives some much welcome certainty to the property industry in an uncertain period for the wider economy.'

'This decision can be added, pleasingly for landlords, to a long line of cases where a tenant has unsuccessfully argued that its lease is frustrated.'

Because of the UK's decision to quit the EU, London is losing the EMA to Amsterdam on grounds that the agency's work is tied to the EU treaties. The agency must therefore be based in an EU member state and cannot remain in London, where it has been headquartered since January 1995.

The EMA claimed that Brexit has caused a so-called 'frustration of the lease', which should allow it to quit the £500 mln (€570 mln) lease without having to pay the outstanding amount. The EMA's lease, which has no break clause, is for 10 floors of the 20-storey tower in Churchill Place. The EU agency took up the £13 mln a year lease with CWG in 2011 before the British referendum took place in June 2016 which led to the decision for Britain to leave the EU. However British right-wing political forces have long been pushing for a way to ditch UK membership of the EU.

Lawyers for CWG argued that Brexit was foreseeable at the time the EMA signed the lease because the debate over the UK's membership of the EU has long been a topical one.

'This was the first case which considered the commercial realities of the UK's departure from the European Union. It appears for now the decision will not result in opening the floodgates with other tenants trying to use Brexit to end their leases of office space which would have been particularly damaging to landlords with large portfolios of commercial property. However, there is still a possibility of an appeal by the EMA which we are told is being considered,' said Shilpa Mathuradas, partner and head of property litigation at legal firm Osbornes Law.

High threshold

No claim of 'frustration' of a lease has ever succeeded in the UK. Legal reasons why previous cases have failed include the nature of a lease being a long-term property interest not personal to the tenant and capable of alienation, and the high threshold required for an event to be deemed 'frustrating'

Scott Goldstein, associate in the dispute resolution department and property litigation specialist at Payne Hicks Beach, said: 'The courts take very seriously the bargain of agreement that parties make with each other. The courts generally expect parties to keep these agreements.'

In the case of frustration, the interrupting event must be so extreme that the justice would require the Court to release the parties from the transaction. It must result in a qualitative change in the obligation such that the continued performance of it amounts to something fundamentally or radically different.

The event that causes frustration must also usually be fundamental to the terms of the contract and it must be an event which was not in the contemplation of the parties when the deal was agreed. It is not enough that an unexpected event such as Brexit occurs, without either party's fault that makes the contract's performance more of a burden than the parties had previously thought.

Goldstein said: 'The whole basis of the argument of frustration is that there's been a totally unexpected event which has meant the parties can't perform their obligations. These kinds of cases are very rare. There is a whole line of cases that deal with what happened in the aftermath of King Edward VII's coronation dating back to 1902 when various landlords let rooms out to view the coronation parade, but it didn't happen. That's the kind of lens through which this needs to be seen.'

In its legal action CWG applied to the court for a declaration that Brexit will not frustrate the EMA's lease. The EMA argued that Brexit renders it physically and commercially impossible for the agency to fulfil its commitments under the lease especially when it was announced in 2017 that the EMA would move to Amsterdam.

Fact-specific ruling

The danger if the EMA had won the case against CWG was that other tenants would likely attempt to make the same arguments. But legal experts say that whatever the ruling it was expected to be fact-specific and likely to be limited to leases held by agencies of the EU only.

Dentons' Payton said: 'Had the European Medicines Agency succeeded, the judgement could have had a profound impact on the property market and the wider economy too. By not opening the floodgates to similar claims, the judgement will be welcomed by the sector.'

The case concluded at the High Court in January. DLA Piper advised defendants EMA.

The remainder of EMA staff moved to Amsterdam at the start of the year, leaving its London offices for the final time on Friday, 25 January. EMA is expected to be able to pursue other options such as sub-letting to a third party. US co-working giant WeWork is reportedly in talks with the agency about taking over its lease in Canary Wharf. London is also losing the European Banking Authority to Paris on the same grounds as the EMA.

The benefits of a break clause

To enter into the 2011 lease agreements, the EMA needed to obtain approval from the EU institutions. The European Parliament's Committee on Budgets debated the issue and gave an opinion recognising the absence of the break clause when it approved the deal in June 2011. The Committee on Budgets had specifically asked about the absence of a break clause, and the EMA told it that any break would affect the financial package on offer because of the impact on the landlord's income security. One committee MEP however had said there was no justification for a 25-year lease without a break clause.

The EU Court of Auditors' report also pointed out the lack of a break clause, noting the lease 'as a contingent liability, as the rental contract does not include any exit clause', according to legal documents. The European Parliament called on the Commission and the EMA to negotiate with CWG.

The evidence of the request for a break clause and the exchanges in the European Parliament reveal that both parties were well aware of political and commercial risk, CWG lawyers claim. The EMA received a £43 mln tenant's inducement and a six-month rent-free period at the start of the lease, amounting to a front-loaded benefit that would be evened out by the 25-year commitment to pay the full market rent. The initial rent was around £11.8 mln a year from January 2015 to 2018.

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