

Frustration of Leases following Canary Wharf  
(BP4) T1 Ltd. -v- European Medicines Agency  
[2019] L&TR 14

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“Non haec in foedera veni”

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# Canary Wharf –v- European Medicines Agency

- Pursuant to agreement made in 2011, EMA takes 25-year lease of premises in Canary Wharf
- Term starts in 2014
- In March 2017, the UK gives notice under Article 50
- In August 2017, EMA writes to CW stating that it will treat Brexit as a frustrating event
- CW commenced Part 8 proceedings for declaration that that was not the case

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## Why did EMA say that lease would be frustrated?

- 1/ Loss of certain protections necessary for its ability to function
- 2/ Inability, as a matter of law, to occupy the premises
- 3/ Inability, as a matter of law, to make any profitable use of the premises
- 4/ Performance of lease obligations “ultra vires”
- 5/ Requirement to lease alternative premises and pay double rent

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## CW's answer

None of EMA's contentions correct, as a matter of fact

Even if they were, they would not amount to frustrating events

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# The Classic Statements – (1)

“...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it **a thing radically different** from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.”

*Davis Contractors –v- Fareham UDC* [1956] AC 696

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# The Classic Statements (2)

“Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which **so significantly** changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties **could reasonably have contemplated** at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.”

*National Carriers –v- Panalpina (Northern) Ltd.* [1981] AC 675

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# Types of frustrating event

- Supervening illegality
- Frustration of common purpose
- Impossibility due to destruction of subject-matter, other types of impossibility, impracticability

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# How do you establish what the parties “promised to do”?

- Terms of the contract
- Matrix or Context
- The parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, so far as these can be ascribed mutually and objectively

*Edwinton Commercial –v- Tsavliris Russ* [2007] EWCA 547

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# The “coronation” cases



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**Herne Bay Steam Boat Co –v- Hutton [1903] 2 KB 683**

- D hires boat from P to take paying passengers to view naval review
- Review cancelled; D refuses to pay balance
- C sues and wins; the venture was D's alone and the risk of cancellation fell on him (*“unable to agree ..the review was the basis of performance of the contract...”*)

## *Krell –v- Henry* [1903] 2 KB 740

- D agrees to hire P's flat in Pall Mall to view parade
- Parade cancelled
- C sues and loses; parties buying and selling “a room with a view” and there was no “view” to be had (*“a licence to use rooms for a particular purpose and none other”*)
- Position would have been different if the room had been a hotel room charging a higher rate because of the higher demand for rooms

How did the Court dispose of the case?

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## (1) Supervening illegality

- Started by rejecting EMA's submissions about its capacity following Brexit – in particular, its capacity to hold property outside the EU and its capacity to pay rent
- Given that the Judge rejected the EMA's case on capacity, he was able to dismiss its case on supervening illegality – quite simply, there was none

## (1) Supervening illegality

- But, the Judge held, even if he had found that EMA lacked capacity to hold property/pay rent, he would not have regarded that as supervening illegality, as the illegality would not arise under English law but EU law
- And, for good measure, that even if these circumstances had been enough to amount to frustration, it would have been self-induced frustration, as the lack of capacity emanated from an EU directive.

## (2) Frustration of Common Purpose

Relevant factors - a reminder

- Terms of the contract
- Matrix or Context
- The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, so far as these can be ascribed mutually and objectively

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## (2) Frustration of Common Purpose

Matters relevant to parties' expectations:

- Foreseeability of supervening event; but withdrawal “not relevantly foreseeable”
- Fact that EMA contemplated HQ for 25 years, and CW saw EMA as key-stone tenant, did not amount to a “common purpose”
- Course of negotiations relevant; Protocol 7 protections (which EMA got), break-clause (which they didn't)

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## (2) Frustration of Common Purpose

Matters relevant to parties' expectations:

- Foreseeability of supervening event (but withdrawal “not relevantly foreseeable” at date of agreement)
- “Bespoke” nature of premises
- Course of negotiations; Protocol 7 protections (which EMA got), break-clause (which they didn't)
- Terms of lease (duration; absence of break clause; insurance; alienation provision; user)
- Legal Advice received

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## Alienation Provisions in detail

- General prohibition on assignment
- EMA's rights of alienation more extensive than successor tenants
- Any tenant could share with a group company of the tenant
- Tight controls on sub-letting - guarantor if CW “reasonably so require”
- Tenant could sub-let whole – guarantor if CW “reasonably so require”
- CW entitled to withhold assignment of whole

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## Alienation Provisions in detail (cont)

CW entitled to withhold assignment of whole if proposed assignee

-- not “Acceptable Assignee”

-- had sovereign immunity

-- resident in a jurisdiction without procedures for recognising and enforcing an English judgment

If assignment to non-EU entity, CW could require an AGA

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Per Marcus Smith J at para.92:

*“...The Lease contained detailed provisions regarding alienation. These are extremely important provisions of the Lease for the purposes of this dispute ...”*

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Per Marcus Smith J at para.249:

*“...the EMA chose to enter into a long-term relationship, with long-term obligations. It played a role in framing those obligations: it could have opted for different premises, with a shorter lease; it could have negotiated a break and paid a (far) higher price and foregone the inducements it received. It did none of these things, but instead accepted provisions contemplating its departure from the Premises and providing for this case.”*

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## Lessons to be drawn

- The established tests for frustration remain good law
- Cases of frustration in the leasehold context will be rare
- Analysis of whether there has been frustration will involve assessing whether either party assumed the risk of the event in question
- That will involve consideration of terms of lease, but of other matters too; general expectations and assumptions, course of negotiations etc.

## Examples of frustrating events

According to Woodfall, a lease “*may be*” frustrated where:

- (a) some “vast convulsion of nature” occasions the destruction of the subject matter of the lease;
- (b) the lease provides for the use by the tenant of the property for a single purpose which subsequently becomes illegal;
- (c) there is a short term lease of a building or structure which is destroyed;

## Examples of frustrating events (cont).

- (d) there is a short term lease of a building which burns down;
- (e) the purpose of the lease is to enable the tenant to view some particular event which is subsequently cancelled;
- (f) wartime restrictions made it impossible for the parties to carry out a contract for the supply of timber in a timber yard which was the subject-matter of an agreement for lease between them;
- (g) a salmon fishery became unusable due to the construction of a nearby bombing range.

## Examples of non-frustrating events

However, a lease “is not frustrated” (?) where:

- (a) a ten-year lease of a warehouse has three and a half years to run and the only access to it is closed for a year;
- (b) the tenant is ousted from the premises by government requisition;
- (c) building restrictions suspended the tenant’s ability to build in accordance with his obligations under a long lease;

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## Examples of non-frustrating events (cont.)

(d) the tenant is prevented from occupying the premises because of his status as an enemy alien;

(e) although the primary use contemplated by the lease becomes illegal, there are other uses available to the tenant;

(f) the property is burnt down, although the tenant would be excused from liability for waste.

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