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Claim No: PT-2018-000505

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**  
**PROPERTY TRUSTS AND PROBATE LIST**

Rolls Building  
7 Rolls Building  
Fetter Lane  
London EC4A 1NL

20 February 2019

Before :

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

Between :

(1) CANARY WHARF (BP4) T1 LIMITED  
(2) CANARY WHARF (BP4) T2 LIMITED  
(3) CANARY WHARF MANAGEMENT  
LIMITED

Claimants

- and -

EUROPEAN MEDICINES AGENCY

Defendant

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Ms Joanne Wicks, QC, Lord Anderson of Ipswich, KBE, QC, Mr Jonathan Chew and Ms  
Zahra Al-Rikabi (instructed by Clifford Chance LLP) for the Claimants  
Mr Jonathan Seitler, QC, Mr Thomas de la Mare, QC, Ms Emer Murphy and Mr James  
Segan (instructed by DLA Piper LLP) for the Defendant

Hearing dates: 16, 17, 18, 21, 22, 23, 24, 25 and 28 January 2019

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Marcus Smith:**

**A. INTRODUCTION**

**(1) The background to these Proceedings**

1. The European Medicines Agency (the “EMA”<sup>1</sup>) is an agency of the European Union. It holds an underlease dated 21 October 2014 (the “Lease”) of part of 25-30 Churchill Place, Canary Wharf (the “Property”) for a term of 25 years (the “Term”). The Claimants – collectively “CW” – are the landlords of the Lease and the management company for the Canary Wharf estate. It is unnecessary to differentiate between the Claimants for the purposes of this judgment. I shall refer to the property leased to the EMA pursuant to the Lease as the “Premises”.
2. By a letter dated 2 August 2017, the EMA wrote to CW stating that:

“Having considered the position under English law, we have decided to inform you that if and when Brexit occurs, we will be treating that event as a frustration of the Lease.”
3. These proceedings (the “Proceedings”) were commenced because CW took the view that the commercial uncertainty created for CW and their lenders by this contention required early resolution. For its part, the EMA did not dissent from the importance of an early resolution of the Proceedings. By an order dated 2 August 2018, Mann J ordered that – so far as practicable – these proceedings should be heard, and preferably judgment delivered, by 29 March 2019.
4. The Proceedings were commenced under CPR Part 8. The relevant part of the CPR Part 8 Claim Form states that CW are seeking:

“...a declaration that the withdrawal of the United Kingdom from the European Union and/or the relocation of the [EMA] (whether inside or outside of the United Kingdom) will not cause [the Lease] to be frustrated and that the [EMA] will continue to be bound by all of its covenants and obligations in the Lease and all related documents including (but not limited to) payment of the full rents under the Lease throughout the Term of the Lease unless released by law upon a lawful assignment of the Lease properly made in accordance with its terms...”
5. It will be necessary to set out precisely why the EMA contends that the Lease will be frustrated. The reference to the relocation of the EMA in the Part 8 Claim Form is a reference to the EMA’s contention that one consequence of the United Kingdom’s withdrawal from the European Union is the need for the EMA to re-locate away from the United Kingdom, with the corollary that its (present) London headquarters would no longer be needed. The EMA’s letter of 2 August 2017 put the point thus:

“It would be unprecedented and incongruous for an EU body such as the [EMA] to be located in the UK and continue to pursue its mission in London after the UK has left the EU. Such circumstances were simply not contemplable at the time of entering into the Lease.”

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<sup>1</sup> Annex 1 to this Judgment contains a list of the terms and abbreviations used in this Judgment, stating where each term/abbreviation is first used in the Judgment.

6. By his order of 2 August 2018, Mann J ordered that the EMA file and serve points of claim providing particulars of the EMA’s case on frustration in response to CW’s claim for a declaration. Such points of claim – together with a counterclaim for declarations of its own – were duly served by the EMA (the “Points of Claim”).<sup>2</sup> CW responded by way of “Points of Response”.<sup>3</sup>

**(2) Issues between the parties**

7. The EMA contends that the Lease is frustrated for the following reasons (which are relied upon by the EMA individually and collectively):

- (1) *“Ground 1”*: The loss, to the EMA, of the protection conferred on it pursuant to Protocol 7 to the Treaty on the European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”). “Protocol 7”, as I shall refer to it, confers certain privileges and immunities on the EMA which, according to the EMA:
- (a) Are necessary to the proper functioning and independence of the EMA; and
- (b) Will be lost – or, at least, will cease to be guaranteed or will apply only in very modified form – once the United Kingdom withdraws from the European Union.<sup>4</sup>
- (2) *“Ground 2”*: The legal inability (on the part of the EMA and any other European Union entity) to use the Premises. The EMA contends that, after the withdrawal of the United Kingdom from the European Union, as a matter of law neither it – nor any other agency of the European Union – can use the Premises.<sup>5</sup> In the case of this ground, “use” refers to the ability on the part of the EMA (or any other European Union entity) lawfully to be located in the Premises.
- (3) *“Ground 3”*: The legal inability on the part of the EMA to make use of the Premises. Ground 3 is a counter-point to Ground 2. In Ground 2, the contention is that neither the EMA nor any other European Union entity could themselves use the Premises. The substance of Ground 3 is that the “EMA will...be unable safely or legally to make profitable use of the Lease”. The Lease contains provisions entitling the EMA to assign or transfer the Lease. It will be necessary to consider those provisions in due course. The substance of the EMA’s point is that after the withdrawal of the United Kingdom from the European Union, the EMA will be unable (as a matter of law) to exercise the rights conferred on it by the Lease.<sup>6</sup>
- (4) *“Ground 4”*: The future performance of the EMA’s obligations under the Lease would be *ultra vires* and unlawful. Ground 4 is predicated upon the success of one or more of Grounds 1 to 3. By this ground, the EMA contends that it will have no power to meet its future obligations under the Lease – including the obligation to

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<sup>2</sup> The Points of Claim have been amended once. Save where the contrary is stated, all references are to the latest version of the Points of Claim.

<sup>3</sup> Which have also been amended. Again, all references are to the latest amended version.

<sup>4</sup> See paragraph 78 of the Points of Claim and Section D of the EMA’s written opening submissions.

<sup>5</sup> See paragraphs 79-81 of the Points of Claim and Section E of the EMA’s written opening submissions.

<sup>6</sup> See paragraph 82 of the Points of Claim and Section F of the EMA’s written opening submissions.

pay rent under the Lease<sup>7</sup> – once the United Kingdom has withdrawn from the European Union.<sup>8</sup>

- (5) “Ground 5”: Future payment of “double rent” would impair the EMA’s capacity, effectiveness and independence. Ground 5 is predicated upon the success of one or more of Grounds 1 to 3. By this Ground, the EMA contends that if it is obliged to rent alternative premises within the European Union and is also obliged to maintain its obligations under the Lease, then “the EMA will be placed in a situation in which it cannot avoid paying “double rent” for headquarters buildings, one of which it *can* use (in Amsterdam) and one of which it *cannot* (in London). This would seriously impair the EMA’s capacity, effectiveness and independence.”<sup>9</sup>

I shall refer to these Grounds 1 to 5 collectively as the “Frustrating Grounds”.

8. CW disputed that the Frustrating Grounds could frustrate the Lease, on grounds articulated in the Points of Response and in CW’s written opening submissions. The dispute between the parties operated on two levels. First, CW did not accept the correctness of many of the specific points founding Grounds 1 to 5.<sup>10</sup> This, however, was CW’s secondary case. CW’s primary case was that – even if established – none of the Frustrating Grounds could amount to a frustrating event because the United Kingdom’s withdrawal from the European Union and/or the relocation of the EMA away from London could not (whatever the consequences) amount to an event capable of frustrating the Lease.<sup>11</sup>
9. In addition to the Frustrating Grounds, a further point emerged in the EMA’s written opening submissions.<sup>12</sup> Section J – which section is entitled “*Separate Argument: Performance of the Lease would be ultra vires and domestic law must provide a remedy*” – states in paragraph 195:

“Further, if, as the EMA contends, it will lack power to maintain its obligations under the Lease or make effective and profitable use of it after Brexit, then the EMA respectfully submits that the Court is bound by EU law to fashion a remedy to give effect to that lack of power. The Court cannot and should not hold the EMA to a lease in which it has no power to continue. This part of the EMA’s case applies regardless of whether the English law doctrine of frustration is or is not engaged: the EMA’s contention is simply that it cannot and should not be held to a contract the performance of which is *ultra vires*.”

I shall refer to this contention as the “EMA’s Self-Standing Point”, so called because it stands independently of English contract law and the law of frustration and is based in

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<sup>7</sup> The EMA refers (in, e.g. paragraph 149 of its written opening submissions) to the EMA having “no power to meet its future obligations under the Lease once the UK becomes a third country”. In the course of argument, I asked Mr Seitler, QC in terms whether this embraced the obligation to pay rent, and he confirmed that it did.

<sup>8</sup> See paragraph 85 of the Points of Claim and Section G of the EMA’s written opening submissions.

<sup>9</sup> Quoting from paragraph 154 of the EMA’s written opening submissions. See, generally, paragraphs 83-84 of the Points of Claim and Section H of the EMA’s written opening submissions.

<sup>10</sup> See paragraphs 118ff of CW’s written opening submissions.

<sup>11</sup> See paragraphs 92ff of CW’s written opening submissions.

<sup>12</sup> The point was pleaded in paragraphs 85 and 101.2 of the Particulars of Claim, but it is fair to say that this point was given greater prominence (although it remained the EMA’s alternative case) in submissions. The position of both parties on certain points evolved over time. Given that all these points were points of law, both parties quite rightly and properly took the view that any prejudice – if any – could be dealt with by ensuring time for additional submissions on such points. The court made such additional time available.

essence on European Union law. The essence of the EMA's Self-Standing Point is that if the Lease is not frustrated, then there is a self-standing rule of European Union law that serves to absolve the EMA of its obligations under the Lease.

10. Mr de la Mare, QC, who advanced the EMA's contentions in so far as they rested on European Union law, accepted that the Frustrating Grounds were really five faces of one overarching point, which was that the withdrawal of the United Kingdom from the European Union would cause the Lease to be frustrated because the United Kingdom's withdrawal would trigger a number of legal changes relating to the EMA's legal capacity to continue with the Lease.
11. There is also a considerable overlap between the Frustrating Grounds and the EMA's Self-Standing Point.
12. It will be necessary, in due course, to determine the law applicable to these issues. It will also be necessary to consider the inter-relationship of this law with the law applicable to questions of the performance and frustration of leases.

**(3) The event said to frustrate the Lease lies in the future**

13. The event said to frustrate the Lease lies in the future: the United Kingdom has yet to withdraw from the European Union and remains at the time of the judgment a "Member State". The EMA did not contend – and has not at any point sought to contend – that either the outcome of the referendum on 23 June 2016 (held pursuant to the European Union Referendum Act 2015) or the giving of notice by the United Kingdom pursuant to Article 50 TEU were either individually or in combination events capable of frustrating the Lease. It was the actual withdrawal of the United Kingdom from the European Union that was, *pace* the EMA, the reason the Lease would be frustrated.<sup>13</sup>
14. The legal position regarding the withdrawal of the United Kingdom from the European Union is as follows:
  - (1) The European Union is now founded on the TEU and the TFEU which, by Article 1 TEU "shall have the same legal value" and are referred to collectively as the "Treaties".<sup>14</sup> By the Treaties – and specifically by the TEU<sup>15</sup> – "the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common."
  - (2) Article 50 TEU created an express mechanism for a Member State to leave the European Union. Article 50 provides:
    - “1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
    2. A Member State which decides to withdraw shall notify the European Council of its intention. In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the

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<sup>13</sup> See paragraphs 25 and 75 of the Points of Claim. That explains the conditional references to frustration in this judgment.

<sup>14</sup> Article 1 TEU.

<sup>15</sup> Article 1 TEU.



arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) [TFEU]. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) [TFEU].

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.”

- (3) Following the European Union (Notification of Withdrawal) Act 2017 and pursuant to Article 50(2) TEU, the Prime Minister of the United Kingdom notified the President of the European Council of the United Kingdom’s decision to withdraw from the European Union.
- (4) Absent contrary provision in a withdrawal agreement or absent an extension pursuant to Article 50(3) TEU, the Treaties will cease to apply, as a matter of European Union and public international law, to the United Kingdom on 29 March 2019. This is the legal effect of Article 50(3) TEU and that legal effect pertains – at the level of European Union and public international law – without more.
- (5) Of course, at the domestic or municipal level, any European law that has been incorporated into English<sup>16</sup> domestic or municipal law continues to have effect, unless and until repealed. The continued application – or otherwise – of European Union law within the United Kingdom is governed by the European Union (Withdrawal) Act 2018. In very broad overview – the Act runs to some 102 pages – and subject to certain (extremely broad) savings<sup>17</sup> the European Communities Act 1972 – which is the gate through which European Union law has effect in the United Kingdom – “is repealed on exit day”.<sup>18</sup> According to the definitions in section 20(1) of the Act, ““exit day” means 29 March 2019 at 11.00pm”, but the definition of “exit day” may be amended pursuant to sections 20(2) to (5) of the Act.
- (6) On 25 November 2018, a special meeting of the European Council endorsed an “*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*” (the “Withdrawal Agreement”). The Withdrawal Agreement may only be ratified (i.e. agreed by the United Kingdom at the level of European Union

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<sup>16</sup> Naturally, the same pertains for all the other parts of the United Kingdom. However, since I am here concerned with the effect on a Lease governed by English law, I shall where appropriate refer to the law of England.

<sup>17</sup> Described in sections 2ff of the Act.

<sup>18</sup> Section 1 of the Act.

and public international law) if and when the conditions laid down in section 13 of the European Union (Withdrawal) Act 2018 are met. As at the date of this judgment, these conditions have not been met, and the Withdrawal Agreement is without legal effect.

- (7) The United Kingdom’s notice under Article 50(2) TEU may be withdrawn by the United Kingdom at any time prior to the application of Article 50(3) TEU.<sup>19</sup>
15. At the time of writing this judgment, matters are in a state of flux and it is impossible to say – and certainly not for a judge to speculate – what will be the position on 29 March 2019. There are, as it seems to me, five possible cases that might pertain:
- (1) *“Scenario 1”*: Article 50(3) TEU takes effect without the United Kingdom ratifying the Withdrawal Agreement. This is the default position under both the TEU and the European Union (Withdrawal) Act 2018. On this basis, the United Kingdom withdraws from the European Union on 29 March 2019 without any further agreement between the United Kingdom and the European Union. As I have noted,<sup>20</sup> the European Union (Withdrawal) Act 2018 makes provision for the repeal of the European Communities Act 1972 and the continued, qualified, application of European Union law within the United Kingdom.
- (2) *“Scenario 2”*: The time at which Article 50(3) TEU takes effect is extended by the European Council with the agreement of the United Kingdom pursuant to Article 50(3) TEU, but no other agreement is reached. On this basis – and assuming the definition of exit day in the European Union (Withdrawal) Act 2018 is varied accordingly – the United Kingdom withdraws from the European Union on that later date, but otherwise the position is exactly the same as in Scenario 1.
- (3) *“Scenario 3”*: The Withdrawal Agreement is ratified by the United Kingdom and the withdrawal of the United Kingdom from the European Union takes effect according to the terms of the Withdrawal Agreement, either on 29 March 2019 or at some later date. In the course of argument it became clear that, were the Withdrawal Agreement to be ratified, certain changes would have to be made to the European Union (Withdrawal) Act 2018.<sup>21</sup> For the purposes of Scenario 3, I shall assume that such changes would be made to United Kingdom’s domestic or municipal law so as to ensure that the United Kingdom’s domestic or municipal law operated consistently with its international obligations as stated in the Withdrawal Agreement.<sup>22</sup>

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<sup>19</sup> See *Wightman v. Secretary of State for Exiting the European Union* (Case C-621/18), EU:C:2018:978, EU:C:2018:999, [2018] 3 WLR 1965.

<sup>20</sup> See paragraph 14(5) above.

<sup>21</sup> Thus, for instance, Articles 7(1), 86, 87, 127(1), 127(3), 127(6), 158, 160 and 161 of the Withdrawal Agreement provide for the continued jurisdiction of the Court of Justice of the European Union (“CJEU”), including as regards: the binding nature of the CJEU’s decisions; the ability in the UK to make preliminary references pursuant to Article 267 TFEU (a “preliminary reference”); and the CJEU’s jurisdiction to determine such preliminary references (a “preliminary ruling”). By contrast, the European Union (Withdrawal) Act 2018 provides that a United Kingdom court or tribunal “is not bound by any principles laid down, or any decisions made, on or after exit day by the [CJEU]” (section 6(1)(a)) and that a United Kingdom court or tribunal “cannot refer any matter to the [CJEU] on or after exit day” (section 6(1)(b)).

<sup>22</sup> This would either be achieved:

- (4) *“Scenario 4”*: Further negotiations occur between the United Kingdom and the European Union. Such further negotiations might result in a revised Withdrawal Agreement or an altogether new withdrawal agreement, pursuant to which the United Kingdom withdraws from the European Union, either on 29 March 2019 or at some later date.
- (5) *“Scenario 5”*. The United Kingdom’s notice under Article 50(2) TEU is withdrawn by the United Kingdom prior to the application of Article 50(3) TEU. On this basis, the United Kingdom would remain a Member State and – I infer – the EMA would cease to contend that the Lease had been frustrated.
16. In an ideal world, I would consider the question of frustration of the Lease after it was clear which scenario pertained. But – for entirely understandable reasons – the parties seek clarity before 29 March 2019, and an expedited trial has been ordered on that basis. I cannot “wait and see”. On this basis, it seems to me that I must, in the first instance at least, determine the question of frustration on the basis of Scenario 1. That is not because of any assessment of the probabilities between the various scenarios (on which I have no authority to speak and about which I say nothing) but because this is most likely to produce an answer that will be helpful to the parties on the question of frustration generally. Scenario 1 is the case where the consequences of the United Kingdom’s withdrawal from the European Union are at their most stark: those consequences will not, in the case of Scenario 1, be ameliorated in any way by the Withdrawal Agreement or, indeed, by any other agreement. If, on this basis, I conclude (contrary to the EMA’s submissions) that the Lease has not been frustrated, then that conclusion will likely<sup>23</sup> be determinative in relation to Scenarios 2, 3 and 4 – because these are all less stark versions of Scenario 1. Scenario 5, of course, does not involve any question of frustration at all because (in that case) the United Kingdom would continue to be a Member State of the European Union.
17. On the other hand, if I were to conclude (contrary to CW’s submissions) that the effect of Scenario 1 was to frustrate the Lease, it would be necessary to consider the other scenarios to see if, were they to pertain, the outcome would be different. It is possible, at the outset, to identify which of these possible scenarios are going to be pertinent for the purposes of this Judgment:
- (1) Scenario 2 can make no difference to the outcome, since all this scenario does is shift the “exit date” on which the United Kingdom withdraws from the European Union to another, later, date. In all material respects, therefore, Scenario 2 is the same as Scenario 1 and does not require further consideration.
- (2) Scenario 3 involves a significant amelioration of the position over Scenario 1, because it involves the continued application of EU law during a transition period. Indeed, the Withdrawal Agreement actually makes specific provision – in Article 119 – for aspects of the re-location of the EMA. In these circumstances, it would

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(1) By way of primary legislation. Section 13 of the European Union (Withdrawal) Act 2018 contains provisions concerning the ratification of any withdrawal agreement, including the Withdrawal Agreement, and provides in section 13(1)(d) that an Act of Parliament must be passed “which contains provisions for the implementation of the withdrawal agreement”; and/or

(2) Assuming proper ratification of the Withdrawal Agreement, by way of delegated or secondary legislation pursuant to section 9 of the European Union (Withdrawal) Act 2018.

<sup>23</sup> I stress the “likely”. As I describe, my approach will be to consider Scenario 1 first, followed by Scenario 3. I propose to do this, whatever my conclusion in relation to Scenario 1.

be very necessary for me to re-visit my conclusion in relation to the frustrating effect of Scenario 1 in light of the fact that Scenario 3 may come to pass.

- (3) The same is true of Scenario 4, save that there is – at present – no alternative version of the Withdrawal Agreement for me to consider. It would be entirely pointless and wholly speculative for me to seek to consider Scenario 4, and I do not do so.
  - (4) Scenario 5, as I have noted, does not involve any question of frustration at all because (in that case) the United Kingdom continues to be a Member State of the European Union.
18. I shall, therefore, proceed to consider in the first instance whether Scenario 1 causes the Lease to be frustrated. I shall then, in light of my conclusions, re-visit those conclusions on the assumption that Scenario 3 pertains. I shall not consider Scenarios 2 or 5 any further because Scenario 2 is in all material respects the same as Scenario 1 and because Scenario 5 does not actually require me to determine any question at all. Since there is as at the time of this judgment no alternative withdrawal agreement to consider, Scenario 4 is (for the reason I have given) not one that I can consider. Accordingly, I propose to consider the effect of the Frustrating Grounds in relation to Scenario 1 and Scenario 3 only.
19. I shall take the same approach in relation to the EMA’s Self-Standing Point.

**(4) Structure of this Judgment**

20. In light of this introduction, this Judgment considers the following matters in the following order:
- (1) Section B considers the English doctrine of frustration in general terms, but with specific reference to leases. This section seeks to eschew questions of fact specific to this case, but simply seeks to articulate the relevant principles of English law in general terms. It also seeks to eschew questions of private international law although, as I have noted,<sup>24</sup> such questions do fall for consideration in this case.
  - (2) Section C states the material facts of the case. These are, in large part, common ground, but there are instances where a factual determination must be made. In particular, this section describes:
    - (a) The factual and expert evidence that was adduced by the parties: Section C(1).
    - (b) The nature of the Property and the manner in which the Property and the Premises came to be procured: Section C(2).
    - (c) The nature of the EMA. It is evident that the political and legal constraints within which the EMA operates are highly material to an understanding of the Frustrating Grounds and the EMA’s Self-Standing Point. These matters are considered in Section C(3).

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<sup>24</sup> See paragraph 12 above.

- (d) The material provisions of the Lease are considered in Section C(4). This includes the provision that was made for a rent-free inducement intended to induce the EMA to enter into the Lease.
  - (e) The EMA's attempts to dispose of the Premises: Section C(5).
  - (f) The EMA's budgetary process and the manner in which its spending is controlled: Section C(6).
- (3) Section D considers the EMA's legal capacity in relation to the Lease to the extent necessary to understand the Frustrating Grounds and the EMA's Self-Standing Point. In particular, Section D:
- (a) Sets out the precise nature of the EMA's case in this regard: Section D(1).
  - (b) Describes the approach I take to this case: Section D(2). In particular, Section D(2) identifies the need to resolve various anterior questions before questions relating to the EMA's legal capacity can be resolved. These anterior questions are then considered and disposed of in Section D(3).
  - (c) Having resolved these anterior questions, proceeds to resolve the issues regarding the EMA's legal capacity to act in relation to the Lease, given the United Kingdom's withdrawal from the European Union: Section D(4).
- (4) Section E considers whether, on the assumption that Scenario 1 applies,<sup>25</sup> the Lease is frustrated given:
- (a) My statement of the relevant legal principles in Section B;
  - (b) My statement of the material facts in Section C;
  - (c) My conclusions regarding the EMA's legal capacity in relation to the Lease in Section D.
- (5) Section F considers whether, on the assumption that Scenario 3 applies,<sup>26</sup> the conclusion that I reach at the end of Section E would be any different.
- (6) Section G considers the EMA's Self-Standing Point in light of the conclusions reached in Sections B to F.
- (7) Section H briefly states my overall conclusions and how I propose to dispose of this dispute.

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<sup>25</sup> My definition of Scenario 1 is at paragraph 15(1) above.

<sup>26</sup> My definition of Scenario 3 is at paragraph 15(3) above.

## B. THE ENGLISH DOCTRINE OF FRUSTRATION

### (1) Central propositions

21. The doctrine of frustration operates to bring a contract prospectively to an end because of the effect of a supervening event.

22. In *Davis Contractors Ltd v. Fareham UDC*,<sup>27</sup> Lord Radcliffe framed the following general test for frustration, which has stood the test of time:

“...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.”

23. Another formulation that has stood the test of time is that of Lord Simon in *National Carriers Ltd v. Panalpina (Northern) Ltd*:<sup>28</sup>

“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.”

24. In *J Lauritzen AS v. Wijsmuller BV, The “Super Servant Two”*,<sup>29</sup> Bingham LJ identified five propositions, established by the highest authority, which he considered were not open to question. I set them out here, substantially quoting from Bingham LJ, but omitting the authorities cited by him:

- (1) The doctrine of frustration was evolved to mitigate the rigour of the common law’s insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and equitable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.
- (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine must not be lightly invoked and must be kept within very narrow limits.
- (3) Frustration brings the contract to an end forthwith, without more and automatically. It does not require an act by the parties to the contract.
- (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.
- (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

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<sup>27</sup> [1956] 1 AC 696 at 729.

<sup>28</sup> [1981] 1 AC 675 at 700.

<sup>29</sup> [1990] 1 Lloyd’s LR 1 at 8.

## (2) The juridical basis for the doctrine of frustration

25. It is difficult to differentiate between subsequent events that do not, and subsequent events that do, cause a contract to be frustrated. Whilst it is clear that the object of the doctrine is to do justice as between the parties, where injustice would result from the literal enforcement of the contract, what is “just” and what is “unjust” is coloured by the nature of the doctrine and the juridical basis upon which it operates.
26. A number of juridical bases have been articulated:
- (1) *The implied term or implied condition theory.*<sup>30</sup> By this theory, the court must consider whether a term or condition can be implied into the contract, providing for the subsequent event. The problem with such an approach is that it turns on a test of what the parties would have said in response to the interjection of the “officious bystander” at the moment of the parties’ agreement.<sup>31</sup> Given that the subsequent, frustrating, event is something in essence unanticipated, it is difficult to know what such a person would say. As Lord Hailsham noted in *Panalpina*,<sup>32</sup> “I have not the least idea what they would have said, or whether either would have entered into the lease at all”. Of course, where the legal test for the implication of a term is met, the term implied may very well be relevant to questions of frustration. But that is not the same as resolving all questions of frustration by reference to an implied term or condition.
  - (2) *The total failure of consideration theory.*<sup>33</sup> By this theory, a contract can only be frustrated where the subsequent event causes one party to sustain a total failure of consideration. As an explanation for the doctrine of frustration, it is inadequate on two grounds:
    - (a) First, as Lord Hailsham noted in *Panalpina*,<sup>34</sup> “many, if not most, cases of frustration which have followed *Taylor v. Caldwell* have occurred during the currency of a contract executed on both sides, when no question of total failure of consideration can possibly arise”.
    - (b) Secondly, there will be cases of total failure of consideration, where there is no subsequent “frustrating” event. Not every total failure of consideration ends in the contract being frustrated, and the total failure of consideration theory says nothing about what constitutes a “frustrating” event.

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<sup>30</sup> See, for example, *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 687 (*per* Lord Hailsham LC), 702 (*per* Lord Simon), 717 (*per* Lord Roskill).

<sup>31</sup> *Per* MacKinnon LJ in *Southern Foundries (1926) Ltd v. Shirlaw* [1939] 2 KB 206 at 227: “For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: “Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!”””

<sup>32</sup> At 687.

<sup>33</sup> See, for example, *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 687 (*per* Lord Hailsham LC), 702 (*per* Lord Simon).

<sup>34</sup> At 687.

- (3) *The “frustration of the adventure” or “frustration of the foundation of the contract” theory.*<sup>35</sup> Although attractively phrased, this theory is no more than a form of words, with no clear meaning behind it. As Lord Hailsham said in *Panalpina*:<sup>36</sup>

“This, of course, leaves open the question of what is, in any given case, the foundation of the contract or what is “fundamental” to it or what is the “adventure”.”

- (4) *Construction of the contract theory.*<sup>37</sup> This involves ascertaining precisely which obligations each party did, and did not, assume. Plainly – and unsurprisingly – where the contract makes sufficient provision for the subsequent “frustrating” event, the contract will prevail, and there will be no discharge. This is, quite simply, a matter of the due and proper construction of the contract. But, just as with the implied term or implied condition theory – of which this is a more sophisticated variant – whilst the true construction of the contract may be relevant to the question of frustration, it is not of itself the test for frustration. Just as the parties may not know how to respond to the officious bystander in the case of implied terms, so too even a sophisticated contract, carefully constructed, may be silent in the face of a subsequent, unanticipated, event. More to the point, even a sophisticated contract which, on its face, appears to make provision for all subsequent vicissitudes may find itself defeated by the truly unforeseen.<sup>38</sup>
- (5) *Performance rendered radically different by fundamental change in circumstances.*<sup>39</sup> Lord Radcliffe’s dictum, quoted in paragraph 22 above, is said to encapsulate this theory,<sup>40</sup> which has found favour in the recent case law.<sup>41</sup> In *Panalpina*, Lord Roskill said this:<sup>42</sup>

“What is sometimes called the construction theory has found greater favour. But, my Lords, if I may respectfully say so, I think the most satisfactory explanation of the doctrine is that given by Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council*, [1956] 1 AC 696, 728. There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to say: “this was not the bargain which these parties made and their bargain must be treated as at an end” – a view which Lord Radcliffe himself tersely summarised in a quotation of five

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<sup>35</sup> See, for example, *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 687-688 (*per* Lord Hailsham LC), 702 (*per* Lord Simon).

<sup>36</sup> At 688.

<sup>37</sup> See, for example, *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 688 (*per* Lord Hailsham LC), 702 (*per* Lord Simon), 717 (*per* Lord Roskill).

<sup>38</sup> This is why the operation of the doctrine is so difficult as a matter of practice. Contracts, these days, seek to anticipate everything and one factor a court must bear in mind is that the contract – on its true construction – has provided for the risks to fall according to that construction. But, like the implied term theory, it would be an error to assume that every contract precisely allocates the risks arising out of every future eventuality. The weakness of the construction approach is that it assumes – wrongly – that construction or interpretation of the contract can resolve every problem.

<sup>39</sup> See *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 688 (*per* Lord Hailsham LC), 702 (*per* Lord Simon), 717 (*per* Lord Roskill).

<sup>40</sup> See *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 688 (*per* Lord Hailsham LC), 717 (*per* Lord Roskill).

<sup>41</sup> See *National Carriers v. Panalpina Ltd*, [1981] 1 AC 675 at 688 (*per* Lord Hailsham LC), 717 (*per* Lord Roskill).

<sup>42</sup> At 717.



words from the *Aeneid*: “*non haec in foedera veni*”. Since in such a case the crucial question must be answered as one of law...by reference to the particular contract which the parties made and to the particular facts of the case in question, there is, I venture to think, little difference between Lord Radcliffe’s view and the so-called construction theory.”

In many cases, Lord Roskill may be right: in many cases, there may be little difference in outcome between the construction of the contract theory and the “performance is radically different” test. But there is, in my judgment, a very material difference in how these two theories work in their application. Under the former, the true construction of the contract resolves all; the latter theory recognises the importance of the true construction of the contract, but also recognises that even construction has its limits when faced with extreme and unforeseeable supervening events.

27. As I have noted, certainly since *Panalpina*, the prevailing wisdom is that the fifth approach that I have described best encapsulates the essence of the doctrine of frustration. Whether a contract is frustrated depends upon a consideration of the nature of the bargain of the parties when considered in the light of the supervening event said to frustrate that bargain. Only if the supervening event renders the performance of the bargain “radically different”, when compared to the considerations in play at the conclusion of the contract, will the contract be frustrated.

**(3) “It was not this that I promised to do”**

28. In one sense, that which a party has promised to do arises out of the contract he or she has made and is defined by the construction of that contract. Although there have been many cases dealing with construction of contracts since *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,<sup>43</sup> it is nevertheless worth re-stating Lord Hoffmann’s governing principles of contractual construction:

“I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen*, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation has been discarded. The principles may be summarised as follows:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in

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<sup>43</sup> [1998] 1 WLR 896 at 912-13 (*per* Lord Hoffmann).

this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion to explore them.

- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd*.
- (5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201: “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”
29. In some cases – the vast majority, for frustration is a doctrine not easily invoked – the construction of the contract will resolve the issue between the parties, including whether a subsequent “unforeseen” event has allocated a risk to one party (by requiring that party to perform in more onerous circumstances) or to the other party (by an interpretation bringing the contract to an end because of those onerous circumstances). But that is not so much the end of the doctrine of frustration, as its beginning. Fundamentally, when one seeks to describe what a party promised, one does not recite the individual terms and conditions, but has regard to something much more elemental, that cannot necessarily be captured in the precise terms used by the parties in their contract, but which requires reference to what I will term the parties’ “common purpose”.
30. CW contended for an approach to the doctrine of frustration which equated “common purpose” with contractual construction. In other words, CW contended for the construction of the contract theory described in paragraph 26(4) above. That, as I have noted, is not the approach that has found most favour since (at least) *Panalpina*. Moreover, I do not consider that it is an approach that is open to me to take (even if I were inclined to do so). In *Edwinton Commercial Corporation v. Tsavlis Russ (Worldwide Salvage and Towage) Ltd, The “Sea Angel”*,<sup>44</sup> Rix LJ said this:
- “In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.”

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<sup>44</sup> [2007] EWCA Civ 547 at [111] (emphasis added).

31. Rix LJ identified various factors relevant to be taken into account when considering circumstances as at the time of the contract. These were:
- (1) The terms of the contract itself.
  - (2) Its matrix or context.
  - (3) The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at any rate so far as these can be ascribed mutually and objectively.
32. The first two factors can readily be mapped to a constructionist or interpretative approach: the first factor refers to the terms of the contract, the second to the matrix of fact. Both factors are therefore consistent with the construction of contract theory of frustration. The third factor, however, does not fit within the maxims of construction and is not consistent with the construction theory of frustration. For example, mutual expectations/assumptions/contemplations might very well arise out of the previous negotiations of the parties and their declarations of subjective intent, matters which are not to be taken into account when interpreting a contract.<sup>45</sup> Yet they are, *pace* Rix LJ, relevant in the case of frustration.
33. Although I am conscious that one should not read the *dicta* of judges – however eminent – as if they were the words of a statute, nevertheless it seems to me that, by his third factor, Rix LJ has encapsulated the difference between the construction theory of frustration and the “radically different” theory of frustration.
34. Although the EMA based its argument on frustration principally on subsequent illegality (defining, for present purposes, “illegality” as including *ultra vires* acts<sup>46</sup>), it also relied upon the frustration of a common purpose.<sup>47</sup> It is, therefore, necessary to consider what, exactly, is meant by this and how, exactly, common purpose differs from the outcome dictated by the construction of the contract.
35. *Treitel* says this about frustration of purpose:<sup>48</sup>

“Frustration of purpose is, in a sense, the mirror-image of impracticability. The typical contract is an arrangement under which one party agrees to supply a thing or a service or some other facility to the other, and the latter agrees to pay a sum of money for it. In cases of impossibility, the contract is discharged because the supervening event has made it impossible for the former party to supply the thing, service or facility. In cases of alleged impracticability there is no such impossibility, but the normal position is that the *supplier* argues that the cost of providing the thing, service or facility has risen, or that other difficulties of so doing have increased, to such an extent that he should be discharged. In cases of alleged frustration of purpose it is normally the *recipient* of the thing, service or facility who argues that the contract should be discharged. His own obligation, merely being one to pay money, cannot have become impossible, nor has any impossibility affected the obligation of the supplier, which can still be performed. But the recipient's case is that the contract should be discharged because the supplier's performance is

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<sup>45</sup> Although this is a point gives rise to controversy in academic circles, that remains the position in English law: McMeel, *McMeel on the Construction of Contracts*, 3<sup>rd</sup> ed (2017) at [5.61]ff.

<sup>46</sup> This point was obviously controversial, and I consider it below.

<sup>47</sup> See paragraphs 63ff of the EMA's written opening submissions.

<sup>48</sup> Treitel, *Frustration and Force Majeure*, 3<sup>rd</sup> ed (2014) (“*Treitel*”) at [7-001].

not longer of any use to the recipient for the purpose for which both parties had intended it to be used.”

36. *Treitel* rightly identifies the “coronation” cases as illustrations of frustration of purpose. The “coronation” cases – essentially, two decisions of the Court of Appeal, *Krell v. Henry*<sup>49</sup> and *Herne Bay Steam Boat Company v. Hutton*<sup>50</sup> – both arose when the coronation of King Edward VII was postponed because of the illness of the King. As *Treitel* has noted,<sup>51</sup> “[m]any contracts had been made in anticipation of the coronation, e.g. for the hire of rooms, or of seats on stands, from which the hirers or ticket-holders expected to be able to watch the processions which had been planned. Performance of these contracts did not, by reason of the supervening events, become impossible or even impracticable. It remained possible for the owners to provide the rooms or seats, and for the hirers or ticket-holders to occupy them and to look out on an ordinary day’s London traffic; but this would, for them, have been a pointless exercise. They therefore claimed that the contracts were discharged on the ground of frustration of purpose, i.e. because the facilities to be provided by the owners were no longer of any use for the contractually<sup>52</sup> contemplated purpose”.
37. The “coronation” cases shed a valuable light on Lord Radcliffe’s test and on his epithet “It was not this that I promised to do”. The “this”, as I have suggested, is rooted in the contractual agreement reached by the parties (including the matrix of fact) and in something altogether more fundamental and general, which I have termed the common purpose, and sought to describe above. The coronation cases provide a concrete illustration of what does, and what does not, amount to a common purpose:
- (1) In both *Krell v. Henry* and *Herne Bay*, Vaughan Williams LJ made reference to the example of a cab driver being engaged to take a passenger to Epsom on Derby Day at a suitably enhanced price for such a journey. Would, he asked, the contract be discharged if the race at Epsom had, for some reason, become impossible? Vaughan Williams LJ considered that this would not be a frustrating event,<sup>53</sup> and obviously considered the example to be compelling, for he repeated it in both cases. The reason Vaughan Williams LJ considered this to be such a clear example of a non-frustrating event is because the cab driver’s price was simply a reflection of an excess of demand for cabs over their supply, with the cab driver’s price being correspondingly high as a result. In short, the high price was simply a reflection of market forces, with the the cab driver being entirely indifferent as to the purpose of the journey and indeed its destination, whilst the passenger would be concerned not with the identity of the cab driver, but merely with the objective of securing a cab – any cab – to go to the stated destination. The high price, in other words, is nothing to do with a common purpose, but entirely a reflection of the opposing interests of cab driver and passenger, mediated through the market forces of supply and demand. In the case of this example, the market forces enabled the cab driver to charge a premium: the fact that, the premium having been agreed, the

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<sup>49</sup> [1903] 2 KB 740.

<sup>50</sup> [1903] 2 KB 683.

<sup>51</sup> *Treitel*, at [7-006].

<sup>52</sup> By this, I do not read Professor Treitel as stating that these contracts contained a term as regards the purpose of the contract. That would simply be to go back down the constructionist approach that I have rejected. I consider that the term “common purpose” is altogether more apt than “contractual purpose”, for this reason.

<sup>53</sup> *Krell v. Henry* at 750-751 (*per* Vaughan Williams LJ); *Herne Bay* at 689 (*per* Vaughan Williams LJ).

passenger's underlying purpose of the journey fell away, would be a matter of indifference to the cab driver.

- (2) The point could be tested in the following way: suppose the passenger wanted to make the journey for an altogether different purpose (to visit a relative in Epsom), but was forced to pay a higher price because of the coincidence of the timing of the visit to the relative and the Epsom races. The cancellation of the race might well have an effect on market price (demand for cabs would fall), but one could surely not say that the "purpose" of the contract had been undermined by the cancellation of the race: the relative would still be in Epsom to be visited. Conversely, if the relative became unavailable to be visited, but the races still went on, the passenger (whose purpose would have been thwarted) would still be held to the contract.
  - (3) In the *Herne Bay* case, the defendant hired a boat from the plaintiff in order to take fare-paying passengers to view the naval review and for a day's cruise around the fleet. The defendant paid a 50*l* deposit but declined to pay the balance and repudiated the contract on the ground that it had been frustrated when the review was cancelled due to the King's illness. The defendant was taking advantage of the review (occasioned by the Coronation) to make a profit through his own venture. No doubt he paid more for hiring the vessel than he would have done but for the Coronation; but, equally, would have more passengers and/or be able to charge more to the passengers for the same reason. The risk of an absence of high demand for the trips he was offering was the defendant's. The cancellation of the review doubtless meant that fewer people would want to buy tickets from the defendant. But the venture was always possible: it is simply that one factor adversely affecting demand arose subsequent to the contract. As the Court of Appeal said, the venture was the defendant's alone,<sup>54</sup> as was the risk of the venture failing.<sup>55</sup> As in the case of the cab driver, the interests and purposes of the parties to the contract were in essence opposed: each, in his own way, was trying to make a profit out of the occasion.
  - (4) In *Krell v. Henry*, the defendant agreed to hire the plaintiff's flat in Pall Mall for 26 and 27 June (days, but not nights). These were the days it had been announced that the Coronation processions would take place and pass along Pall Mall. What the parties were buying and selling was, quite literally, a room with a view.<sup>56</sup> Their common purpose was just that: whilst the parties surely would have been in opposition in bargaining on price, the thing that they were bargaining about was predicated on the procession taking place. Matters would have been very different had the room been a hotel room charging a higher rate because of the higher demand for rooms on that particular day due to the Coronation.
38. The coronation cases show that where the supervening event causes one party to appreciate – with the benefit of hindsight – that he or she has made a bad bargain, there will be no frustration of a common purpose. If the only effect of the supervening event is to cause the price for the bargain to appear – in hindsight – to be too high, the contract will not be frustrated. (By "price" I should stress that I mean more than simply the consideration agreed to be paid, but all of the terms that go to define the benefit one party to the contract confers on the other.) That was the position both in the case of Vaughan

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<sup>54</sup> At 691 (*per* Sterling LJ).

<sup>55</sup> At 692 (*per* Sterling LJ).

<sup>56</sup> At 750 (*per* Vaughan Williams LJ).

Williams LJ's cab driver and in the facts of the *Herne Bay* case. In both of those cases, one party paid more due to market conditions that subsequently changed: the passenger paid more because of the high demand due to the races; the defendant in *Herne Bay* paid more because of the naval review. In each case, were the price bargained for to be adjusted in the light of the new, supervening, market conditions, neither party would be able to complain. That demonstrates that there was, in these cases, no common purpose to be frustrated: one party was simply complaining that he had made what was, in retrospect, a bad bargain. By contract, even if the price paid by the licensee in *Krell v. Henry* were to be dramatically reduced, the purpose of the contract would still be undermined. In *Krell v. Henry*, the point of the contract was the purchase and sale of a room with a view: the view never came to pass.

#### (4) A multi-factorial approach

39. In *Edwinton Commercial Corporation v. Tsavlis Russ (Worldwide Salvage and Towage) Ltd, The "Sea Angel"*,<sup>57</sup> Rix LJ took as his starting point the two *dicta* cited in paragraphs 22 and 23 above, before going on to say:

"110. In the course of the parties' submissions we heard much to the effect that such and such a factor "excluded" or "precluded" the doctrine of frustration, or made it "inapplicable"; or, on the other side, that such and such a factor was critical or at least amounted to a *prima facie* rule. I am not much attracted by that approach, for I do not believe that it is supported by a fair reading of the authorities as a whole. Of course, the doctrine needs an overall test, such as that provided by Lord Radcliffe, if it is not to descend into a morass of quasi-discretionary decisions. Moreover, in any particular case, it may be possible to detect one, or perhaps more, particular factors which have driven the result there. However, the cases demonstrate to my mind that their circumstances can be so various as to defy rule-making.

111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that the mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated

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<sup>57</sup> [2007] EWCA Civ 547.

by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

113. Mr Hamblen submitted that whereas the demands of justice play an underlying role, they should not be overstated. He referred the court to *Chitty on Contracts* (29<sup>th</sup> edn, 2004) vol 1 pp1315-1316 (para 23-008) (“But this appeal to the demands of justice should not be taken to suggest that the court has a broad absolving power whenever a change of circumstances causes hardship to one of the contracting parties...Such a test is too wide, and gives too much discretion to the court”). I respectfully agree. Mr Hamblen also referred to Treitel *Frustration and Force Majeure* (2<sup>nd</sup> edn, 2004) p645 (para 16-009) (“The “theory” does not, in other words, supersede the rules which determine the circumstances in which the doctrine of frustration operates”). I would again respectfully agree, as long as it is not thought to apply those rules as though they are expected to lead one automatically, and without an exercise of judgment, to a determined answer without consideration of the demands of justice.”

40. I consider that these paragraphs correctly state the approach that I must take.

#### (5) Types of frustrating event

41. There is no *numerus clausus*, no limited class of frustrating event. Of the various classes that have been recognised,<sup>58</sup> two are relied upon by the EMA:

- (1) *Frustration of common purpose*. The nature of a “common purpose” was considered in paragraphs 28ff above and is relied upon by the EMA (albeit as its alternative case). Whilst, as I have found, the common purpose does not have to be contractual (in the sense that it does not have to be a term of the contract, express or implied), it must be assessed as at the time of contracting, by reference to the mutual intentions of the parties, objectively.<sup>59</sup>
- (2) *Subsequent legal changes and supervening illegality*.<sup>60</sup> This was the EMA’s primary frustration case. The EMA contended that supervening illegality was a particularly potent sort of frustrating event. It will be necessary to consider this point. In *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd*,<sup>61</sup> Lord Simon LC stated that:

“Discharge by supervening impossibility is not a common law rule of general application, like discharge by supervening illegality; whether the contract is terminated or not depends on its terms and the surrounding circumstances.”

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<sup>58</sup> These include: impossibility due to the destruction of the subject-matter of the contract (*Treitel*, ch 3), other types of impossibility (*Treitel*, ch 4) and impracticability (*Treitel*, ch 6).

<sup>59</sup> See *The Sea Angel* at [111], quoted at paragraph 31 above.

<sup>60</sup> The relevant chapter of *Treitel* (ch 8) is simply entitled “Illegality”. The relevant part of Beale (ed), *Chitty on Contracts*, 33<sup>rd</sup> ed (2018) (“*Chitty*”) at [23-022] refers to “Subsequent Legal Changes and Supervening Illegality”. As I have noted, the sort of subsequent illegality that was capable of frustrating a contract was a matter of dispute between the parties and is a matter that will have to be determined. I shall refer generally to “supervening illegality”.

<sup>61</sup> [1942] AC 154 at 163.

It is clear that not every supervening illegality causes a contract to be frustrated. In the context of contracts and the English law of illegality and frustration, the following points must be noted:

- (a) English law distinguishes between illegality at the outset or as to formation and supervening illegality or illegality as to performance.<sup>62</sup> For present purposes, it is unnecessary to consider illegality at the outset or as to formation. It does not arise in the present case.
- (b) In cases of supervening illegality, it is quite clear that the law has a range of responses. Although it used to be said that a contract could be void or voidable for illegality, that language is no longer helpful when considering illegality. As *Chitty* notes:<sup>63</sup>

“...much confusion would have been avoided if contracts were no longer themselves categorised as being voidable for illegality, or on grounds of public policy, in the same kind of way as contracts are being categorised as being void on other grounds, as the effect of illegality on the contract may vary according to the circumstances...”

In some cases, the supervening illegality has no effect at all on the enforcement of contractual obligations;<sup>64</sup> in others, it renders the contract unenforceable by one party or the other but leaves the rest of the contract standing and enforceable;<sup>65</sup> in yet others, neither party will be able to enforce the contract. In some cases, supervening illegality will cause the contract to be frustrated, but not in all.

- (c) English law distinguishes between performance that is illegal under English law and illegality under foreign law.<sup>66</sup>

42. I shall refer to the EMA’s two types of frustration as “frustration by supervening illegality” and “frustration of common purpose”.

#### **(6) Self-induced frustration**

43. Of the five propositions identified by Bingham LJ in *The Super Servant Two* as not open to question,<sup>67</sup> two might be said to relate to self-induced frustration:

- (1) Proposition 4, that frustration should not be due to the act or election of the party seeking to rely on it; and
- (2) Proposition 5, that the frustrating event must take place without blame or fault on the side of the party seeking to rely upon it.

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<sup>62</sup> *Chitty*, [16-015].

<sup>63</sup> *Chitty*, [16-002].

<sup>64</sup> *Chitty*, [16-018].

<sup>65</sup> As where the objectionable portion of the contract can be severed: *Chitty*, [16-236].

<sup>66</sup> *Chitty*, [23-027] (considering supervening illegality in the context of frustration), [30-281]ff (considering illegality in the contract of private international law).

<sup>67</sup> See paragraph 24 above.



44. Whether frustration is self-induced does not turn on technical questions of duty of care or fault.<sup>68</sup> Bingham LJ cited the following *dictum* of Griffiths LJ with approval:<sup>69</sup>

“The essence of frustration is that it is caused by some unforeseen supervening event over which the parties to the contract have no control and for which they are therefore not responsible. To say that the supervening event occurs without the default or blame or responsibility of the parties is, in the context of frustration, but another way of saying it is a supervening event over which they had no control. The doctrine has no application and cannot be invoked by a contracting party when the frustrating event was at all times within his control; still less can it apply in a situation in which the parties owed a contractual duty to one another to prevent the frustrating event occurring.”

45. In the case of *The Super Servant Two*, the defendant had agreed to carry the claimant’s drilling rig from A to B using the “transportation unit”, which referred to one of two barges, *The Super Servant One* and *The Super Servant Two*. *The Super Servant Two* was allocated to this job, and *The Super Servant One* was allocated to other contracts. *The Super Servant Two* sank, and the defendant contended that it could not perform the contract due to frustration. The Court of Appeal held that this was a case of self-induced frustration: the defendant could have used *The Super Servant One* to perform the contract, although that would probably have involved the defendant breaching other contracts.

46. Clearly, in this case, the defendant could not, in any real way, be criticised or said to be at fault. It is obviously not unreasonable conduct on the part of the defendant to seek to ensure that both barges were fully utilised. The Court of Appeal appears to have considered that because the defendant had two barges, it could have ensured some redundancy or spare capacity in the event that unforeseen circumstances put one barge out of action. The defendant chose not to do that, and this election prevented the case from being one of frustration. A similar case is that of *Maritime National Fish Ltd v. Ocean Trawlers Ltd*,<sup>70</sup> where it was contended that a contract was frustrated because a trawler (the *St Cuthbert*) could not leave harbour with an otter trawl unless it had a licence. In this case, although the trawler had no licence, the defendants – who owned five trawlers – had been offered three licences and were given the choice of which vessels in their fleet should be licenced. The defendant elected not to licence the *St Cuthbert*, and the Privy Council held that this amounted to self-induced frustration.<sup>71</sup>

“...it was the act and election of the appellants which prevented the *St Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the *St Cuthbert* as one, in which event a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and respondents, that the appellants were operating other trawlers to three of which they gave preference. What matters is that they could have got a licence for the *St Cuthbert* if they had so minded.”

Again, there were no doubt perfectly good reasons why the defendant allocated the limited licences it received in the way that it did. But the defendant was not entitled to

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<sup>68</sup> *J Lauritzen AS v. Wijsmuller BV, The “Super Servant Two”* [1990] 1 Lloyd’s LR 1 at 9.

<sup>69</sup> At 9. The *dictum* of Griffiths LJ came from *The Hannah Blumenthal* [1983] 1 AC 854 at 882.

<sup>70</sup> [1935] AC 524.

<sup>71</sup> At 529-530 (*per* Lord Wright).

rely upon the manner in which it chose to conduct its business in support of a frustration argument.

## C. THE MATERIAL FACTS

### (1) The evidence before the court

47. This claim began as a claim under CPR Part 8. There was a dispute between the parties as to whether the claim was appropriately so made. By an order made at a case management conference on 26 September 2018, I reclassified the claim as a CPR Part 7 Claim, ordering it to continue as if commenced under CPR Part 7. The reality, however, is that the claim lies somewhere on the spectrum between CPR Part 8 and CPR Part 7. As a result, there was limited disclosure<sup>72</sup> and limited cross-examination of the factual witnesses.<sup>73</sup> Most of the facts were uncontentious.
48. All of the witnesses before me were remarkably capable in their fields and gave evidence clearly, precisely and with transparent honesty. In the order in which they were called, I heard from:
- (1) *Mr Richard Archer*. Mr Archer was called by CW. He is the Managing Director, Offices, of the Canary Wharf group of companies, which include CW. He provided one witness statement (“Archer 1”) and gave evidence on Day 1 (16 January 2019).
  - (2) *Sir George Iacobescu*. Sir George was called by CW. He is the Chairman and Chief Executive Officer of Canary Wharf Group Investment Holdings plc, the ultimate UK parent company of CW. He provided one witness statement (“Iacobescu 1”) and gave evidence on Day 1 (16 January 2019).
  - (3) *Mr Frederick Hargreaves*. Mr Hargreaves was called by the EMA. He is a Senior Director of BNP Paribas Real Estate Advisory & Property Management UK Limited. In this regard, Mr Hargreaves and BNP Paribas have provided advice and assistance to the EMA in seeking to dispose of the Premises. He provided one witness statement (“Hargreaves 1”) and gave evidence on Day 1 (16 January 2019).
  - (4) *Mr Andreas Pott*. Mr Pott was called by the EMA. He was the EMA’s Head of Administration between May 2000 and December 2010 and Acting Executive Director from December 2010 to November 2011. Thereafter, and save for a short period as Acting Executive Director between November 2014 and November 2015, he was the EMA’s Deputy Executive Director until his retirement in June 2016. He provided one witness statement (“Pott 1”) and gave evidence at the end of Day 1 and beginning of Day 2 (16 and 17 January 2019).
  - (5) *Mr Nerimantas Steikunas*. Mr Steikunas was called by the EMA. He has been employed by the EMA in various capacities since 2004. Since 2016, he has held the roles of Head of Administration and Corporate Management *ad interim* and Head of Finance *ad interim*. He provided one witness statement (“Steikunas 1”) and gave evidence on Day 2 (17 January 2019).

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<sup>72</sup> See paragraph 2.1 of my order dated 26 September 2018.

<sup>73</sup> See paragraph 1 of my order dated 3 December 2018.

49. There were, additionally, three witnesses whose evidence was admitted without cross-examination. These witnesses all gave evidence on behalf of the EMA. They were:
- (1) *Professor Guido Rasi*. Professor Rasi is the Executive Director of the EMA. He provided one witness statement (“Rasi 1”).
  - (2) *Mr Noel Wathion*. Mr Wathion is the Deputy Executive Director of the EMA, a position he has held since 2016. He is also the EMA’s Chief of Policy and chair of the EMA’s Operations and Relocation Preparedness Task Force. He has worked for the EMA in various managerial positions since 1996. He provided one witness statement (“Wathion 1”).
  - (3) *Ms Jane Summerfield*. Ms Summerfield is the Head of Knowledge Management of the Real Estate Department of DLA Piper UK LLP (“DLA”). She provided one witness statement (“Summerfield 1”). Although DLA have conducted these Proceedings on behalf of the EMA, Ms Summerfield had no involvement in these Proceedings, save for the provision of her witness statement.<sup>74</sup> On this basis, CW did not object to her evidence.
50. Some of the witnesses – notably Mr Wathion – gave evidence on what might be said to be points of law. Thus, by way of example, Mr Wathion emphasised the importance of Protocol 7 to the EMA<sup>75</sup> and the implications of the United Kingdom’s withdrawal from the European Union on the EMA’s Protocol 7 protections.<sup>76</sup> As legal propositions, these points were controversial between the parties. The evidence of Mr Wathion and witnesses similarly expressing opinion on points of law was admitted on the basis that, whilst the views they expressed were genuinely held by them, and informed the EMA’s conduct, points of law were for me and that disputes on points of law did not have to be put to the factual witnesses.
51. I received expert evidence from two experts in the field of Modern British Political History and Political Science: Professor Tim Bale on behalf of the EMA and Professor Will Jennings on behalf of CW. The evidence was directed to the question of the foreseeability of the withdrawal of the United Kingdom from the European Union as that issue was viewed prior to 6 August 2011. As I have explained, some factors relevant to the question of frustration have to be considered as at the date of contracting. For the purposes of this case, this date is 6 August 2011.<sup>77</sup>
52. By paragraph 4.2 of my order of 26 September 2018, the content of the experts’ reports “shall be limited to the collation of relevant information in the public domain and the provision of a narrative of the facts in context (but not the expression of an opinion) in relation to the issue of the possibility of the UK leaving the EU, as that issue was viewed prior to 6 August 2011”.
53. The purpose of the experts’ reports was not to express an opinion on the foreseeability, as at 6 August 2011, of the United Kingdom withdrawing from the European Union.

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<sup>74</sup> See paragraph 1 of Summerfield 1.

<sup>75</sup> See paragraph 20 of Wathion 1.

<sup>76</sup> See paragraph 28 of Wathion 1.

<sup>77</sup> The Lease is dated some time later than this. It was entered into on 21 October 2014. The reason for the earlier date is that the EMA contractually obliged itself to enter into the Lease by an earlier agreement. It was common ground between the parties, and I accept, that this earlier date was the relevant date for these purposes.

That, as both parties accepted, was a question of fact for me. Rather, the purpose of the reports was to remind me of the nature of discourse regarding the United Kingdom's withdrawal as it stood some eight years ago and to assist me in putting to one side the voluminous and near constant stream of discussion and reporting within the media regarding the United Kingdom's withdrawal from the European Union that has been a feature since the referendum in June 2016.

54. To this end, three reports were adduced:

- (1) The report of Professor Bale dated 2 November 2018, on behalf of the EMA ("Bale 1").
- (2) The report, in response, of Professor Jennings, on behalf of CW, dated 22 November 2018 ("Jennings 1").
- (3) The reply report of Professor Bale dated 7 December 2018 ("Bale 2").

Each report had appended to it collations of relevant information in the public domain regarding "the issue of the possibility of the UK leaving the EU, as that issue was viewed prior to 6 August 2011".

55. Given the purpose of these reports, the experts were not called to give evidence. Paragraph 2 of my order of 3 December 2018 provided that the expert reports should stand "as narratives and no further expert evidence shall be permitted...Any further points in relation to the expert reports will be addressed by way of counsel's submissions."

**(2) The nature of the Property and the manner in which the Property and the Premises came to be procured**

56. CW<sup>78</sup> are the registered proprietors of the leasehold interest in the Property. The Property is a high-quality commercial office building at basement, promenade level and ground level with 20 floors above.<sup>79</sup> The Property had not been constructed when discussions first commenced between CW and the EMA regarding the leasing of space in the (future) Property. Without a firm commitment from a prospective tenant prepared to lease a significant part of the Property, so as to assure future cash-flow, I find that the Property would not have been built. Obtaining the commitment of the EMA to lease a substantial part of the Property was, thus, very important to CW.<sup>80</sup> The advantage to the EMA – which was looking for new headquarters<sup>81</sup> – of a pre-let was that it could have real input into the building, which could be bespoke to its requirements.<sup>82</sup>

57. The process by which the pre-let was secured was as follows:

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<sup>78</sup> I have defined "CW" so as to include the Claimants collectively: see paragraph 1 above. A number of other companies in CW's group were involved in the development and provision of the Property. I refer to them all, without distinction, as "CW", for nothing turns on the specific identities.

<sup>79</sup> Paragraph 9 of Iacobescu 1.

<sup>80</sup> The process is described in paragraphs 9 to 14 of Iacobescu 1. See also paragraph 8 of Archer 1.

<sup>81</sup> Paragraph 7 of Hargreaves 1; paragraph 12 of Wathion 1.

<sup>82</sup> Paragraphs 23, 24 and 26 of Hargreaves 1.

- (1) Following what must have been detailed negotiations, CW and the EMA concluded an “Agreement for Lease” on 5 August 2011. The Agreement is substantial and detailed: in terms of volume, including its many annexes, it fills three lever arch files.
  - (2) The Agreement for Lease was conditional upon the conclusion of a “Construction Management Agreement” between CW and the EMA. The Construction Management Agreement was also concluded on 5 August 2011. It, too, is a detailed agreement.
  - (3) By these agreements (the “Agreements”), CW and the EMA agreed as follows:<sup>83</sup>
    - (a) CW would complete the development of the Property. As at 5 August 2011, the piling and initial concrete substructure works of the Property had been completed:<sup>84</sup> by the Agreements, CW undertook to construct the remainder of the shell and core of the Property to an agreed “shell and core” specification.
    - (b) The EMA would – for the parts of the building it was going to lease, i.e. the Premises – be entitled to “fit out” the Property. The Agreements differentiated between “Tenant’s Category A Works” (fitting out the Premises to a standard developer’s finish) and “Tenant’s Category B Works” (fitting out the Premises according to the EMA’s specific purposes). This fitting out was done pursuant to the Construction Management Agreement.<sup>85</sup>
    - (c) On completion of the development of the Property, the EMA and CW would execute a lease in the form of the draft at Annex 15 of the Agreement for Lease (the “Annex 15 Draft Lease”). Unsurprisingly, the Lease is in these terms: neither side identified any material difference between the Annex 15 Draft Lease and the Lease.
  - (4) The Lease was concluded on 21 October 2014. The term of the Lease was 25 years, commencing 1 July 2014 and expiring on 30 June 2039. The EMA had options as to how many floors to take.<sup>86</sup> In the end, the EMA went up to level 10 of the Property.<sup>87</sup>
58. There was an issue between the parties as to the extent to which the Property – as opposed to the Premises – was bespoke. The Premises plainly were bespoke, in that the Tenant’s Category B works were intended to create a working environment designed for the EMA. In particular, this involved a conference centre on levels 2 and 3, containing various

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<sup>83</sup> Given their volume and detail, what follows is necessarily a somewhat broad-brush description of the terms of the Agreements. Where necessary, I shall quote specifically from the terms of the Agreements, but on the whole this is unnecessary for the purposes of this case.

<sup>84</sup> Paragraph 12 of Iacobescu 1.

<sup>85</sup> See clause 1.129 of the Agreement for Lease.

<sup>86</sup> The Agreement for Lease contained various options for the EMA to exercise. This was to provide flexibility to the EMA because of the uncertainty regarding the EMA’s needs: see paragraph 34 of Hargreaves 1. In the end, by a “Deed of Variation” dated 7 February 2014, the Premises that the EMA was to lease were defined and the options originally contained in the Annex 15 Draft Lease fell away.

<sup>87</sup> See paragraph 13 of Iacobescu 1.

meeting rooms (the largest accommodating over 135 people) providing for a “UN-style” seating environment for delegates,<sup>88</sup> and an unusually large restaurant/kitchen facility on level 4.<sup>89</sup> Mr Hargreaves asserted that these requirements were unusual for an occupier of an office building like the Property and that they existed because of the EMA’s particular requirements.

59. The unusual features on levels 2, 3 and 4 might well render it more difficult or – at any rate – more expensive to assign or sub-let the Premises. Mr Hargreaves explained his efforts (since the last quarter of 2017) to dispose of the Premises on behalf of the EMA.<sup>90</sup> He considered that levels 2, 3 and 4 might deter potential assignees or sub-lessees from taking the Premises without a different fit out.<sup>91</sup>
60. More controversial as between the parties was whether the EMA’s requirements affected the shell and core of the Property. To an extent, I find that they did. Thus, the EMA wanted two entrances to the Property, so that one entrance could be dedicated solely for the EMA’s use and the other used for CW’s other tenants.<sup>92</sup> Also, the EMA wanted – for some levels at least – higher than usual ceilings. More fundamentally, the EMA was allowed to choose the configuration for the Property, although (as Mr Archer testified) that configuration was in line with his own recommendation for building configuration.
61. I find that the Premises were purpose built to the EMA’s specification and that the Property itself was to an extent bespoke or purpose built. However, whilst CW permitted the EMA to have input into matters affecting the Property’s shell and core, I consider that it did so because what the EMA was proposing was in line with (or, at least, not out of line with) what CW itself considered was necessary to render the Property attractive to persons other than the EMA. In other words, the EMA’s proposals were broadly consistent with what CW considered sensible in its own interests. The point did not arise, but I anticipate that CW would have been rather less accommodating had the EMA made proposals affecting the shell and core that would have rendered the Property less marketable to persons other than the EMA.

### **(3) The nature of the EMA**

62. It will be evident, from the arguments set out above, that the political and legal constraints within which the EMA operates are highly material in this case. A number of these constraints will have to be considered more specifically, but the following serves as a general introduction.

#### **(a) Establishment**

63. The EMA’s predecessor<sup>93</sup> was established by Article 49 of Council Regulation (EEC) No 2309/93 of 22 July 1993 (the “1993 Regulation”). The EMA itself was established

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<sup>88</sup> See paragraph 43 of Hargreaves 1.

<sup>89</sup> See paragraph 44 of Hargreaves 1. This was, I was told in evidence, because of the very large number of delegates visiting the EMA each year (c. 30,000 per year).

<sup>90</sup> He refers to these generally in paragraph 49 of his statement, but expanded on the position when giving evidence.

<sup>91</sup> In other words, stripping out the EMA-specific fittings.

<sup>92</sup> Paragraph 45 of Hargreaves 1.

<sup>93</sup> The European Agency for the Evaluation of Medicinal Products.

by Article 55 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 (the “2004 Regulation”).<sup>94</sup> The second paragraph of Article 55 of the 2004 Regulation provides:

“The [EMA] shall be responsible for coordinating the existing scientific resources put at its disposal by Member States for the evaluation, supervision and pharmacovigilance of medicinal products.”

**(b) *Personality***

64. Article 47 TEU provides:

“The Union shall have legal personality.”

65. Article 71 of the 2004 Regulation provides:

“The [EMA] shall have legal personality. In all Member States it shall enjoy the most extensive legal capacity accorded to legal persons under their laws. It may in particular acquire or dispose of moveable and immovable property and may be a party to legal proceedings.”

**(c) *Capacity***

66. Whereas Article 47 TEU was concerned with the legal personality of the European Union in general, and in particular with its legal personality in international law,<sup>95</sup> Article 335 TFEU is concerned with capacity. It provides:

“In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of moveable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.”

67. The equivalent provision as regards the EMA is Article 71 of the 2004 Regulation, set out at paragraph 65 above. Its wording draws from both Article 47 TEU and Article 335 TFEU.

**(d) *An intra-Union function***

68. As well as establishing the EMA’s predecessor, the 1993 Regulation laid down European Union<sup>96</sup> procedures for the authorisation and supervision of medicinal products for human and veterinary use. The 1993 Regulation explicitly focussed on medicinal products within the territory of the European Union. Thus, Article 3(1) provided that “[n]o medicinal product...may be placed on the market within the [European Union] unless a marketing authorisation has been granted by the [European Union]” in

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<sup>94</sup> The 2004 Regulation has been amended on multiple occasions: I refer to the 2004 Regulation in its amended state.

<sup>95</sup> See Geiger, Khan & Kotzur, *European Union Treaties*, 1<sup>st</sup> ed (2015) (“*European Union Treaties*”), p.1018 (commentary on Article 335 TFEU at paragraph 1).

<sup>96</sup> At the time, it was the European Community. For convenience, I shall refer to the “European Union” throughout this Judgment.

accordance with the 1993 Regulation.<sup>97</sup> Equally, Article 2 provided that “[t]he person responsible for placing medicinal products covered by this Regulation on the market must be established in the [European Union]”. The EMA contended, and I accept, that the 1993 Regulation was in no way “outward looking”. The EMA was not engaged in matters going beyond the territory of the European Union. Its function was “inward looking”.

69. Essentially, the same is true of the 2004 Regulation, although one outward looking function was pointed out to me, namely the EMA’s obligation to “collaborate with the World Health Organisation in matters of pharmacovigilance”.<sup>98</sup> The World Health Organisation is based in Geneva – outside the territory of the European Union – but it was not suggested, by either party, that this competence would require the EMA to have an office outside the territory of the European Union.

(e) *Funding and expenditure*

70. The EMA is funded by a contribution from the European Union and from the fees paid by undertakings for obtaining and maintaining a European Union marketing authorisation and for other services provided by the EMA.<sup>99</sup> The fees chargeable by the EMA are not set by it, but by other entities of the European Union.<sup>100</sup> They are set with a high degree of specificity, and the EMA has a very limited discretion in terms of varying these set fees.<sup>101</sup>

71. The EMA’s expenditure “shall include staff remuneration, administrative and infrastructure costs, and operating expenses as well as expenses resulting from contracts entered into with third parties”.<sup>102</sup>

72. The EMA’s revenue and expenditure must be in balance.<sup>103</sup>

73. The EMA is subject to the budgetary control of other entities of the European Union.<sup>104</sup> The precise detail of this control is not material for present purposes, but the strictness of the regime is. The regulatory regime is described by Mr Steikunas:<sup>105</sup>

“9. In order for the EMA to fulfil its tasks (operational and organisational) in accordance with [the 2004 Regulation], the legislator has established that its revenue “... shall consist of a contribution from the EU and fees paid by undertakings for obtaining and maintaining EU marketing authorisations and for other services provided by the [EMA]... (2004 Regulation, Article 67(3)). As to these two components:

9.1 The maximum level of EU contribution for the EMA is set out in the multi-annual financial framework, adopted by the Council (see the last multi-annual

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<sup>97</sup> Emphasis added.

<sup>98</sup> Article 28c of the 2004 Regulation.

<sup>99</sup> See Article 67(3) of the 2004 Regulation. Article 57(1) of the 1993 Regulation is in similar terms.

<sup>100</sup> See Article 70 of the 2004 Regulation. Article 58 of the 1993 Regulation is in similar terms.

<sup>101</sup> See, for example, Council Regulation (EC) No 297/95 of 10 February 1995.

<sup>102</sup> Article 67(5) of the 2004 Regulation. The wording of Article 57(2) of the 1993 Regulation is not materially different.

<sup>103</sup> See Article 67(2) of the 2004 Regulation. Article 57(4) of the 1993 Regulation is in similar terms.

<sup>104</sup> See Article 67 of the 2004 Regulation. Article 57 of the 1993 Regulation is in similar terms.

<sup>105</sup> Steikunas 1 (emphasis added).



financial framework 2013-2020, Council Regulation (EU, Euratom) 1311/2013 of 2 December 2013).

9.2 The EMA's fees are governed by "general" fee regulation (Council Regulation (EC) No 297/95) and the "pharmacovigilance fee regulation" (Regulation (EU) No 658/2014).

10. The EMA's revenues are therefore finite. Any unforeseen or additional expenditure is not covered by either the EU contribution or additional fee income from the pharmaceutical industry: it has to be funded by cutting the EMA's other expenditure. With the exception of contributions for orphan medicines for rare diseases, which are governed by specific legislation, according to the financial regulations of the EMA, the EU contribution is a balancing contribution to finance operations of the [EMA] mandated by legislation which are not sufficiently covered by fees. In that regard, the EMA's financial and budgetary activity is monitored and approved on an annual basis in accordance with the procedure described in paragraphs (5)-(10) of Article 67 of the 2004 Regulation, which read as follows:

"5. The expenditure of the [EMA] shall include staff remuneration, administrative and infrastructure costs, and operating expenses as well as expenses resulting from contracts entered into with third parties.

6. Each year the Management Board, on the basis of a draft drawn up by the Executive Director, shall produce an estimate of revenue and expenditure for the Agency for the following financial year. This estimate, which shall include a draft establishment plan, shall be forwarded by the Management Board to the Commission by 31 March at the latest.

7. The estimate shall be forwarded by the Commission to the budgetary authority together with the preliminary draft general budget of the European Union.

8. On the basis of the estimate, the Commission shall enter in the preliminary draft general budget of the European Union the estimates it deems necessary for the establishment plan and the amount of the subsidy to be charged to the general budget, which it shall place before the budgetary authority in accordance with Article 272 of the Treaty.

9. The budgetary authority shall authorise the appropriations for the subsidy to the [EMA]. The budgetary authority shall adopt the establishment plan for the [EMA].

10. The budget shall be adopted by the Management Board. It shall become final following adoption of the general budget of the European Union. Where appropriate, it shall be adjusted accordingly..."

11. Based on the foregoing procedure, the preparation, content and formalities of the EMA's budget are required to be aligned with the ["EMA's Financial Regulation"],<sup>106</sup> which is in turn based upon the Commission Delegated Regulation on the framework financial regulation for the bodies referred to in Article 208 of Council Regulation (EU, Euratom) No 966/2012 (Article 1 of the EMA's Financial Regulation). Article 5 of the EMA's Financial Regulation requires that:

"The budget of the Agency shall be established and implemented in accordance with the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account,

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<sup>106</sup> Most of the provisions of this Regulation entered into force on 1 January 2014, with some coming into effect later (on 1 January 2015 and 1 January 2016).

universality, specification, sound financial management which requires effective and efficient internal control, and transparency as set out in this Regulation.”

12. As per Article 6 of the EMA’s Financial Regulation, every year the budget shall comprise:
  - “(a) own revenue consisting of all fees and charges which the [EMA] is authorised to collect by virtue of the tasks entrusted to it, and any other revenue;
  - (b) revenue made up of any financial contributions of the host Member States;
  - (c) a contribution granted by the Union;
  - (d) revenue assigned to specific items of expenditure in accordance with Article 23(1);
  - (e) the expenditure of the EMA, including administrative expenditure.
2. Revenue consisting of fees and charges shall only be assigned in exceptional and duly justified cases provided for in the constituent act.
3. When one or several constituent acts provide that clearly defined tasks are financed separately or when the [EMA] implements tasks entrusted to it by a delegation agreement, it shall hold separate accounts, on the revenue and expenditure operations. The Agency shall clearly identify each group of tasks in its human resource programming including in the annual and multiannual programming document referred to in Article 32.”
13. As referred to above, the preparation and implementation of the budget is a very stringent procedure from which the EMA cannot deviate. For this reason, Article 67(12) of the 2004 Regulation requires that “the Management Board shall, as soon as possible, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any projects relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof.”
14. This legal obligation makes it imperative prior to any commitments being made for the rental or purchase by the EMA of premises that may have a significant impact on its budget, the EU budgetary authority shall be informed and approve such activity. The EMA may sign a lease agreement or authorise expenditure with a landlord only following a favourable opinion of the budgetary authority (jointly, the Council of the EU and the European Parliament) and based on the terms approved by them. No deviation from these terms can be subsequently agreed.”
74. With the exception of one value judgment (the underlined text in the above quotation), which is a matter of law at issue in these proceedings, I accept this as an accurate statement of the European Union budgetary process as it applies to the EMA.
75. It is worth noting that – with the exception of the EMA’s Financial Regulation (which came into force after the Agreements on 5 August 2011, but before the Lease – which was concluded on 21 October 2014) – all of the significant budgetary provisions governing the EMA’s budget and referred to by Mr Steikunas were in force at the time

the Agreements were concluded. The Agreements would have been subject to these processes. Sir George Iacobescu refers to these processes in his witness statement:<sup>107</sup>

“Projects which may have significant financial implications for the funding of the EMA’s budget, in particular any projects relating to the purchase or rental of property, are subject to a specific notification from the EMA’s Management Board to the European Parliament and the European Council, and the EU Commission is also informed. At the time in 2011, the European Parliament and the European Council then had two weeks after receiving such notification to communicate their intention to issue an opinion on the matter to the EMA’s Management Board. Failing a reply, under this process, the EMA’s Management Board would then be authorised to proceed with the planned operation under its own administrative autonomy. Prior to entry into the Agreement for Lease, notification of the proposal to enter into an agreement for lease with [CW] was given by the EMA on 18 April 2011, a favourable opinion was delivered by the European Parliament on 7 June 2011 and, so far as I have been able to ascertain, no notification or following opinion was delivered by the European Council.”

76. The EMA’s notification to the Budgetary Authority dated 18 April 2011 (the “EMA’s Notification”) made clear that the proposed lease was for a term of 25 years, with no break clause.<sup>108</sup> These facts – along with many others – were considered by the European Union (if I can use that general reference to embrace all of the entities, apart from the EMA, involved in that process). The length of the lease and the absence of a break clause were specifically queried and looked into.

(f) *Liability of the EMA*

77. Article 72 of the 2004 Regulation provides (so far as material) as follows:

- “(1) The contractual liability of the [EMA] shall be governed by the law applicable to the contract in question. The [CJEU] shall have jurisdiction pursuant to any arbitration clause contained in a contract concluded by the Agency.
- (2) In the case of non-contractual liability, the [EMA] shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The [CJEU] shall have jurisdiction in any dispute relating to compensation for any such damage.”

78. These provisions reflect similar provisions relating to the European Union contained in the TFEU. Thus:

- (1) Article 340(2) TFEU relevantly provides that “[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”
- (2) Article 268 TFEU provides that “[t]he CJEU shall have jurisdiction in disputes relating to compensation for damage provided for in the second...paragraph[...] of Article 340”.

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<sup>107</sup> See paragraph 11 of Iacobescu 1.

<sup>108</sup> See paragraph 1.3 of the EMA’s Notification.

(g) **Protocol 7**

79. Protocol 7 applies to the EMA.<sup>109</sup> As noted in paragraph 7(1) above, Protocol 7 is a common protocol annexed to both the TEU and the TFEU. It constitutes a separate agreement between the “High Contracting Parties”, which (at the time it was concluded) included the United Kingdom. Protocol 7 is the latest of a series of protocols to similar effect.
80. Protocol 7 contains a series of immunities or protections conferred on the European Union. The most significant of these, for present purposes, are set out below:

**“Article 1**

The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.

**Article 2**

The archives of the Union are inviolable.

...

**Article 5**

For their official communications and the transmission of all their documents, the institutions of the Union shall enjoy in the territory of each Member State the treatment accorded to that State to diplomatic missions.

Official correspondence and other official communications of the institutions of the Union shall not be subject to censorship.”

81. Even absent the provision in the 2004 Regulation (Article 74) making clear that Protocol 7 applies to the EMA, it would be evident from the terms of the Protocol itself that this was the case. Prior to the Lisbon reform, the European Union (as it now is) had not been provided with a legal personality. Article 47 TEU now provides that “[t]he Union shall have legal personality”. Prior to this, it was the Member States who actually formed the Union, with only certain institutions – notably the European Commission – enjoying legal personality.<sup>110</sup> Given that the Union is (by Article 1 TEU) founded on the TEU and TFEU, and given that all EU institutions and agencies must derive their existence from a specific treaty competence,<sup>111</sup> the concept of the “European Union” must embrace all other institutions and agencies including the EMA.
82. Protocol 7 is also directly effective in the UK pursuant to section 2(1) of the European Communities Act 1972. Section 2(1) provides:
- “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided

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<sup>109</sup> Article 74 of the 2004 Regulation. Article 63 of the 1993 Regulation is in similar terms.

<sup>110</sup> See *European Union Treaties*, p.10 (commentary on Article 1 TEU, paragraph 5).

<sup>111</sup> A point considered further below.

for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.”

“Treaties” includes the TEU and TFEU and Protocol 7.<sup>112</sup>

83. Article 74 of the 2004 Regulation – itself directly effective in the United Kingdom – is thus really only for the avoidance of doubt.<sup>113</sup>
84. The provisions of Protocol 7 are very similar to the sort of protections that are conferred on international organisations and the embassies of foreign states. In his statement, Mr Wathion emphasised the importance of these protections, which he explained were conferred in the public interest of the European Union and the EMA, so as to avoid any interference with the functioning and independence of the European Union and the EMA.<sup>114</sup> Mr Wathion noted that “these protections guarantee the ability of the EMA and its officials or employees to go about the business of the EMA unhindered by interference from any Member State. All these protections are fundamental to the EMA’s independence and (thus) its proper functioning...”.<sup>115</sup> I accept this evidence.
85. The fact that the protections conferred by Protocol 7 are in the public interest of the European Union and the EMA and exist only for that purpose is confirmed by the fact that these protections can be waived or lifted. It is important to understand how this occurs:
  - (1) Suppose a contractual claim against the EMA, brought in the domestic or municipal courts of a Member State, resulted in judgment against the EMA.<sup>116</sup>
  - (2) Enforcement of that judgment would be precluded by Article 1 of Protocol 7.
  - (3) However, although the protections in Protocol 7 are framed in absolute terms, it is clear law that:
    - (a) They can be waived by the institution protected by Protocol 7. Thus, EMA could waive the protection conferred by Protocol 7.
    - (b) Even if such a waiver did not occur or was refused by the EMA, the judgment creditor could apply to the CJEU for the Protocol 7 protection to be lifted. The CJEU would – in considering whether the Protocol 7 protections should be lifted – consider whether the protection was necessary

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<sup>112</sup> See the definition of “Treaties” or “EU Treaties” in section 1(2) of the 1972 Act.

<sup>113</sup> That also appears to be the view of the Foreign and Commonwealth Office: see its letter to the EMA’s predecessor dated 24 June 1996, regarding the application of a predecessor of Protocol 7 in the United Kingdom.

<sup>114</sup> See paragraphs 19 to 23 of Wathion 1.

<sup>115</sup> Paragraph 21 of Wathion 1.

<sup>116</sup> Unlike in the case of non-contractual liability, where the relevant forum is the CJEU, such a claim would be before a national court (see Article 72 of the 2004 Regulation, quoted in paragraph 77 above) and the EMA has the competence to be a party to such proceedings (see Article 71 of the 2004 Regulation, quoted in paragraph 65 above).

in the interests of the European Union. If not, the protection would be lifted.<sup>117</sup>

86. It was suggested by CW that the fact that no case could be identified where a judgment creditor was seeking to enforce a judgment against an institution of the European Union somehow meant that the Protocol 7 protections were unimportant. I do not accept this contention. It seems to me that the Protocol 7 protections are extremely important, and that the fact that there is no evidence of applications for them to be waived or lifted, save in the case of garnishee proceedings,<sup>118</sup> actually underlines their importance. The fact is that the European Union and its agencies are responsible bodies, subscribing to the rule of law: as institutions they will respect their proper obligations and honour their due debts. That is, no doubt, one reason explaining the absence of applications for the Protocol 7 protections to be waived or lifted. But I am equally confident that the European Union and its agencies will not subscribe to bogus claims, “try-ons” or claims that are abusive. In such cases, the Protocol 7 protections are significant and important, and the absence of applications for these protections to be waived or lifted is, to my mind, cogent evidence of their efficacy, rather than their unimportance.

**(h) *Location of the EMA’s headquarters***

87. Article 341 TFEU provides that:<sup>119</sup>

“The seat of the institutions of the Union shall be determined by common accord of the governments of the Member States.”

88. There are many instances where such common accord is manifested. Thus, Protocol No. 6 to the Treaties (“Protocol 6”) records the seats of various European Union bodies. Indeed, Protocol 6 records a decision of 6 April 1965, which set out the provisional places of work of various Community institutions.

89. Neither the 1993 Regulation nor (until it was amended in 2018) the 2004 Regulation determined the location of the EMA’s headquarters. Article 74 of the 1993 Regulation provided:

“This Regulation shall enter into force on the day following the decision taken by the competent authorities on the headquarters of the Agency<sup>120</sup>.”

90. The decision on headquarters was taken by Decision 93/C 323/01 entitled “Decision taken by common agreement between the representatives of the Governments of the Members States, meeting at Head of State and Government level, on the location of the seats of certain bodies and departments of the European Communities and Europol” (the

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<sup>117</sup> See, for example, Case T-345/05, *Mote v. European Parliament* [2008] ECR II-2849.

<sup>118</sup> See Laenaerts, Maselis & Gutman, *EU Procedural Law*, 1<sup>st</sup> ed (2014), ch. 14.

<sup>119</sup> This provision has applied at all material times: it was previously Art 289 of the Treaty Establishing the European Communities (“TEC”).

<sup>120</sup> This was, of course, a reference to the EMA’s predecessor, the European Agency for the Evaluation of Medicinal Products.

“1993 Decision”). Article 1 of the 1993 Decision allocated the seats of various bodies to various cities or Member States.<sup>121</sup> Article 1(e) provided:

“The European Agency for the Evaluation of Medicinal Products shall have its seat at London.”

91. Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 (the “2018 Regulation”) is expressed – by Article 2 – to enter into force on the day of its publication in the *Official Journal of the European Union* (which was 16 November 2018), but “shall apply from 30 March 2019”. Article 1 inserts a new Article 71a into the 2004 Regulation, as follows:

**“The [EMA] shall have its seat in Amsterdam, the Netherlands**

The competent authorities of the Netherlands shall take all necessary measures to ensure that the [EMA] is able to move to its temporary location no later than 1 January 2019 and that it is able to move to its permanent location no later than 16 November 2019.

The competent authorities of the Netherlands shall submit a written report to the European Parliament and the Council on the progress on the adaptations to the temporary premises and on the construction of the permanent building by 17 February 2019, and every three months thereafter, until the [EMA] has moved to its permanent location.”

#### **(4) The provisions of the Lease**

92. As has been described, the Lease was materially in the same terms as the Annex 15 Draft Lease. The Lease contained the following provisions:<sup>122</sup>

- (1) Clause 3 demised the Premises to the EMA and its successors in title, and clause 4.1 obliged the EMA and its successors in title to pay rent.
- (2) Clause 4.18 of the Lease defined the use to which the Premises might be put by the EMA. The user was defined negatively – “[n]ot to use or occupy the [Premises] for any purpose except for the Permitted User”. Permitted User was defined in clause 1.58 of the Lease as, essentially, use as professional or commercial offices together with uses ancillary to such office use.<sup>123</sup>
- (3) Clause 4.19 contained a series of restrictions on the EMA in terms of alterations to the Premises. The clause contains, within these restrictions, a series of limited permissions to make “non-structural internal alterations”.

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<sup>121</sup> In some cases, no specific town was provided for. Thus, Article 1(c) provided that “[t]he Office for Veterinary and Plant-Health Inspection and Control shall have its seat in a town in Ireland to be determined by the Irish Government”.

<sup>122</sup> Again, I shall seek to avoid direct quotation of very lengthy provisions, and instead summarise the effect of these provisions. I have, at all times, had in mind the full wording of the provisions. I quote from the Lease, but the Annex 15 Draft Lease was in all material respects the same.

<sup>123</sup> There were provisions specific to the EMA regarding use of floors “for hotel use to be used for delegates”, for the sale of alcohol and for use as a travel agency. These were all provisions bespoke to the specific needs of the EMA.

- (4) The Lease contained detailed provisions regarding alienation. These are extremely important provisions of the Lease for the purposes of this dispute, and both parties took me to them extensively:
- (a) Beginning with a general prohibition on assignment<sup>124</sup> and underletting,<sup>125</sup> the Lease permitted the EMA under limited and strictly confined conditions to share, assign or sub-let the Premises. In order to understand the scope of these limited permissions on alienability, it is necessary to differentiate between tenants succeeding to the EMA's title, and the EMA's own rights as the initial tenant of the Premises. The distinction is important, because the EMA's rights of alienation were more extensive than those of successor tenants.
  - (b) Although the EMA was not permitted to share occupation or part with possession of the Premises, any tenant (including the EMA) could share with a group company of the tenant.<sup>126</sup> Additionally, the EMA – as long as it was the tenant – could share the premises with another European Union entity.<sup>127</sup>
  - (c) In terms of the permission to sub-let, there were tight controls on the extent to which a tenant (including the EMA) could sub-let parts of the Premises.<sup>128</sup> Where such a sub-letting was permitted, the tenant was obliged to obtain an acceptable guarantor for any proposed undertenant if CW<sup>129</sup> “shall reasonably so require”.<sup>130</sup> Thus, notwithstanding the continuance, in such a case, of the EMA's obligation to pay rent, CW could require the undertenant's obligations to be guaranteed.
  - (d) The tenant was also permitted to sub-let the whole of the Premises.<sup>131</sup> In such a case, the tenant was again obliged to obtain a guarantee if CW “shall reasonably so require”,<sup>132</sup> albeit that if the EMA as tenant was sub-letting to another European Union entity, such a guarantee could not be required.<sup>133</sup>
  - (e) Given that an assignment is a transfer of an interest, by definition the EMA could only assign the whole of the Premises: the Lease, however, makes this explicitly clear.<sup>134</sup> CW was entitled to withhold its consent to an assignment in a number of instances, for example:

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<sup>124</sup> See clause 4.21.1(a).

<sup>125</sup> See clause 4.21.1(c).

<sup>126</sup> See clause 4.21.1(b).

<sup>127</sup> See clause 4.21.1(b).

<sup>128</sup> See clause 4.21.1(c).

<sup>129</sup> I shall refer to CW rather than the landlord, although CW could of course alienate its interest.

<sup>130</sup> See clause 4.21.1(c).

<sup>131</sup> See clause 4.21.1(d).

<sup>132</sup> See clause 4.21.1(d).

<sup>133</sup> See clause 4.21.1(d).

<sup>134</sup> See clause 4.21.2.



- (i) Where the proposed assignee was not an “Acceptable Assignee”.<sup>135</sup> An Acceptable Assignee is a defined term in the Lease, running to 1½ pages in length. In essence, it is intended to ensure that the Acceptable Assignee has adequate financial standing given the commitments – specifically in terms of rent – that such an assignee would be assuming.
- (ii) Where the proposed assignee had sovereign immunity.<sup>136</sup>
- (iii) Where the proposed assignee was resident in a jurisdiction not having in place procedures for recognising and enforcing a judgment obtained in the courts of England and Wales.<sup>137</sup>

Very self-evidently, the object of these provisions of the Lease was to ensure that were the EMA to assign its interest, CW would (in terms of performance of covenants by the tenant, in particular the covenant to pay rent) be in as good a position – if not a better position – than if the EMA did not assign its interest.

- (f) Additionally, in the case of an assignment to a non-European Union entity, CW could require the EMA to execute an “Authorised Guarantee Agreement” or “AGA”. The form of such an agreement was set out in schedule 8 of the Lease and essentially obliged the EMA – to the maximum extent permitted by law – to guarantee the obligations of the assignee.<sup>138</sup>
- (5) Clause 4.25.1 provided as follows:

“At the [tenant’s] own expense to comply in all respects with every statute now in force or which may after the date of this Lease be in force and any other obligation imposed by law and all regulations laws or directives made or issued by or with the authority of The European Commission and/or The Council of Ministers relating to the [Premises] or their use, including the Offices, Shops and Railway Premises Act 1963, the Fire Precautions Act 1971, the Defective Premises Act 1972, the Health and Safety at Work, etc Act 1974 and the Environmental Protection Act 1990”.

- (6) Clause 7.1 imposed upon CW various obligations to insure, including the obligation to insure against the non-payment of rent. Late in the case – and largely because of a query that I made – the question of insurance became a matter of some controversy. It was suggested that the obligation to insure in respect of the non-payment of rent extended to a case where the EMA did not pay rent because the Lease was frustrated. I am satisfied that this is not the case, and that the obligation to insure in this case is tied to those cases where the EMA was entitled – because of destruction or damage to the Property or the Premises – to cease to pay rent.<sup>139</sup>

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<sup>135</sup> See clause 4.21.2(a)(i).

<sup>136</sup> See clause 4.21.2(a)(iii).

<sup>137</sup> See clause 4.21.2(a)(iii).

<sup>138</sup> See clause 4.21.2(b)(i).

<sup>139</sup> See clause 7.5.

(7) At various points in the Lease, reference is made to Protocol 7 and the existence of the protections on the EMA as a result of Protocol 7. As I shall describe, the inclusion of references reflecting the effect of Protocol 7 in the Lease were the subject of considerable debate between the solicitors representing the EMA and CW, with CW's solicitors seeking to remove references to Protocol 7. In this regard, the EMA prevailed, and the terms of the Lease reflect the importance of the EMA's Protocol 7 rights.<sup>140</sup>

(8) Clause 9.16 provided:

“This Lease shall be governed by and construed in all respects in accordance with the Laws of England and proceedings in connection therewith shall be subject (and the parties hereby submit) to the non-exclusive jurisdiction of the English Courts and for the purposes of Rule 6.15 of the Civil Procedure Rules 1998 and any other relevant Rules thereof the [tenant] hereby irrevocably agree[s] that any process may be served upon it at the [Premises] marked for the attention of the Head of Administration or at such other address for service within England and Wales and/or marked for such other person as may be notified in writing from time to time to [CW]. [CW] acknowledges that in the case of [the EMA], [CW] is also required to seek an order from the [CJEU] in order to enforce a judgement obtained in the English Courts due to the [EMA's] rights under [Protocol 7].”

93. The Agreements and the Lease contained complex provisions regarding the adjustment of rent payable by the EMA as an inducement to enter into the Agreements and the Lease. It is unnecessary to consider these provisions in detail, but it is important to note that the EMA received a substantial inducement to enter into the Agreements (the inducement was in excess of £40 million). The inducement was, in this case, applied in discharge of the costs payable by the EMA in having the Premises fitted according to its requirements, although the inducement could have been received by the EMA in different ways. The fact that the inducement was received in discharge of payment obligations under the Construction Management Agreement makes clear the linkage between the Agreement for Lease and the Construction Management Agreement.

#### **(5) The EMA's attempts to dispose of the Premises**

94. In his witness statement, Mr Hargreaves briefly described the efforts that the EMA had made to dispose of the Premises:<sup>141</sup>

“Since the last quarter of 2017, we have been instructed by the EMA to try to find a major tenant to take an assignment of the whole space occupied by the [EMA]. CW are fully aware of this and have offered to provide assistance as required on a number of occasions.”

95. In cross-examination, Mr Hargreaves accepted that the basis on which the EMA was seeking to dispose of the Premises involved a right to occupy the Premises after the presumed date of the withdrawal of the United Kingdom from the European Union. In short, the EMA was offering to dispose of the Premises after the date on which (on the EMA's case) the Lease would be frustrated. Although CW sought to make a forensic point out of this – namely that the EMA was somehow acting inconsistently with its frustration argument – I do not see the EMA's conduct in this way. The EMA and CW were simply seeking to remove an issue (namely, the fact that EMA could no longer use the Premises as its headquarters, by reason of the 2018 Regulation) in a commercial way,

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<sup>140</sup> See, for example, clause 9.18.2 and clause 9.16, quoted below.

<sup>141</sup> Paragraph 49 of Hargreaves 1.

without litigation. Unfortunately, these efforts came to nothing: but I am certainly not going to criticise the parties for trying, still less regard the EMA's case differently by reason of these efforts.

#### **D. ISSUES RELATING TO THE EMA'S LEGAL CAPACITY IN RELATION TO THE LEASE ARISING OUT OF THE FRUSTRATING GROUNDS AND THE EMA'S SELF-STANDING POINT**

##### **(1) Introduction: the EMA's case**

96. The EMA's contention that the Lease was frustrated by supervening illegality, taken at its highest, involved the proposition that, after withdrawal of the United Kingdom from the European Union, it would no longer be lawful for the EMA to pay rent to CW pursuant to the Lease. The payment of rent would be unlawful because the EMA would – in paying rent – be acting *ultra vires* or without capacity. The basis for this contention was that:

- (1) The EMA's headquarters had shifted from London to Amsterdam by reason of the 2018 Regulation. The effect of that Regulation – and this was common ground between the parties – was to impose upon the EMA the legal obligation to move its headquarters to Amsterdam.
- (2) According to the EMA, the 2018 Regulation did no more than respond to the effect on the EMA's legal position given the United Kingdom's notice of withdrawal from the European Union. Although this was disputed by CW, the EMA contended that, when once the United Kingdom had withdrawn from the European Union, the United Kingdom's status changed from that of a Member State to that of a "third country" (as the European Union describes non-Member States), and that it was not legally possible for the EMA to have its headquarters in a third country. As a matter of European Union law, the EMA contended, a European Union agency was obliged to have its headquarters in a Member State (which, by definition, the United Kingdom would not be).
- (3) Moreover, even apart from this question of location, there were other reasons why it would not be possible for the EMA to continue with its headquarters in London. That was because:
  - (a) The EMA would lose its protection under Protocol 7. I have described Protocol 7 and its importance in Section C(3)(g) above. CW did not accept this contention; but also suggested that, even if the EMA's contention was correct, had the EMA decided to remain headquartered in London, equivalent protections could be put in place.
  - (b) The EMA would lose the benefit of tortious claims being heard by the CJEU. This benefit arises out of the operation of Article 72(2) of the 2004 Regulation.<sup>142</sup> Again, this contention was not accepted by CW. CW also contended that even if the EMA was right on this point, it was not a matter that would preclude the EMA being headquartered in London.

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<sup>142</sup> See paragraph 77 above.

- (4) It would be *ultra vires* the EMA to make rental payments for a property that it could not use. In this regard, the EMA's case was that not only could it not lawfully use the Premises itself, but also:
- (a) This was the case for any other European Union entity. It would not, therefore, be possible for the EMA to share, assign or sub-let the Premises to other European Union entities.
  - (b) This inability to share, assign or sub-let would obviously not affect non-European Union entities, who could (entirely properly) take an assignment of the Lease or sub-let the Premises. As regards such non-European Union entities, it was the EMA's case that:
    - (i) It could not, post-withdrawal, lawfully sub-let the Premises, because it was outside its legal capacity.
    - (ii) It could not, post-withdrawal, lawfully assign the Lease, because this was outside its legal capacity.
- (5) The payment of rent under the Lease was not *per se ultra vires* but arose as a consequence of the EMA's inability to use the Premises. In other words, the issue of the EMA's *vires* to pay rent – and to perform any other on-going obligations under the Lease – turns essentially on the points identified in paragraphs 96(1)-(4) above. If the EMA did have the capacity to use the Premises, then the EMA would have capacity to pay rent.
97. Although the EMA did not accept this, the EMA's case regarding frustration underwent one significant evolution during the course of the hearing before me. When presenting the EMA's case prior to Mr de la Mare, QC's submissions on European Union law, Mr Seitler, QC submitted that, since the EMA could neither lawfully use nor dispose of the Premises, then – unless the Lease were frustrated – the Premises would be left empty, with the EMA paying rent. He did not (at this point, at least as I understood him) suggest that paying the rent would itself be *ultra vires* the EMA.
98. The contention that the EMA could not lawfully pay rent under the Lease is flatly inconsistent with the EMA's fifth ground as to why the Lease was frustrated. Ground 5 – which is described in paragraph 7(5) above – is based upon the contention that future payment of “double rent” would impair the EMA's capacity, effectiveness and independence. Ground 5 assumes or even postulates, that the EMA would pay rent even after the United Kingdom becomes a third country and relies upon the unfortunate consequences of this on the EMA's operations as a basis for contending that the Lease is, indeed, frustrated. Thus, paragraph 84 of the Particulars of Claim pleads:<sup>143</sup>
- “...the Agency's budget is approved by the Council of the EU and the European Parliament annually and relies in part on an EU contribution (funded by EU tax-payers) and in part by fees paid by undertakings seeking (for example) authorisations. Securing the approval of the Council of the EU and the European Parliament of a budget requiring the [EMA] to fund expensive rental costs (the Agency's future liabilities under the Lease amount to approximately £500m) from either of these sources in relation to a building in the UK which the [EMA] no longer occupies, will be politically challenging and may well prove impossible. If so, the Agency will have no

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<sup>143</sup> Emphasis added.

budget to meet its obligations under the Lease, or will be able to meet such obligations only by neglecting its core duties.”

99. In his submissions after Mr de la Mare’s European Law submissions, Mr Seitler, QC confirmed – in response to a question from me – that the EMA was contending as part of its frustration case that paying rent under the Lease was *ultra vires* the EMA.
100. There is thus something of an inconsistency in the EMA’s frustration case. By contrast, the EMA’s Self-Standing Point does assert that payment of rent under the Lease is *ultra vires* the EMA. The Particulars of Claim plead:<sup>144</sup>

“Further, by dint of the matters set out above, after Brexit Day<sup>145</sup> future performance of the Lease (and payment under it) will become *ultra vires* for the [EMA] and so unlawful as a matter of EU law. As a consequence, as a matter of EU law, the Lease and all continued obligations under it will become unenforceable upon Brexit (just as an agreement that comes to be in breach of Article 101 TFEU is unenforceable). As a matter of domestic law such state of affairs must be treated as a frustrating event in the absence of any contractual provision providing for the same, alternatively as a *sui generis* event discharging the [EMA] from future performance.”

The point regarding the EMA’s ability to pay rent was, thus, live on the pleadings, and I certainly am not going to prevent the EMA putting its case on frustration in this way. However, it does seem to me that I cannot also treat the EMA as having abandoned Ground 5. I therefore propose to consider the EMA’s case on frustration in two ways:

- (1) First, that the payment of rent under the Lease was *ultra vires* the EMA.
- (2) Secondly, and alternatively, that the payment of rent under the Lease was *intra vires* the EMA, but that the Lease is nevertheless frustrated, by reason of the EMA’s inability to use the Premises.

## (2) My approach to the EMA’s case

101. As is clear from my description of the EMA’s contentions, the EMA’s case on frustration requires me to consider and (perhaps<sup>146</sup>) determine a number of questions regarding the EMA’s capacity. Before I turn to these questions, it is necessary to determine a number of linked, anterior, matters. I turn to these next.

### (3) Anterior questions

#### (a) *The applicable law*

- (i) *Does a question of private international law arise at all?*

102. I must use English law to determine the issues before me, unless some foreign or international element in the case indicates that the law of another jurisdiction is applicable. “The objective of conflict of laws rules is to enable a court to decide which

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<sup>144</sup> See paragraph 85 of the Particulars of Claim. See also Section J of the EMA’s written submissions.

<sup>145</sup> This is the date on which the United Kingdom withdraws from the European Union and becomes a third country.

<sup>146</sup> The EMA contended that unless I was of the view that the EMA would be acting *ultra vires*, and so should uphold its case, I should make a preliminary reference to the CJEU rather than determining the matter.

system of law is to be applied to resolve a legal question when there is a foreign, i.e. non-English, element, involved in an issue.”<sup>147</sup>

103. The first question is whether the various questions relating to the EMA’s capacity do in fact raise a non-English element. All of the questions concern the (in)ability of the EMA to do certain things after the United Kingdom’s withdrawal from the European Union.
104. Until the United Kingdom has withdrawn from the European Union, the European Union law provisions concerning the EMA are enforceable EU rights within the sense of section 2(1) of the European Communities Act 1972. In other words, these provisions are English law. If, therefore, I were seeking to determine the EMA’s capacity to act prior to the United Kingdom’s withdrawal from the European Union, no non-English element would exist at all.
105. But the questions regarding the EMA’s capacity arise on the explicit premiss that the United Kingdom has withdrawn from the European Union and is a third country. It seems to me that I must approach the question of whether a non-English element exists on the basis of this premiss.
106. The position, after the withdrawal of the United Kingdom from the European Union, is as follows:
  - (1) *Scenario 1*. In the case of Scenario 1, the European Union (Withdrawal) Act 2018 governs. As to this:
    - (a) The 2018 Act causes existing European Union law to be retained as part of English law. This law is referred to as “retained EU law”.<sup>148</sup> European Union law can be retained through the operation of three distinct sections of the Act:
      - (i) Section 2 deals with “EU-derived domestic legislation”, that is European Union law that required implementation in the UK by way of implementing UK measures.<sup>149</sup> We are not here concerned with “EU-derived domestic legislation”: all of the European Union provisions under consideration in this Judgment are enforceable EU rights.
      - (ii) Section 3 causes what it describes as “direct EU legislation” to be translated into domestic English law. Thus, section 3(1) provides:

“Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.”

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<sup>147</sup> *Haugesund Kommune v. Depfa Bank* [2010] EWCA Civ 579 at [38].

<sup>148</sup> A term defined in section 6(7) of the 2018 Act. It includes all EU-derived domestic legislation and all direct EU legislation.

<sup>149</sup> In other words, section 2 is concerned with non-directly effective European Union law or law that does not amount to enforceable EU rights. Generally speaking, such law is implemented pursuant to section 2(2) of the European Communities Act 1972, which provides for a broad power to implement European Union law without the need for primary legislation.

- (iii) Section 4 deals with rights under section 2(1) of the European Communities Act 1972. Section 4(1) provides:
- “Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day –
- (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
- (b) are enforced, allowed and followed accordingly,
- continue on or after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).”
- (b) It is very clear, therefore, that after exit day, there will be two bodies of European Union law:
- (i) The law of the European Union as it applies in the territories of the Member States; and
- (ii) The law of the European Union as incorporated into English law.
- (c) These two bodies of law will not be identical and will diverge. There are many reasons why there will be divergence. The following list is not intended to be exhaustive, but merely seeks to identify some of the factors that will create such divergence:
- (i) Only European Union law operative immediately before exit day is incorporated into English law. Thus, future European law is not incorporated; nor is any European Union law that (albeit made) comes into force after exit day.
- (ii) Not all European Union law operative immediately before exit day is incorporated into English law. By way of example, the definition of direct EU legislation in section 3(1) contains a number of “carve-outs”, where provisions of European Union law that would otherwise be direct EU legislation are excluded.<sup>150</sup>
- (iii) Section 8 of the 2018 Act confers on ministers wide powers to amend retained EU law.
- (iv) Section 6(1)(a) of the 2018 Act provides that United Kingdom courts or tribunals are not bound by any principles laid down or any decisions made on or after exit day by the CJEU. Section 6(1)(b) provides that no United Kingdom court or tribunal may refer any matter to the CJEU on or after exit day.
- (2) *Scenario 3*. In the case of Scenario 3, the Withdrawal Agreement has been ratified by the United Kingdom and implemented into United Kingdom domestic or municipal law. As to this:

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<sup>150</sup> See section 3(2) of the 2018 Act.

- (a) The divergence or the potential for divergence between United Kingdom law and European Union law will be much less stark than in the case of Scenario 1. Article 4 of the Withdrawal Agreement provides:

“(1) The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Accordingly, natural or legal persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

(2) The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.”

As I have noted, the Withdrawal Agreement makes provision for the continued jurisdiction of the CJEU.

- (b) Even though United Kingdom law and European Union law will be closely aligned by virtue of the Withdrawal Agreement, there will nevertheless be two bodies of law: European Union law, as applied in the Member States, by virtue of the TEU and the TFEU; and United Kingdom law, applying European Union law as a third country by virtue of its international obligations contained in the Withdrawal Agreement, implemented into United Kingdom law.<sup>151</sup>

107. Accordingly, I conclude that the present case does potentially give rise to an issue of non-English law. I therefore need to characterise the issue and, having characterised it, determine the applicable law.

(ii) *Characterisation*

108. The EMA’s case gives rise to questions concerning the ability of the EMA to do certain things after the United Kingdom’s withdrawal from the European Union. Although it was not contended by the EMA that it lacked capacity to enter into either the Agreements or the Lease, the EMA’s contentions raised the novel question of a supervening incapacity to act.

109. These issues are best characterised as questions of capacity. In *Haugesund Kommune v. Depfa Bank*,<sup>152</sup> Aikens LJ considered that the concept of “capacity” had to be given a broader, “internationalist” meaning, unconstrained by any narrower definitions accorded by English domestic law. Aikens LJ defined capacity as the legal ability of a corporation to exercise specific rights, including but not limited to the legal ability to enter into a valid contract with a third party.

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<sup>151</sup> The mechanisms for achieving this were briefly considered in footnote 24 above.

<sup>152</sup> [2010] EWCA Civ 579 at [47].



(iii) *Applicable law*

110. In the first instance, the capacity of a corporation to exercise specific rights is determined by the constitution of the corporation, which is itself governed by the law of the place of incorporation.<sup>153</sup>
111. Generally speaking, English-speaking writers on the conflict of laws refer to the applicable law of another “country”.<sup>154</sup> *Dicey* explains the meaning of the term as follows:<sup>155</sup>

“This word has from long usage become almost a term of art among English-speaking writers on the conflict of laws, and it is vitally important to appreciate exactly what it means. It was defined by Dicey as “the whole of a territory subject under one sovereign to one body of law.” He suggested that a better expression might be “law district”: but this phrase has never found much favour with English-speaking writers, who prefer the more familiar word “country”. England, Scotland, Northern Ireland, the Isle of Man, Jersey, Guernsey, Alderney, Sark, each British colony, each of the Australian States and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a State known to public international law. However, for some purposes larger units than these may constitute countries. Thus, the United Kingdom is one country for the purposes of the law of companies, Australia is one country for the purposes of the law of marriage and matrimonial causes, and Canada is one country for the purposes of the law of divorce.”

112. In this case – and for obvious reasons I prefer the term “law district” – the applicable law is European Union law as applied in the Member States of the Union, the United Kingdom for the purposes of this question being treated as a third country and not as a Member State.

(b) *A preliminary reference?*

113. Article 267 TFEU provides as follows:

“The [CJEU] shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the [CJEU].

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the [CJEU] shall act with the minimum of delay.”

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<sup>153</sup> *Haugesund Kommune v. Depfa Bank*, [2010] EWCA Civ 579 at [27]-[28] (*per* Aikens LJ).

<sup>154</sup> Collins (ed), *Dicey, Morris & Collins: The Conflict of Laws*, 15<sup>th</sup> ed (2012) (“*Dicey*”) at [1-065].

<sup>155</sup> *Dicey* at [1-065].

114. Article 267 TFEU is “one of the most significant provisions of the TFEU in view of ensuring legal unity within the Union. Its practical significance cannot be overestimated: more than half of the procedures pending before the [CJEU] are based on preliminary rulings. The preliminary ruling interlocks national and European courts through the possibility or rather the obligation to make a reference, and thus links the European constitutions.”<sup>156</sup>

115. Subject to one point which I consider below, the parties accepted that I had a discretion to refer and (as a court of first instance) not an obligation. In *R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd*,<sup>157</sup> Sir Thomas Bingham MR described the approach a court of first instance should take:

“...I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law is critical to the court’s final decision, the appropriate course is ordinarily to refer the issue to the [CJEU] unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the [CJEU] in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.”

116. National courts must also be cautious of over-referring. In *Trinity Mirror plc v. Commissioners of Customs and Excise*,<sup>158</sup> Chadwick LJ referred to Sir Thomas Bingham MR’s judgment in *Else*, cited above, but added:

“But it is, I think, important to have in mind also, the observations of the Advocate-General (Mr Francis Jacobs, QC) in Case-338/95, *Wiener SI GmbH v. Hauptzollamt Emmerich*. The question which he thought it necessary to address is stated at paragraph 10 of his Opinion:

“...whether it is appropriate – and especially whether it is still appropriate today, in view of developments which I shall mention below – for the [CJEU] to be asked to rule in every case where a question of interpretation of Community law may arise.”

He identified the matter which was of practical concern to the [CJEU] at paragraph 15:

“Any “application” of a rule of law can be regarded as raising a question of “interpretation” – even if the answer to the question of interpretation may seem obvious. Every national court confronted with a dispute turning on the application of Community law can refer a question which, if more or less properly phrased, this Court is bound to answer after the entire proceedings have taken their course. That will be so, even where the question is similar in most respects to an earlier question: the referring court (or the parties’ lawyers) may always seek to distinguish the facts of the cases. It will be so even where the question could easily, and with little scope for reasonable doubt, be answered on the basis of existing case law, again the facts may be different, or it may be that a particular condition imposed in earlier case law gives rise to a new legal argument and is regarded as needing further clarification. The net result is that the Court could be called upon to intervene in all cases turning on a point of Community law

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<sup>156</sup> *European Union Treaties*, p.893 (commentary on Article 234 TFEU, paragraph 1).

<sup>157</sup> [1993] QB 534 at 545.

<sup>158</sup> [2001] EWCA Civ 65 at [52].

in any court or tribunal in any of the Member States. It is plain that if the [CJEU] were to be called upon it would collapse under its case-load.”

The solution is “a greater measure of self-restraint on the part of both the national courts and the [CJEU]” – see paragraph 18. Where the national court is not a court of last resort, a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the instant case, or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Between those two extremes, there is a wide spectrum of possibilities – see paragraph 20.”

117. The EMA suggested that this was not a “normal” case for a preliminary reference. The EMA invited me to apply, by analogy, the “*Foto-Frost*” approach to preliminary references. Case 314, *Foto-Frost v. Hauptzollamt Lübeck-Ost*<sup>159</sup> concerned a preliminary reference to the CJEU asking whether a national court could review the validity of a European Union “act” (in this case, the adoption of a decision by the Commission).<sup>160</sup> The CJEU’s preliminary ruling was clear: whilst a national court was entitled to reject a contention of invalidity regarding an act of the European Union, it was not entitled to accede to such a contention and declare the act to be invalid. The CJEU had exclusive jurisdiction to declare void an act of an institution of the European Union, and if a national court (even a court of first instance) was not able to reject a contention of invalidity, it was obliged to make a preliminary reference.<sup>161</sup>
118. The EMA contended that, were I not to accede to its contentions that, post-withdrawal of the United Kingdom from the European Union, the EMA’s capacity was constrained in the ways contended by the EMA and if, as a result, I concluded that the EMA continued to be bound by the Lease, then I (a national court judge) would effectively be compelling the EMA to act *ultra vires*. The EMA contended that, by analogy with *Foto-Frost*, this would be a case where I was obliged to refer and had no discretion.
119. I am disinclined to make new law regarding the circumstances when a court of first instance must rather than may make a preliminary reference. The analogy with *Foto-Frost* is a tenuous one. In *Foto-Frost*, the CJEU was concerned in preserving its exclusive jurisdiction to declare an act of the European Union invalid. It is easy to see why this is important: were national courts to do so, the threat to the unity of and uniformity of application of Union law would be immediate. In this case, however, whatever the outcome, I am not declaring an act of the European Union invalid.
120. I turn, then, to the question of whether I should exercise my discretion to make a preliminary reference to the CJEU regarding the EMA’s capacity. Considering the spectrum of cases described by Chadwick LJ in *Trinity Mirror*,<sup>162</sup> this case appears at the lower end. Although I can appreciate that the EMA regards questions relating to its capacity as important and would wish to have these questions resolved by the CJEU, this is a one-off case where it is said that the EMA’s capacity is limited by a Member State withdrawing from the European Union. There is no question of general importance. In other words, just because the United Kingdom’s withdrawal from the European Union is

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<sup>159</sup> [1987] ECR-4199.

<sup>160</sup> At [9].

<sup>161</sup> At [11]ff.

<sup>162</sup> See paragraph 116 above.

of immense significance and importance, that does not mean to say that every legal question arising out of this withdrawal is similarly significant and important.

121. I also note that the questions of Union law arising out of this case are a step on the way to an altogether larger question – not governed by European Union law – which is whether the Lease is frustrated. In short, these questions of Union law regarding the EMA’s capacity form part of a greater whole, and it seems to me important that I at least attempt to resolve the whole question, involving as it does multiple issues governed by different laws.
122. Nor am I persuaded that European Union law is – to use Sir Thomas Bingham MR’s test – “critical” to my final decision.<sup>163</sup> As I have noted, the questions of European Union law regarding the EMA’s capacity are stepping stones towards resolving a greater question. Whilst I propose to determine these questions, I shall (to the extent my conclusions differ from the EMA’s submissions) consider whether my later analysis would change were I to accept the EMA’s contentions. In short, I shall, if appropriate and to the extent I do not accept the EMA’s contentions, proceed on the basis of an assumption that the EMA’s contentions are right.
123. Furthermore, it is important to note that although the questions regarding the EMA’s capacity require determination of some legal questions, there is in relation to at least two of these questions (the question regarding the loss of the benefit of Protocol 7<sup>164</sup> and the question of the loss of the CJEU’s jurisdiction in relation to non-contractual claims against the EMA<sup>165</sup>), an important question of fact. Even assuming the EMA is right on the law, are these legal effects caused by the withdrawal of the United Kingdom from the European Union so critical as to frustrate the Lease? That question is one that I consider later on in this judgment: what matters for the present is that this question, in my judgment, is not a matter that could be referred to the CJEU on a preliminary reference. It plainly falls outwith Article 267 TFEU.
124. The parties were entirely in dispute as to the difficulty of the European Union law questions going to the EMA’s capacity. Perhaps unsurprisingly, the EMA contended that they were very difficult questions that could only be determined by the CJEU; whereas CW contended (for I asked Lord Anderson, QC, whether he went this far) that the answers to these questions were *acte clair* such that no preliminary reference was required for this reason alone.
125. The *acte clair* doctrine has received the (grudging<sup>166</sup>) acceptance of the CJEU in Case 281/81, *CIFIT*,<sup>167</sup> as well as the (somewhat more enthusiastic<sup>168</sup>) acceptance of national courts across the Union. I shall not consider whether the European Union law questions relating to the EMA’s capacity are *acte clair* or not. My reasons for refusing to make a preliminary reference are those in paragraphs 120-123 above. Although, as a court of first instance, I am not obliged to make a reference, but can simply decline to do so on

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<sup>163</sup> See paragraph 115 above.

<sup>164</sup> See paragraph 96(3)(a) above.

<sup>165</sup> See paragraph 96(3)(b) above.

<sup>166</sup> As Hartley notes (Hartley, *The Foundations of European Union Law*, 8<sup>th</sup> ed (2014) (“Hartley”) at 306), “this approval was subject to so many conditions that one might think the [CJEU] was really trying to kill the idea”.

<sup>167</sup> [1982] ECR 3415.

<sup>168</sup> *Hartley*, p.306.

the ground that the provision is one that I can resolve with “complete confidence”,<sup>169</sup> that is not the reason why I decline to make a preliminary reference. I shall, however, express my view in relation to each of the Union law questions as I consider them.

(c) *Capacity and vires in European Union law*

126. Article 263 TFEU deals with actions for annulment and identifies four grounds for the annulment of an act of the European Union:<sup>170</sup> “lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers”. By Article 264 TFEU, if the action for annulment is well founded, the CJEU shall declare the act concerned to be void, although the CJEU may (exceptionally) limit the effects of such a finding.

127. “Lack of competence” refers to the legal power to adopt an act. The principle of the Treaties is that institutions have no power to adopt an act unless they are authorised to do so by a Treaty provision. The European Union has no “inherent jurisdiction” conferring on it additional legislative or executive power.<sup>171</sup> This principle is clearly stated in Article 5(2) TEU, which provides:

“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

128. The commentary in *European Union Treaties* in relation to Article 5(2) TEU says this:<sup>172</sup>

“According to the principle of conferral, the Union may act only within the limits of the competences conferred upon it and only to attain the objectives set out therein (para. 2). Thereby, the Treaty explicitly makes clear that the Union possesses only competences which are limited. The Union may realise only those tasks and powers which have been conferred on it and – notwithstanding peripheral effects of such activities – may not intrude on the competences which have remained in the Member States. Thus the Union did not have the competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms until it was empowered correspondingly by the new para. 2 of Article 6 TEU. Union competence was also held to be lacking for concluding an agreement on air transport with the USA, which contained rules on data processing operations concerning public security.

The scope of the conferral must be assessed according to the objective of the relevant provisions in connection with the principle of *effet utile*. Thus the basis for the exercise of the powers conferred on the EU in the area of sea transport in Article 100 para. 2 TFEU, which reads that the Union may “lay down appropriate provisions”, may allow an interpretation that, if the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combatting serious offences, the Union legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective. In contrast, it is only the Member States who possess general legislative powers for promulgating criminal laws.

The principle of conferral does not exclude recourse to “implied powers” and the rule on *effet utile* is a principle well-known in public international law on treaties. It is complemented by the

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<sup>169</sup> Again, the test of Sir Thomas Bingham MR in *Else*: see paragraph 115 above.

<sup>170</sup> These are comprehensively defined in the first paragraph of Article 263 TFEU.

<sup>171</sup> *Hartley*, p.419.

<sup>172</sup> *European Union Treaties*, p.36 (commentary on Article 5 TEU, paragraphs 3-5).

principle of conferral of institutional competences and the procedure to be followed by Union institutions (Article 7 para. 2 TEU).”

129. Although the principle of conferral does not exclude recourse to implied powers, a power cannot be implied where it overrides express contrary provisions,<sup>173</sup> and should only be implied where “necessary to ensure the practical effect of the provisions of the Treaty or the basis regulation at issue”.<sup>174</sup>

#### **(4) Issues regarding the EMA’s legal capacity to act in relation to the Lease**

##### **(a) Introduction**

130. The nature of the EMA was described in Section C(3) above. It is now necessary to consider the effect of the United Kingdom’s withdrawal from the European Union on the EMA’s capacity. It is necessary to do this separately by reference to the two scenarios – Scenario 1 and Scenario 3 – that I have identified.

131. In the case of each Scenario, my approach will be similar:

- (1) First, I consider the effect of the United Kingdom’s withdrawal from the European Union on the EMA’s Protocol 7 protections.
- (2) Secondly, I consider the effect of the United Kingdom’s withdrawal from the European Union on the EMA’s protection under Article 72 of the 2004 Regulation.
- (3) Thirdly, I consider whether the EMA is capable of holding and/or dealing with immovable property outside the territory of the European Union.
- (4) Fourthly, I consider whether, as a matter of law, the EMA is obliged to have its headquarters within the territory of the European Union.
- (5) Fifthly, I consider whether – in light of my conclusions on the first four points – the EMA’s contention that it would, post withdrawal of the United Kingdom from the European Union, be *ultra vires* the EMA to pay rent pursuant to the Lease.

##### **(b) Scenario 1**

###### **(i) Effect on the EMA’s Protocol 7 protections**

132. Protocol 7 is, as I found, directly effective in the United Kingdom, both by virtue of its own provisions and by virtue of Article 74 of the 2004 Regulation.<sup>175</sup> Both provisions, being provisions operative immediately before exit day would transfer into English domestic law according to the provisions of the 2018 Act.<sup>176</sup>

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<sup>173</sup> Case T-143/06, *MTZ Polyfilms Ltd v. Council of the European Union*, [2009] ECR II-4135 at [50]; Joined Cases C-14/09 and C-295/06, *Parliament v. Commission* [2008] ECR I-1649 at [52].

<sup>174</sup> Case T-143/06, *MTZ Polyfilms Ltd v. Council of the European Union*, [2009] ECR II-4135 at [47]; Joined Cases C-14/09 and C-295/06, *Parliament v. Commission* [2008] ECR I-1649 at [52].

<sup>175</sup> See paragraphs 81-83 above.

<sup>176</sup> See paragraph 106(1)(a) above.

133. Thus, assuming<sup>177</sup> the EMA remained in the United Kingdom post the United Kingdom's withdrawal from the European Union, some form of Protocol 7 protections would remain in place. As to this:

- (1) The EMA contended that Protocol 7 would, in fact, not serve to protect the EMA in this way. The EMA noted that the recitals in Protocol 7 referred to the European Union enjoying “in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks”.<sup>178</sup> Thus, *pace* the EMA, whilst section 3 of the 2018 Act (in the case of the 2004 Regulation) and section 4 of the 2018 Act (in the case of the Protocol) would cause Protocol 7 to be incorporated into United Kingdom law post withdrawal, because of the limiting reference to the territories of the Member States, Protocol 7 – even as retained EU law incorporated into English law pursuant to the 2018 Act – would not apply to the United Kingdom, the United Kingdom being a third country.
- (2) I reject this contention. The 2018 Act incorporates operative European Union law into the law of the United Kingdom. It does not purport to cause Protocol 7 (and other Union law provisions referring to Member States) to apply extra-territorially to those nations remaining Member States. The whole point of section 3 is to incorporate portions of European Union law that previously applied to the United Kingdom by virtue of its status as a Member State into United Kingdom law even though the United Kingdom was now a third country. There is, with great respect to the EMA, no other way in which these provisions can be read. The EMA's reading gives rise to manifest absurdity in that it applies European Union law in territories not part of the United Kingdom where it already applies by virtue of the Treaties and fails to apply Union law in the territory of the United Kingdom where, by virtue of the United Kingdom's withdrawal, such law would not otherwise apply. It is also a reading of the 2018 Act that flouts the presumption that Acts of Parliament are not intended to have extra-territorial effect.<sup>179</sup>
- (3) That said, the EMA's protection under Protocol 7 would undoubtedly be diminished:
  - (a) In the first place, the operation of Protocol 7 within the United Kingdom would be subject to change at the behest of the United Kingdom authorities and not the European Union. I have described the manner in which Union law incorporated into the United Kingdom's legal system could diverge from European Union law.<sup>180</sup> Although I have no doubt that – on the hypothesis that the EMA remained in London – the United Kingdom authorities would ensure that the EMA's Protocol 7 protections would remain strong, the fact remains that the control of these protections would have shifted away from the European Union and towards the United Kingdom. I accept Mr Wathion's evidence as to the significance to the EMA of this change.<sup>181</sup>

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<sup>177</sup> I consider the appropriateness of that assumption below.

<sup>178</sup> Emphasis supplied.

<sup>179</sup> As to this, see Bailey & Norbury, *Bennion on Statutory Interpretation*, 7<sup>th</sup> ed (2017) (“*Bennion*”) at [4.6] and [4.8].

<sup>180</sup> See paragraph 106(1)(c) above.

<sup>181</sup> See paragraph 32 of Wathion 1.

- (b) Secondly, and relatedly, it is entirely unclear how the waiver or lifting of Protocol 7 protections could work after the United Kingdom's withdrawal from the European Union. The process whereby such protections are presently waived or lifted was described in paragraph 85 above. Whilst, no doubt, the EMA could continue to waive its rights under the Protocol, it seems to me most unlikely that the present regime of CJEU adjudication where there was no waiver could survive the United Kingdom's withdrawal from the European Union. Even if – on the application of a judgment creditor – the CJEU felt it appropriate to consider the matter,<sup>182</sup> I have little doubt – given the provisions of the 2018 Act – that any such ruling would be ineffective in the United Kingdom by virtue of section 6(1) of the 2018 Act. This, as it seems to me, might well be one area where the section 8 powers in the 2018 Act might well be deployed in order to locate the “lifting” jurisdiction presently exercised by the CJEU onto institutions within the United Kingdom. This is, inevitably, speculation, given that the EMA is not staying in the United Kingdom, but it only goes to reinforce the point made in the foregoing sub-sub-paragraph.

134. I conclude that – in the eyes of the EMA – one effect of the withdrawal of the United Kingdom from the European Union would be to substantially degrade the EMA's Protocol 7 protections were the EMA to remain in London. I do not accept that they would necessarily vanish altogether, but certainly (as Mr Wathion noted) the provisions of Protocol 7 “could be removed or adversely amended at any time...either by the UK Parliament or Government, without reference to the EU authorities...In other words, Protocol 7 would in any view cease to function as an automatically overriding set of guarantees. This is, however, the critical aspect of Protocol 7 from the EMA's perspective. The EMA does not control local, UK, law. Protocol 7 is only an effective system of guarantees if it automatically overrides local law, as it does presently through the supremacy of EU law.”<sup>183</sup>
135. CW contended that the effect of the EMA's relocation to Amsterdam prior to the United Kingdom's withdrawal from the European Union meant that the EMA's Protocol 7 rights would continue to protect it seamlessly. That is true but entirely irrelevant. The EMA's point was that if the EMA stayed with its headquarters in London, certain very damaging things would happen in relation to its legal status and capacities. That, according to the EMA, is precisely why the decision to relocate was made and precisely why the Lease is frustrated. I will come to determine these issues in due course: but the one thing that cannot be done is to pretend an alleged frustrating event has not occurred by relying upon the EMA's very efforts to avoid the damaging consequences of that alleged frustrating event.<sup>184</sup>

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<sup>182</sup> There would be an extremely difficult question of jurisdiction: would the CJEU have jurisdiction regarding a Protocol 7 protection not conferred by European Union law but conferred by United Kingdom law?

<sup>183</sup> Paragraph 32.1 of Wathion 1. Of course, I accept that the European Union and the United Kingdom could, bilaterally, negotiate a treaty providing the EMA with suitable protections, as has been done – in a more limited way – in the Withdrawal Agreement. This, however, as it seems to me, is nothing to the point.

<sup>184</sup> CW's point appeared to be that actions by a party to a contract seeking to minimise the adverse consequences of a prospective frustrating rendered the prospective frustrating event not a case of frustration at all. I reject that argument, which is inconsistent with the analysis in *Treitel*, ch 9.



(ii) *Potential loss of the EMA's protection under Article 72 of the 2004 Regulation*

136. Article 72 of the 2004 Regulation was set out in paragraph 77 above. Article 72(2) provides that in cases of non-contractual liability, where the EMA is the defendant, the CJEU shall have jurisdiction.

137. The 2004 Regulation is directly effective and would be operative immediately before exit day. It would, thus, fall to be incorporated into United Kingdom law pursuant to section 3 of the 2018 Act.

138. Article 72 is another provision liable to be altered pursuant to section 8 of the 2018 Act. It is easy to see why if one hypothesises (i) that the EMA remained in London and (ii) after the withdrawal of the United Kingdom from the European Union, the EMA committed a tortious act, which claimant C then sought to vindicate against the EMA:<sup>185</sup>

(1) C could seek to vindicate his claim before the CJEU. As in the case of Protocol 7 applications,<sup>186</sup> it seems to me questionable whether the CJEU would consider that it had jurisdiction. However, even if it did, and determined the matter, this judgment would not be recognised in the United Kingdom by reason of section 6(1) of the 2018 Act.

(2) More to the point, C would be much more likely to advance his or her claim in the courts of the United Kingdom. Suppose C claimed in England? It seems to me most unlikely that an English court would decline jurisdiction given the provisions of the Withdrawal Act 2018.

139. I conclude that one effect of the United Kingdom's withdrawal from the European Union would be to eliminate or substantially degrade the EMA's position under Article 72 of the 2004 Regulation.

(iii) *Capacity to hold or deal with immovable property outside the territory of the European Union*

140. The question, I stress, is one of capacity or *vires*. It is not whether the EMA should, in a given case, acquire, hold or deal with immovable property, but whether it has the theoretical capacity to do so. It may be that such capacity could never or almost never be used properly by the EMA; it may be that the EMA would never want to use such capacity: but that is not the question.

141. The relevant provision regarding the EMA's capacity is Article 71 of the 2004 Regulation, set out in paragraph 65 above. Article 71 comprises three sentences, which I have numbered for convenience:

“[1] The [EMA] shall have legal personality. [2] In all Member States it shall enjoy the most extensive legal capacity accorded to legal persons under their laws. [3] It may in particular acquire or dispose of moveable and immovable property and may be a party to legal proceedings.”

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<sup>185</sup> It matters not what the claim might be. Mr de la Mare, QC, suggested a number of examples, such as a claim by a visitor under the Occupiers' Liability Act 1957.

<sup>186</sup> See paragraph 133(3)(b) above at footnote 182.

142. As was noted in paragraph 67 above, Article 71 actually conflates or draws upon two different Treaty provisions: sentence [1] copies Article 47 TEU,<sup>187</sup> whereas sentences [2] and [3] replicate parts of Article 335 TFEU.<sup>188</sup>
143. It seems to me clear that the three sentences are to be read disjunctively. Sentence [1] deals with personality, an altogether different and anterior question to capacity. Sentence [2] obliges Member States to ensure that the EMA enjoys the most extensive legal capacity conferred on legal persons in each of the jurisdictions of the Member States. The inevitable corollary of that obligation is that the EMA has the capacity to exercise (obviously, in an appropriate case) this extensive legal capacity.
144. That leaves sentence [3]. Sentence [3] could be read as simply having been inserted for the avoidance of doubt: i.e. notwithstanding the inevitable corollary of sentence [2], that the EMA has “the most extensive legal capacity”, sentence [3] is making clear that in any event (“in particular”) the EMA may in all Member States (but only there) acquire or dispose of movable and immovable property and may in all Member States (but only there) be a party to legal proceedings.
145. That was the contention of the EMA: that Article 71 was in essence “inward looking” and conferred no powers on the EMA outside the territory of the European Union. I am afraid I regard this construction as entirely far-fetched and I reject it:
- (1) The point can most easily be tested in relation to capacity regarding legal proceedings. Is it being suggested that the EMA cannot enter into a contract containing – let us say – an exclusive jurisdiction and choice of law clause in favour of a third country regarding the provision of (e.g.) moveable property or software?<sup>189</sup> In the event of a breach of contract, is it being suggested that the EMA cannot sue in this third country? Bear in mind that – by Article 72 of the 2004 Regulation – the “contractual liability of the [EMA] shall be governed by the law applicable to the contract in question”. It would be remarkable if the EMA were unable to commence litigation (for e.g. breach of contract) in a foreign jurisdiction that had exclusive jurisdiction over the dispute.
  - (2) Article 335 TFEU – or, more particularly, its predecessor Article 282 TEC – has been considered by the CJEU on a couple of occasions:
    - (a) In Case C-131/03 P, *Reynolds v. Commission*,<sup>190</sup> it was contended that it was *ultra vires* the Commission to commence legal proceedings “outside the Community legal order”.<sup>191</sup> Specifically, the Commission had adopted a civil action, in its name, against certain American cigarette manufacturers in the United States District Court, Eastern District of New York, a federal court of the United States of America. The CJEU held:<sup>192</sup>

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<sup>187</sup> See paragraph 64 above.

<sup>188</sup> See paragraph 66 above.

<sup>189</sup> I shall assume a third country party to the Hague Convention on Choice of Court Agreements 2005.

<sup>190</sup> [2006] ECR I-7823.

<sup>191</sup> At [86].

<sup>192</sup> At [94].

“It is sufficient to point out in that regard that Article 211 TEC<sup>193</sup> provides that the Commission is to ensure that the provisions of the Treaty and the measures taken pursuant thereto are applied, that under Article 281 TEC<sup>194</sup> the Community has legal personality and that Article 282 TEC,<sup>195</sup> although restricted to Member States on its wording, is the expression of a general principle and states that the Community has legal capacity and is, to that end, to be represented by the Commission.”

- (b) In Case C-73/14, *Council of European Union v. European Commission*,<sup>196</sup> the same point arose in relation to the Commission’s participation before an international court as opposed to the court of a third country. The CJEU stated:<sup>197</sup>

“58. ...it is clear from the case law of the Court that Article 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the EU has legal capacity and is to be represented, to that end, by the Commission...

59. It follows that Article 335 TFEU provided a basis for the Commission to represent the EU before ITLOS<sup>198</sup> in Case No. 21.

60. Nevertheless, as the Council has emphasised, supported by the intervening Member States, the applicability of Article 335 TFEU in the present case does not exhaustively resolve the issue, raised by the first plea in law, of whether the principle of conferral of powers laid down in Article 13(2) TEU required that the content of the written statement presented to ITLOS in Case No. 21 by the Commission, on behalf of the EU, receive the prior approval of the Council.

61. In that respect, it must be recalled that, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the EU, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions...”

- (3) It seems clear, therefore, that so far as Article 335 TFEU is concerned, the power to be a party to legal proceedings includes a capacity to act extra-territorially, and it is difficult to see how the capacity to acquire or dispose of moveable and immovable property can be differentiated, both in terms of the wording used in Article 335 and in terms of a purposive construction.

- (4) The same holds true of Article 71 of the 2004 Regulation. Indeed, but fully appreciating that a close textual analysis is not the CJEU’s approach, the use of a full stop between sentence [2] and sentence [3], rather than the semi-colon in Article 335, makes the position (to an English lawyer) even stronger. That said,

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<sup>193</sup> Now repealed.

<sup>194</sup> Now repealed.

<sup>195</sup> Now Article 335 TFEU.

<sup>196</sup> [2016] 2 CMLR 248.

<sup>197</sup> At [58]ff.

<sup>198</sup> The International Tribunal for the Law of the Sea.

appreciating the purposive approach to construction of the CJEU, I place no weight on this point: I do, however, consider that the decisions in *Reynolds* and *Council of European Union* provide a clear statement of the width of the capacity in terms of the extra-territorial capacity to acquire or dispose of moveable and immovable property furnished by Article 335 TFEU and Article 71 of the 2004 Regulation. I consider that the case-law answers the question with a high degree of certainty.

- (5) I appreciate that the Treaties create a clear link between capacity (Article 71 of the 2004 Regulation; Article 335 TFEU) and competences conferred (e.g. Articles 57ff of the 2004 Regulation; Article 5 TEU). I also appreciate, and accept, that the competences of the EMA are very “inward looking” to within and not outside the Member States of the European Union.<sup>199</sup> If no competence of the EMA requires the conferral of a capacity to act, then that is an argument for suggesting that the capacity does not exist. The EMA made the point that its functions were strictly defined in Articles 57ff of the 2004 Regulation, and precluded:
- (a) Holding immovable property in a third country; and
  - (b) Acting as a commercial landlord wherever the immovable property was located, whether within a Member State or in a third country.
- (6) I shall consider, in the next section, whether the European Union has the power to direct that an agency, such as the EMA, should establish its headquarters outside the territory of the Member States of the European Union. (It will be recalled that this is not a power exercisable by the EMA: the EMA is told where to establish itself, and then – pursuant to that instruction – takes steps to do so.<sup>200</sup>) However, in my judgment, whatever the answer to this question, the EMA must have the capacity to dispose of immovable property that it already holds in a third country. It matters not why that immovable property was originally held: in this case, the EMA (and the European Union) obviously intended to and did establish the EMA in a Member State, the United Kingdom. The withdrawal of the United Kingdom from the European Union may, or may not, render it impossible for the EMA to be located in a third country. Whatever the position regarding the establishment of headquarters in a third country – which, as I say, I consider next – I do not consider it arguable, given the express words in Article 71 (“dispose of...immovable property”) and the approach in *Reynolds* and *Council of European Union*, for the EMA to have no capacity to act in relation to immovable property it holds in a third country, at least so far as the “disposal” of that immovable property is concerned.
- (7) The same is true of the EMA’s capacity to act as a commercial landlord. I am quite prepared to accept that the EMA lacks the capacity to venture into an area of business unrelated to its functions. I am also prepared to accept that acting as a commercial landlord would be unrelated to the EMA’s functions, and *ultra vires* the EMA. But that is not this case. The EMA entered into the Lease having – as the EMA itself accepts – the capacity to do so (because, I accept, the Premises were to be the EMA’s headquarters for the next 25 years). The Lease – as I have described in paragraph 92(4) above and as I consider further in paragraphs 239 to 243 below – envisaged the EMA leaving the Premises altogether mid-term, thus obliging it either to leave the Premises empty or (behaving like a commercial landlord, *pace*

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<sup>199</sup> See Section C(3)(d) above.

<sup>200</sup> See Section C(3)(h) above.

the EMA) assigning or sub-letting the Premises according to the provisions of the Lease. The consequence of the EMA's contention is that were the EMA voluntarily to choose to leave the Premises, it would (by that act) lose the capacity to dispose of the Premises by assignment or sub-letting according to the terms of the Lease. That proposition only has to be stated to be rejected.

- (8) I appreciate that the disposal of immovable property, in particular, may be difficult and costly. It may not – depending on market circumstances – be possible. In my judgment, the EMA has the capacity not merely to dispose of immovable property if that involves the incurring of no costs, but also where disposal entails the incurring of costs and/or the performing functions unrelated to those laid down in the Regulations constituting it. Should it be the case that the EMA acquired property that it cannot dispose of, then in my judgment it has the capacity to hold on to that property. The reason I say this is because the costs or otherwise of disposal of such property are caused by and arise out of the nature of the property held by the EMA and are not related to the EMA's capacity. If, *ex hypothesi*, the EMA has properly acquired what is or becomes immovable property in a third country (or which, for some other reason it no longer requires), it has the power or capacity to divest itself according to the nature of the property it holds.

- (iv) *Capacity of the European Union to designate the EMA's headquarters outside the territory of the Member States of the European Union*

#### Introduction

146. The EMA contended that both as a matter of “local” public international law and as a matter of European Union law it was not legally possible for the EMA to have its headquarters outside the territory of the Member States of the European Union.
147. At the outset, it must be noted that it is extremely unlikely that the European Union would ever sanction a body like the EMA to be located outside the territory of the Member States comprising the European Union. There are at least three good reasons for this:
- (1) First, there is no good reason for locating the EMA extra-territorially. As I have described, the EMA's functions are essentially internal to the European Union, and it is difficult to discern a reason – and certainly, none was put forward by CW – why it might be sensible or pragmatic for the EMA to be so located.
  - (2) Secondly, there are extremely good prudential reasons not to locate the EMA extra-territorially. Two such reasons were identified by the EMA in argument: the loss of Protocol 7 protections (even if broadly equivalent protections could be negotiated with the host third country, they would not approach the level of protection conferred by Protocol 7, as I have found);<sup>201</sup> and the loss, or likely loss, of the exclusive jurisdiction of the CJEU in relation to non-contractual claims.<sup>202</sup>
  - (3) Thirdly, there are strong political reasons for locating European Union agencies within the European Union. No doubt the presence of such an agency within the jurisdiction of a Member State confers a certain prestige on that Member State;

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<sup>201</sup> See Section D(4)(b)(i) above.

<sup>202</sup> See Section D(4)(b)(ii) above.

undoubtedly, whilst there may be costs, there is considerable and sustained economic benefit. The EMA, as I have described,<sup>203</sup> attracts many thousands of visitors to the United Kingdom and London in general, and Canary Wharf in particular. These visitors will spend money, to the benefit of the host country. Such advantages are not lightly to be overlooked, and I consider that the political imperatives for locating a European Union agency within the territory of a Member State to be immense.

148. All of these points indicate the location of the EMA (and other European Union agencies) in a Member State and explain the re-location of the EMA from London to Amsterdam. But they do not, in themselves, amount to a legal imperative to this effect: and that is what the EMA was contending for. The question I must consider is whether such a legal imperative exists.

A rule of public international law

149. In order to establish a rule of customary public international law, two things must be shown:

- (1) First, the existence of a consistent State practice or custom.
- (2) Secondly, *opinio iuris* – that is, a sense that the state practice or custom is based upon a sense that it – the practice or custom – is binding.

150. The International Court of Justice expressed these requirements in the following way in the *North Sea Continental Shelf Cases*:<sup>204</sup>

“...Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked: – and should, moreover, have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

151. I was provided with very little evidence of State practice, apart from the practice of the European Union. So far as this practice is concerned, I accept that it uniformly points to the location of European Union agencies within the territories of Member States of the European Union. I was shown regulations regarding many European Union agencies, and I accept that – without exception<sup>205</sup> – such agencies have been located within the territory of the Member States.

152. So far as other State practice was concerned, CW referred me to the case of the United Nations Office at Geneva. This, according to its website, is the biggest duty station of the UN outside the UN’s headquarters in New York. The UN’s Geneva Office has privileges accorded to it (similar to those of Protocol 7) by an agreement between the Swiss Federal

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<sup>203</sup> See paragraph 58 above at footnote 89.

<sup>204</sup> ICJ Rep 1969 p3 at [74].

<sup>205</sup> The only possible exception – and, in a sense, it is an exception that proves the rule – is the European Union External Action Service (the “EEAS”). The EEAS is headquartered in Brussels but has diplomatic missions outside the territories of the Member States of the European Union. That, it might be said, is self-evidently necessary in the case of an External Action Service.

Council and the Secretary-General of the UN made on 19 April 1946. Yet Switzerland did not become a Member State of the UN until 10 September 2002. Thus, for some 56 years, this office existed – with appropriate protections conferred by a bilateral treaty – outside the territories of the UN Member States.

153. I do not consider that there is evidence of State practice sufficient to support a general rule of customary international law that the headquarters of agencies such as the United Nations and the European Union must be located within the territory of a State party to the treaty constituting that international organisation. Certainly, the evidence of the United Nations Office at Geneva gainsays the existence of general State practice to this effect, although I recognise that this office was not actually the headquarters of the UN.
154. No doubt that is why the EMA contended for a local rule of customary public international law. Effectively, the EMA was contenting for a customary rule, specific to the European Union, but not based on the Treaties. I am unsure as to how far there can be a rule of local public international law that is based upon the practice of a single actor, namely the European Union, in such circumstances. However, I am prepared to assume, for the sake of argument, that it is possible to found local customary international law on such practice or custom.
155. But I have seen no evidence of *opinio iuris*, and that is fatal to the EMA’s contentions in this regard. As I have described,<sup>206</sup> there are a number of very good reasons why an agency of the European Union should – as a matter of policy and prudence – be located within the territory of a Member State. Such reasons are *contra*-indicators for the existence of State practice done pursuant to *opinio iuris*. These reasons do not suggest any sense that a rule of law or legal obligation is involved. Rather, they suggest that location of headquarters is a matter of polity. I consider that I have been shown no evidence in support of the existence of a rule of public international law (local or otherwise) that the headquarters of international agencies be located within the territory of a State party to the treaty constituting that international organisation.

#### A rule of European Union law

156. I have already considered the capacities conferred by the Treaties on the European Union and the EMA in relation to immovable property. I have held that these are broad enough to embrace the capacity to deal with immovable property outside the territory of the European Union.<sup>207</sup> As I have noted, the EMA actually has no say in where it is headquartered. By Article 341 TFEU – which was set out in paragraph 87 above – the EMA’s headquarters (or seat) will be where the institutions of the Union determine “by common accord of the governments of the Member States”. This is, therefore, an inter-Governmental decision. The EMA’s case requires me to read into Article 341 TFEU an implied limitation on the power of the governments of the Member States to select by common accord headquarters outside the territories of the Member States of the European Union. I do not consider that such an implied limitation can appropriately be drawn. Granted, there are strong political reasons for locating the seat of an agency within the territory of the European Union. But if – contrary to such reasons – the “common accord” were to be to locate an institution outside the territory of the European Union, then I consider that would be permitted under Article 341 TFEU.

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<sup>206</sup> See paragraph 147 above.

<sup>207</sup> See Section D(4)(b)(iii) above.

157. Moreover, the Withdrawal Agreement is – so far as the European Union is concerned – made pursuant to Article 50(2) TEU. This provides that the agreement “shall be negotiated in accordance with [Article 218(3) TFEU].” Article 218(3) TFEU provides:

“The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending upon the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.”

158. Article 218(3) thus says nothing about the competences of the European Union in negotiating any withdrawal agreement. Yet the Withdrawal Agreement makes provision for the continued operation of European Union agencies (including the EMA) in a third country. Thus:

- (1) There can be no doubt that the Withdrawal Agreement is between the European Union (as one party) and the United Kingdom (as a third country).

- (2) Yet Article 119 of the Withdrawal Agreement provides as follows:

“The Headquarters Agreement between the United Kingdom and the European Banking Authority of 8 May 2012, the Exchange of Letters concerning the Application in the United Kingdom of the Protocol on the Privileges and Immunities of the European Communities to the European Agency for the Evaluation of Medicinal Products of 24 June 1996, and the Agreement on the Hosting of the Galileo Security Monitoring Centre of 17 July 2013 shall apply, respectively, to the European Banking Authority, the European Medicines Agency and the Galileo Monitoring Centre, until their relocation to a Member State is completed. The date of notification by the Union of the completion date of the relocation shall constitute the termination date of those agreements.”

- (3) Of course, I accept that Article 119 is concerned with the re-location of (amongst other agencies) the EMA’s headquarters. But that is exactly the point. It is clear that the European Union considers itself capable of dealing with the activities of its agencies in the territory of a third country, including the headquartering of such agencies. There is no suggestion that – on withdrawal of a Member State from the European Union – the shutters come down on the European Union’s ability to act in relation to property that has now become property situate in a third country. It seems to me that this confirms the approach already suggested by *Reynolds* and *European Council* that the capacity to act in such circumstances – including the capacity to operate headquarters – does indeed exist. I accept, of course, that these competencies are likely to be used to wind-down the activities and headquarters of such agencies: but that is because of the compelling, non-legal, reasons for maintaining such headquarters within the territories of the Member States of the European Union.<sup>208</sup>

- (v) *The obligation to pay rent*

159. From the foregoing, it follows that it would not be *ultra vires* the EMA for it to pay rent pursuant to the Lease after the withdrawal of the United Kingdom from the European Union.

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<sup>208</sup> See paragraph 147 above.



(vi) *Summary of conclusions*

160. I conclude that the consequences of the United Kingdom's withdrawal from the European Union in the context of Scenario 1 are as follows:

- (1) The EMA's Protocol 7 protections and its position under Article 72 of the 2004 Regulation are materially and adversely affected by the withdrawal of the United Kingdom from the European Union.
- (2) However, I am completely confident that the EMA's capacity to deal with immovable property in what has become a third country remains and that the European Union itself has the capacity to maintain the headquarters of one (or more) of its agencies in a third country. I entirely accept that there are many and good reasons why the European Union would choose not to do so, but these reasons have nothing to do with the capacity of either the EMA or the European Union. In other words, the capacity of the EMA to deal with immovable property in what has become a third country and the capacity of the European Union to maintain the headquarters of one (or more) of its agencies in a third country is most likely to be deployed in the winding down of such a third country presence.
- (3) It follows that I reject the contention, also with complete confidence, that the capacity of the EMA to continue performing its obligations under the Lease post the United Kingdom's withdrawal from the European Union does not continue.

(c) *Scenario 3*

161. Scenario 3 assumes that the Withdrawal Agreement is ratified by the United Kingdom Parliament and enacted into United Kingdom municipal law. Plainly, Scenario 3 cannot affect my conclusions regarding the competencies or powers of the European Union and the EMA as I have found them to exist under the Treaties.

162. The Withdrawal Agreement does, however, confirm the correctness of these conclusions.

163. The Withdrawal Agreement does not alter the fact that the United Kingdom becomes a third country and ceases to be a Member State of the European Union. Indeed, that is one of the Withdrawal Agreement's predicates. The Withdrawal Agreement does, however, cause the effects of the United Kingdom's withdrawal to be ameliorated pending the agreement of a permanent framework stating the relations between the United Kingdom and the European Union. As I have described,<sup>209</sup> the Withdrawal Agreement causes European Union law to persist in the United Kingdom in a way that precludes the sort of divergence that can occur in Scenario 1. Thus, the issues that I have identified as regards Protocol 7<sup>210</sup> and Article 72(2) of the 2004 Regulation<sup>211</sup> simply do not arise on the United Kingdom's withdrawal, but only arise (or only potentially arise, for all depends on the terms of the permanent framework agreement, yet to be agreed, stating the ongoing relations between the United Kingdom and the European Union) when the Withdrawal Agreement ceases to apply.

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<sup>209</sup> See paragraph 106(2) above.

<sup>210</sup> See Section D(4)(b)(i) above.

<sup>211</sup> See Section D(4)(b)(ii) above.

164. As I have described,<sup>212</sup> the Withdrawal Agreement makes provision for the orderly relocation of the EMA and of the other agencies located within the United Kingdom to Member States of the European Union. The Withdrawal Agreement anticipates that the EMA has the capacity to divest itself of immovable property it owns in the United Kingdom after the United Kingdom ceases to be a Member State. These capacities to act extraterritorially are not conferred by the Withdrawal Agreement on the European Union or the EMA: they arise out of the Treaties and are used in the Withdrawal Agreement.

165. It follows that:

- (1) In relation to the EMA's position under Protocol 7 and Article 72 of the 2004 Regulation, the EMA's position is unaffected by the United Kingdom's withdrawal from the European Union. The material adverse effect that arises in Scenario 1 does not arise in Scenario 3.
- (2) In relation to the capacities to act of the European Union and the EMA, the position under Scenario 3 is the same as it is under Scenario 1.

## **E. FRUSTRATION OF THE LEASE IN THE CASE OF SCENARIO 1**

### **(1) Introduction**

166. The EMA contends that the Lease is frustrated by reason of frustration of common purpose and frustration by supervening illegality. Given the conclusions I have reached in relation to the EMA's capacity, the EMA's case on supervening illegality must fail. I have concluded that the EMA has the capacity, post the withdrawal of the United Kingdom from the European Union, to continue to use and/or dispose of the Premises and that it continues to have the capacity to pay rent (and perform its other continuing obligations) under the Lease.

167. I propose to consider the question of frustration by supervening illegality on the assumption that the EMA's contentions regarding its capacity are correct, contrary to my conclusions in Section D above. The EMA contended that supervening illegality by itself caused the contract to be frustrated, without the need to look at other factors. Alternatively, if this contention was incorrect, then it was one factor – and, according to the EMA, a very significant one – to be taken into account in the multi-factorial approach described by Rix LJ *The Sea Angel*.<sup>213</sup>

168. I consider frustration by supervening illegality first; and then frustration of common purpose.

### **(2) Frustration by supervening illegality**

#### **(a) Approach**

169. As I have stated, I proceed on the basis that the EMA has made good its points on capacity.

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<sup>212</sup> See paragraph 158(2) above.

<sup>213</sup> See paragraph 39 above.

170. It was contended by CW that the only sort of illegality capable of frustrating a contract was illegality on “public policy” grounds as considered in *Patel v. Mirza*.<sup>214</sup> I reject that contention. *Chitty* makes clear that “[i]n *Patel v. Mirza* the court was addressing illegality in the narrower sense identified above, viz contracts that somehow involve a legal wrong. The decision seems not to affect the enforceability of contracts that are contrary to public policy for other reasons...”.<sup>215</sup> Supervening illegality means more than simply *Patel v. Mirza* type illegality: it can arise where the performance of a contract becomes unlawful for one party by reason of a supervening change in law or by reason of a supervening change of circumstance rendering that which was previously lawful unlawful.<sup>216</sup>
171. It was the EMA’s case that the withdrawal of the United Kingdom from the European Union had changed the legal landscape in which the EMA operated, so as to render actions on the part of the EMA, which had previously been lawful, unlawful. Thus, the EMA’s case was based more on a subsequent change of circumstance rendering what was previously lawful unlawful than on a supervening change in law: but I do not consider that the position would be any different if this were a case of a supervening change in law (which could be said to arise by way of the 2018 Regulation).
172. It is necessary to consider three matters:
- (1) First, the case-law regarding supervening illegality of this sort.
  - (2) Secondly, whether the fact that there are different applicable laws makes a difference: in short, does it matter if the illegality arises under English law or the law of some other law district.
  - (3) Thirdly, whether the effect of such supervening illegality is always to frustrate the contract.

I consider these three questions in turn below.

**(b) *Supervening illegality in the cases***

173. In *Baily v. De Crespigny*,<sup>217</sup> a lessor was not held liable for an alleged breach of his covenant that neither he nor his assigns would build on a piece of land adjoining the demised premises, when a railway company, under its powers derived from a subsequent statute, compulsorily acquired the land and erected a station on it. The lessor was sued for breaching his covenant not to build. Hannen J, delivering the judgment of the court (Cockburn CJ, Lush, Hannen and Hayes JJ) found that the lessor was not liable:
- (1) In the first instance, the court found that the lessor had been compelled to transfer title to the railway company. This was not a case of voluntary transfer. The railway

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<sup>214</sup> [2016] UKSC 42.

<sup>215</sup> *Chitty*, at [16-003]. *Chitty* goes on to describe the range of types of illegality considered in ch. 16 at [16-004].

<sup>216</sup> *Chitty* describes this as a “subsequent change in the law or in the legal position affecting a contract”, which neatly encapsulates the two alternatives.

<sup>217</sup> (1869) LR 4 QB 180

company was the assignee of the land, “not by the voluntary act of the former owner, but by compulsion of law.”<sup>218</sup>

- (2) The court concluded that the lessor was “discharged from his covenant by the subsequent act of parliament, which put it out of his power to perform it”.<sup>219</sup> The lessor was, in this case, discharged because of the maxim *lex non cogit ad impossibilia* (the law does not compel someone to do that which is impossible). The court then spent some time qualifying this statement, noting that “[t]here can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance”.<sup>220</sup>
- (3) In what makes this – perhaps – an early “frustration” case, the court’s real reason for concluding that the covenant was discharged was not simply because performance was impossible, but because the supervening event “is of such a character that it cannot reasonably be supposed to have been in the contemplation of the parties when the covenant was made, that they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.”<sup>221</sup> In this case the lessor could not foresee and guard against this possibility:<sup>222</sup>

“The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the act of such an assignee is to make an entirely new contract for the parties...”

- (4) The court went on to consider whether the statutory regime for compulsory purchase meant that the lessor “obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair compensation for the right to build”.<sup>223</sup> The court concluded – for reasons it is unnecessary to go into – that this was not a factor that obliged the lessor compensate the claimant,<sup>224</sup> but that instead the statutory scheme laid the loss on the claimant, such that neither the lessor nor the railway company were obliged to compensate the claimant for the breach of the covenant.<sup>225</sup>

174. It seems clear from some of the language that this can be seen as an early frustration case. However, there are two points that may be peculiar to supervening illegality and must be noted:

- (1) The court plainly – and rightly – had regard to the nature of the compulsory acquisition scheme. Had it been the case that the owner of the land had a right of

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<sup>218</sup> At 184-185.

<sup>219</sup> At 185.

<sup>220</sup> At 185.

<sup>221</sup> At 185.

<sup>222</sup> At 186.

<sup>223</sup> At 187-188.

<sup>224</sup> At 188.

<sup>225</sup> At 189.

action against the railway company – which was not in fact the case – the outcome would no doubt have been even more clear-cut in favour of the lessor. By contrast, had the scheme compensated the lessor on the basis that that compensation contained an element compensating the lessor for a future claim for breach of covenant, the outcome may well have been different.

- (2) Although it is clear law that frustration causes a contract to be discharged prospectively, it is the entire (unexecuted) contract (and not merely elements that are unexecuted) that are discharged. In this case, of course, the entirety of the lease was not discharged, merely the lessor's liability under this covenant. Self-evidently, discharge of the entire lease would have been inconsistent with the legislative scheme. For this reason, it might be said that this was not a case of frustration but a case where the supervening legal event rendered one particular covenant discharged, but the remaining obligations intact.

175. In *R v. Reilly*,<sup>226</sup> the appellant was appointed a member of a statutory board in Canada with a specified term of appointment and salary. During the tenure of the appointment, the office was abolished by the repeal of the statute establishing the board. By petition of right, the appellant claimed damages for breach of contract. Giving the opinion of the Privy Council, Lord Atkin held that the appellant was not entitled to damages. This had been the conclusion of the courts below, but they reached that conclusion on different grounds:

- (1) Lord Atkin did not base his conclusion on the reasoning of the courts below. These courts had concluded that there never had been a contract because the relationship between the holder of a public office and the Crown was not contractual<sup>227</sup> and (in a different instance) that there was a contract but subject to an implied term that the Crown could dismiss at pleasure.<sup>228</sup>
- (2) Rather, Lord Atkin based himself on impossibility:<sup>229</sup>

“But the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect, the contract is discharged. In the present case, the office held by the appellant was abolished by statute: thenceforward, it was illegal for the executive to continue him in office or pay him any salary: and impossible for him to exercise his office. The jurisdiction of the Federal Appeal Board was gone. The position, therefore, seems to be this. So far as the rights and obligations of the Crown and the holder of the office rested on statute, the office was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged. It is perhaps unnecessary to add that discharged means put an end to and does not mean broken. In the result, therefore, the appellant has failed to show a breach of contract on which to found damages.”

176. This case is – in terms of its facts – perhaps the closest to the EMA's case. It seems to have been the conclusion of Lord Atkin that the executive simply could not continue to pay the office holder as a matter of law, nor could the office holder continue to exercise

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<sup>226</sup> [1934] AC 176.

<sup>227</sup> At 179: Lord Atkin expressed no final opinion on this but did not base his conclusion on this theory.

<sup>228</sup> At 179: Lord Atkin rejected this.

<sup>229</sup> At 180.

the powers that had once been conferred on him, by reason of the subsequent repeal of the statute establishing the board.

(c) *The significance of the relevantly applicable law*

(i) *Introduction*

177. As I have described,<sup>230</sup> the capacity of a corporation to exercise specific rights is determined – at least in the first instance – by the constitution of the corporation, which is itself governed by the law of the place of incorporation.

178. CW contended – basing itself on *Dicey’s* Rule 175 – that the question of capacity is, in fact, governed by two laws. Rule 175 provides as follows:<sup>231</sup>

“(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.

(2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.”

179. It was common ground that English law governed the Lease and (if different) the transaction in question: that is plain, both from the express choice of law clause in the Lease,<sup>232</sup> from the fact that the Property and the Premises are located in England, and the fact that Article 71 of the 2004 Regulation makes clear that the EMA is bound by the applicable law so found.

180. CW contended that – according to English law, and specifically, by reason of the provisions of the Land Registration Act 2002 – even if the EMA lacked capacity to continue performance in relation to the Lease, that lack of capacity was made good by the provisions of the Land Registration Act 2002. In short, English law “trumped” the law of the place of incorporation and if the EMA had capacity under English law, it was irrelevant that it lacked capacity under European Union law.

181. I consider this point next. Thereafter, I consider the law that applies in relation to the consequences of a frustrating event.

(ii) *Capacity conferred by English law*

182. The EMA is – as was common ground – the registered proprietor of the Premises pursuant to the Lease. The relevant provisions of the Land Registration Act 2002 provide as follows:

“23 **Owner’s powers**

(1) Owner’s powers in relation to a registered estate consist of –

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<sup>230</sup> See Section D(3)(a) above.

<sup>231</sup> *Dicey*, at [30R-020]. Emphasis added.

<sup>232</sup> See paragraph 92(8) above.

- (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and
- (b) power to charge the estate at law with the payment of money.

...

#### 24 **Right to exercise owner's powers**

A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is –

- (a) the registered proprietor, or
- (b) entitled to be registered as the proprietor.

...

#### 26 **Protection of disponees**

- (1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.
- (2) Subsection (1) does not apply to a limitation –
  - (a) reflected by an entry in the register, or
  - (b) imposed by, or under, this Act.
- (3) This section has effect only for the purpose of preventing the title of a donee being questioned (and so does not affect the lawfulness of a disposition).

183. *Dicey* does not consider that the capacity of a foreign corporation could be enlarged by reference to the law governing the transaction. According to the commentary on Rule 175,<sup>233</sup> the capacity of a corporation is limited in a twofold way, first by reference to its constitution and secondly by reference to the law governing the transaction in question. Thus, by way of example, whilst the EMA might (and I speak entirely hypothetically) have the *vires* to act as an insurer according to its constitution, it would not have the capacity to enter into a contract of insurance where English law governed the transaction, because English law restricts who can act as an insurer.<sup>234</sup> Such a “double-lock” on capacity makes good sense, for it reflects the interests of both of the engaged laws in depriving a corporation of capacity.

184. CW contended that *Dicey* was right in suggesting that two laws were involved in determining a corporation's capacity, but wrong in suggesting that the operation of these two laws could operate only to confine the capacity of a corporation. CW contended that the law of the country governing the transaction was capable of overriding the law of the place of incorporation and capable of furnishing on that corporation a capacity it did not otherwise have. Specifically, it was suggested that the provisions of the Land Registration Act 2002, cited above, provided to the EMA the capacity to deal with the Premises (by,

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<sup>233</sup> *Dicey*, at [30-021] and [30-022].

<sup>234</sup> Chitty, [42-064].

for instance, disposing of them) irrespective of the limits to the capacity of the EMA imposed by European Union law.

185. I reject this contention:

(1) Whilst the rule in *Dicey* makes sense when read as a “double lock”, it produces inconsistent and strange results if one law can expand the capacity of a corporation in contradiction of the other applicable law. Why, it might be asked, should English law be able to confer on a foreign corporation a power which, according to its law of incorporation, that corporation simply did not have? In effect, CW’s contention re-writes *Dicey*’s Rule 175 in a way that – absent authority (and none was cited) – I find impossible to follow.

(2) What is more, CW’s contention proceeds upon a false basis. Even in the case of an English corporation acting *ultra vires* its constitution, the Land Registration Act 2002 does not confer capacity. Instead, it ensures that, where a person with “owner’s powers” acts so as to dispose of property registered in that person’s name, that disposition is valid and cannot be questioned, even if that person has no capacity to effect the disposition. Thus, the incapacity remains, but the disposition is effective notwithstanding the incapacity. That is apparent from the express wording of section 26(3) of the Land Registration Act 2002 and is implicit from the otherwise curious wording of sections 23 and 24. Sections 23 and 24 define owner’s powers and who should have them but say nothing about the capacity or *vires* to use them. Instead, section 26(1) provides that “a person’s right to exercise owner’s powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition”. Thus, the “limitation” remains, but simply does not affect the validity of the disposition.

(iii) *Applicable law to the question of frustration and the English law approach to supervening illegality under the law of a different law district*

186. Article 12 of the Rome I Regulation provides that the law applicable to a contract by virtue of the Regulation governs – amongst other things – the “performance” of the contract<sup>235</sup> and “the various ways of extinguishing obligations”.<sup>236</sup> As *Chitty* notes, it is possible that discharge by way of frustration may fall under either Article 12(1)(b) or Article 12(1)(d), but since the applicable law is the same, this does not matter.<sup>237</sup> The parties were agreed, in this case, that the applicable law was English law. Given the choice of law provision in the Lease and the situs of the Premises, this is clearly right.

187. This is a case where the supervening illegality arises under a foreign law that is not the applicable law. Generally speaking, the validity and enforceability of a contract governed by English law is not as a general rule affected by the question whether the contract would be regarded as valid or whether its performance would be lawful according to the law of another country.<sup>238</sup> The English law of frustration discounts illegality arising under a foreign law, save for certain limited exceptions. Thus, for instance, where a contract governed by English law is to be performed abroad, and that performance becomes illegal

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<sup>235</sup> Article 12(1)(b).

<sup>236</sup> Article 12(1)(d).

<sup>237</sup> *Chitty*, at [30-270].

<sup>238</sup> *Chitty*, at [23-027].



by the law of the place of performance, the contract may be frustrated by such supervening (foreign law) illegality. But none of the hitherto articulated exceptions regarding the relevance of illegality under a foreign law apply in this case.<sup>239</sup>

188. The question, then, is whether – assuming that the EMA is right as regards the points it makes on *vires* – these are relevant for the purpose of frustration by way of supervening illegality. The question is whether the English law of frustration, which has regard to questions of legality where the performance of the contract would be unlawful according to the law of the place of performance, should also have regard to the law of incorporation, at least where this affects the capacity of a party to continue to perform obligations under a transaction lawfully entered into by it.

189. In my judgment, the English law of frustration cannot be so extended:

(1) In the converse situation considered by the Court of Appeal in *Haugesund Kommune v. Depfa ACS Bank*,<sup>240</sup> a rigorous distinction was maintained between the question of capacity (governed, in that case, by Norwegian law) and the consequences of a lack of capacity (governed, in that case, by English law). Under Norwegian law, the communes lacked capacity; under English law, the consequence of that lack of capacity was that the contract was void; it mattered not that Norwegian law might, in certain circumstances, have ameliorated that outcome.<sup>241</sup> *Haugesund* suggests a clear line between the law relevant to the capacity to enter into a contract and the law relevant to determining the continued existence of that contract. If that is right, then whilst European Union law might have been relevant to the capacity of the EMA to enter into the Lease, it is not relevant to the question whether subsequent illegality has caused the Lease to be frustrated.

(2) This distinction is confirmed by *Goldman Sachs International v. Novo Banco SA*,<sup>242</sup> where Lord Sumption said this:

“The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party’s domicile, are normally disregarded: *Adams v. National Bank of Greece SA* [1961] AC 255. By way of exception, however, the assumption of contractual liabilities by another entity by way of universal succession may be recognised in England: *National Bank of Greece & Athens SA v. Metliss* [1958] AC 509.”

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<sup>239</sup> *Chitty*, at [23-027].

<sup>240</sup> [2010] EWCA Civ 579.

<sup>241</sup> At [28]-[29].

<sup>242</sup> [2018] UKSC 34 at [12]. This case was not cited to me. However, the two authorities referenced by Lord Sumption at [12] were. I regard Lord Sumption’s summary of the effect of these cases as both authoritative and extremely clearly put.

What this shows is a clear line being drawn between the capacity to enter into a transaction, and supervening events (including, I consider, in relation to capacity) affecting contractual liabilities already assumed. Whilst, in the former case, English law will have regard to the foreign law of incorporation or domicile, it does not in the latter case. That – as it seems to me – is the short answer to the EMA’s contentions regarding supervening incapacity.<sup>243</sup>

(d) *Capable of frustrating the lease?*

(i) *London and Northern Estates Company v. Schlesinger*

190. I have concluded that:

- (1) The EMA does not (contrary to its contentions) lack the *vires* to continue the performance of its obligations under the Lease;<sup>244</sup> and
- (2) Even if the EMA did lack the capacity to continue performance by reason of supervening illegality under European Union law, this is not a matter that the English law of frustration will have regard to.<sup>245</sup>

For these reasons, I conclude that this is not a case of frustration by supervening illegality. Assuming that I am wrong on both of these points, the question arises as to whether the supervening illegality relied upon by the EMA amounts to circumstances capable of frustrating the Lease.

191. In *London and Northern Estates Company v. Schlesinger*,<sup>246</sup> the plaintiffs had, before the outbreak of World War I, let to the defendant, an Austrian subject, a residential flat at Westcliffe-on-Sea for a term of three years. By the terms of the lease, the defendant was not to assign or underlet the premises without the lessor’s licence, such licence not to be unreasonably withheld. On war breaking out, the defendant became an alien enemy, and by an Order in Council, alien enemies were prohibited from residing within certain specified areas, including Westcliffe-on-Sea (although it was possible to obtain an exemption from this prohibition<sup>247</sup>). The plaintiffs sought to recover unpaid rent in respect of the flat; the defendant contended that the lease was frustrated.

192. On appeal, Avory and Lush JJ both rejected this contention, in two short judgments. According to Avory J:<sup>248</sup>

“It has been contended on his [the defendant’s] behalf...that the agreement between the two parties was that he should reside there; and that the Order has rendered the performance of that agreement impossible. I am content in answer to that argument to adopt the language of the Common Serjeant in giving judgment in this case; he says: “By the lease, the defendant had a right to the personal occupation of the premises, and the right to assign or sub-let them to another person in the absence of any reasonable ground for objection. This latter right was of value and

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<sup>243</sup> In other words, this is the sort of case contemplated by the court in *Baily v. De Crespigny* at paragraph 173(2) above.

<sup>244</sup> See Section D above.

<sup>245</sup> See paragraph 189 above.

<sup>246</sup> [1916] 1 KB 20.

<sup>247</sup> See the statement of facts at 21.

<sup>248</sup> At 23.

might even enable the defendant to let the premises at a profit to himself, and this right was not affected by the Aliens Restriction Order. That Order and the statute under which it was made did not avoid the lease, or make it illegal for an alien enemy to hold a lease of land in a prohibited area. This being so the lease is not extinguished, nor is the defendant's title as tenant under it put an end to although his personal enjoyment of the premises under it is prohibited". I do not think I can usefully add anything to that statement. I entirely agree with it, and will only say this, that the right to sub-let is only one of the mode of enjoyment of the premises which are left to the tenant in the event of his being prevented from personally residing there. It is clear that if he had desired to lend the flat to any of his friends there was nothing in the Order to prevent him from doing so."

193. Lush J agreed:<sup>249</sup>

"...here the consideration for which the appellant agreed to pay the rent was not confined to his right of personally residing in the flat; he obtained the right, subject to certain conditions, to assign or sub-let the premises to other persons. As the contract could be performed without his personal residence, the fact that his personal residence was prohibited by the Order did not make the performance of the contract impossible. But there is, I think, a further answer to the contention. It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion it continues vested in him still."

194. It may be doubted whether Lush J's second point – namely, that the defendant had acquired a property interest, in the form of a lease, which was unaffected by the supervening illegality – remains good or reliable law in light of *Panalpina*, where the House of Lords held that, at least in theory, a lease that continued to subsist as a property interest could nevertheless be frustrated.

195. However, the primary basis for the decisions of Avory and Lush JJ is illuminating: for supervening illegality to frustrate, it must remove all or substantially all of the benefit that one party receives from the contract. Thus, Avory and Lush JJ both stressed that not only did the lease continue, but also that the defendant was entitled to sub-let or indeed lend the flat to his friends. In short, the fact that the defendant was himself precluded from occupying the flat was not nearly enough to render the lease frustrated.

(ii) *The present case*

196. The approach of the court in *Schlesinger* explains why the EMA sought to close off all available options to it to use the Premises. Not only could the EMA not occupy the Premises itself, but it could not offer the premises to any other European Union agency, nor yet assign or sub-let the Premises to non-European Union entities. In short, the submission was that the EMA could derive no benefit from the Premises after the United Kingdom withdrew from the European Union.

197. I have rejected the EMA's contentions regarding its capacity. On the assumption that the EMA is right in all respects regarding its capacity (and assuming that this incapacity is relevant for the purposes of frustration, which I have found it not to be), then it would follow that – given the inability to use the Premises at all post the United Kingdom's withdrawal – the Lease would be frustrated. On this basis, it would, of course, be

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<sup>249</sup> At 24.

necessary to consider extremely carefully whether the EMA's contentions as to capacity were in all respects correct as well as relevant to the issue at hand.

198. In paragraphs 97-100 above, I noted the EMA's evolving – and perhaps inconsistent – position as regards its ability to pay rent. In paragraph 100, I considered that I should approach the EMA's case on frustration on two bases:

- (1) First, that the payment of rent under the Lease was *ultra vires* the EMA;
- (2) Secondly, and alternatively, that the payment of rent under the Lease was *intra vires* the EMA, but that the Lease is nevertheless frustrated, by reason of the EMA's inability to use the Premises.

199. It seems to me that on the second, alternative, case, the EMA's frustration case holds good, given the assumptions I am making. By reason of the supervening illegality, the EMA is deprived of substantially all benefit from the Lease, but remains obliged to pay the rent. Performance of the Lease – in the sense of paying rent – is not on this basis unlawful, but any use of the Premises would be unlawful. Applying the reasoning in *Schlesinger*, the EMA would, in these circumstances, have been deprived not merely of some ways of using the Premises, but of all modes of enjoyment.

200. The primary case – where the payment of rent is itself unlawful – lies *a fortiori*.

(iii) *Self-induced frustration*

201. CW contended that even if the Lease were frustrated, this would be a case of self-induced frustration that would not be sufficient to cause the Lease to be discharged.

202. Self-induced frustration was considered in Section B(6) above. The point that the defendant in *Schlesinger* might have obtained an exemption from the prohibition on his residence in the flat has been adverted to:<sup>250</sup> it was not considered in either the judgment of Avory J or Lush J. It is, however, a good example of what might amount to self-induced frustration. Had it been possible for the defendant to obtain an exemption, and he had failed to do so, could it be said that the lease was frustrated?

203. In my judgment, such a factor would be a major pointer away from frustration of the contract. Mr Seitler, QC, contended that matters occurring before the frustrating event could not be taken into account when considering whether the event in question was, indeed, frustrating of the contract. That, he contended, would invite an overly intensive factual analysis of events, causing frustration cases to become unduly factually complex.

204. I reject this contention. It seems to me, first, that the exercise is not a fact-intensive one at all. Rather, the court must have regard to all of the options open to the parties in response to the frustrating event. Generally speaking, of course, the frustrating event will strike the parties to the contract “out of the blue”, and the court will be left to consider what they could have done, post-alleged-frustrating event, in order to ameliorate its effects, in light of their agreement and expectations at the time of contracting. If one party could have done something to ameliorate matters, and failed to do so, that will (obviously) be relevant.

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<sup>250</sup> See paragraph 191 above at footnote 247.

205. Secondly, Mr Seitler, QC’s contention that matters occurring before the frustrating event took place could not be taken into account was contradicted by the decisions in *Maritime National Fish Ltd v. Ocean Trawlers Ltd*<sup>251</sup> and *The Super Servant Two*.<sup>252</sup> In both of these cases, the acts of the party claiming frustration preceded the frustrating event: in *Ocean Trawlers*, it was the decision to allocate the licences on offer to vessels other than the *St Cuthbert*; in *The Super Servant Two*, it was the election not to make the Super Servant One available, but that decision turned on the fact that the Super Servant One was already contractually committed to others.
206. As I have noted,<sup>253</sup> whether frustration is self-induced does not turn on technical questions of duty of care or fault. When considering whether there has been a frustrating event, it is quite clear that the courts consider the conduct of the party alleging frustration broadly and ask the broad question of whether the supervening event was something beyond that party’s control or within it. “Self-induced frustration” is something of a misnomer. It is simply a reference to post-contractual events and actions which indicate that certain options – that might have ameliorated the frustrating event – have been closed off by the acts or omissions of the party claiming frustration. In this case:
- (1) The Prime Minister of the United Kingdom notified the President of the European Union of the United Kingdom’s decision to withdraw from the European Union on 29 March 2017. Absent contrary agreement, it is clear as a matter of law that pursuant to Article 50 TEU, the United Kingdom would be withdrawing from the European Union by the end of March 2019.
  - (2) Of course, I accept, at least as a matter of theory, that the Article 50 TEU notice is capable of being revoked.<sup>254</sup> That fact has not, however, prevented the EMA from contending that the Lease is frustrated, nor yet precluded the European Union from enacting the 2018 Regulation.
  - (3) The fact is – as evidenced by the provisions of the Withdrawal Agreement – that the European Union could have done more than simply baldly ordering the relocation of the EMA (by way of the 2018 Regulation) and focussing only on the progress of the establishment of the EMA’s new headquarters in Amsterdam (which is what the 2018 Regulation does). The 2018 Regulation could have gone further, regarding the winding down of the EMA’s position in the United Kingdom. It could, for example, have included provisions along the lines of Article 119 of the Withdrawal Agreement.
  - (4) It was said by the EMA that the fact that such steps might have been taken was irrelevant. In the first place, it was not for this court to criticise the legislative acts of an international legal person. I am not sure that this point is well-made in any event: but I make it clear that I am in no way making any criticism. I am simply noting that the 2018 Regulation could have gone further in making arrangements for the EMA’s departure from London but that it did not do so. Whether it did not do so because the EMA already had sufficient powers (as I have found) or whether

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<sup>251</sup> See paragraph 46 above.

<sup>252</sup> See paragraphs 44ff above.

<sup>253</sup> See paragraph 44 above.

<sup>254</sup> See paragraph 14(7) above.

it did not do so for some other reason matters not. If and to the extent that the EMA lacked capacity, that was something that could have been addressed.

- (5) Secondly, it was suggested that the acts of the European Union as a whole, apart from the EMA, could not be attributed to the EMA for the purposes of self-induced frustration. This argument is, I find, straightforwardly disposed of: absent the 2018 Regulation, the EMA would have been obliged to stay in the United Kingdom. On the EMA's own case, it would have had no competence to move. The EMA's shift of headquarters is entirely due to the 2018 Regulation. It seems to me that the EMA cannot, on the one hand, say that the Lease is frustrated because its departure from the United Kingdom has been compelled by the 2018 Regulation, itself a reaction to the United Kingdom's withdrawal from the European Union, and on the other hand say that the terms of the 2018 Regulation (by which I mean how that Regulation was framed and how it could have been framed) are altogether irrelevant for the purposes of frustration.

207. In conclusion if, contrary to my primary conclusions, this is a case where the Lease is frustrated, then that frustration I find to be self-induced on the part of the EMA (considering the EMA in its constitutional context within the European Union). Accordingly, the Lease is not frustrated or discharged for this reason also.

**(e) Conclusions**

208. I find that the Lease has not been frustrated by reason of supervening illegality:

- (1) In the first place, I have found no constraints on the EMA's capacity or *vires* such as to cause the Lease to be frustrated.<sup>255</sup>
- (2) Secondly, even if those constraints on capacity existed, I find them irrelevant to the question of frustration by reason of supervening illegality. For the reasons I have given, even if the EMA was constrained by its capacity from continuing to be able to use the Premises or from continuing to perform its obligations under the Lease, such supervening illegality is not a matter that the English law of frustration takes into account.<sup>256</sup>
- (3) Thirdly, if I am wrong on these points, this is a case where the legal effects on the EMA of the United Kingdom's withdrawal from the European Union could have been, but were not, ameliorated by the European Union. This failure to do so is relevant to the question of frustration and, in my judgment, renders the frustration of the Lease self-induced.

**(3) Frustration of common purpose**

**(a) Approach**

209. I adopt the approach described by Rix LJ in *The Sea Angel*:<sup>257</sup>

“...the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the

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<sup>255</sup> See Section D above.

<sup>256</sup> See Section E(2)(c) above.

<sup>257</sup> See paragraph 39 above.

parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."

210. Thus, I consider:

- (1) The matters relevant to the parties' expectations as to risk as these stood at the time of the conclusion of the Agreements. Although the Lease was concluded on 21 October 2014, it was common ground between the parties that the relevant date was the date of the Agreements, 5 August 2011, because on that date both parties were committed, by the Agreements, to enter into the Lease.
- (2) The nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.
- (3) Whether, the supervening event and the parties reasonable and objectively ascertainable calculations render the parties' performance something "radically different" according to the test laid down in *Panalpina*.

**(b) *Matters relevant to the parties' expectations on 5 August 2011***

*(i) Foreseeability of the United Kingdom's withdrawal from the European Union*

#### Introduction

211. The foreseeability of the frustrating event is relevant only insofar as it informs the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk. If a future event is sufficiently foreseeable that it should have informed the manner in which the parties framed their agreement (particularly so far as the risk allocation provisions were concerned), then (to put it no higher than this) a court will be inclined to consider that the parties will have framed their agreement taking this factor into account. Foreseeability is, thus, no more than a factor to be taken into account. There will, no doubt, be many cases where something can be foreseen as a theoretical possibility, but where neither party can be criticised for failing to take it into account.

212. The court must also be careful of framing questions of foreseeability too closely to the exact, specific, nature of the supervening event that ultimately occurred. I remind myself that the test for frustration is whether the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.<sup>258</sup> What "the circumstances" are (or what the "frustrating" event is) will, in most cases, be capable of being framed in a number of ways. Here, the EMA defines the change in circumstance rendering the Lease frustrated as the United Kingdom's withdrawal from the European Union. But that is simply one definition of several possible ones. It might equally be said that the change in circumstance is the EMA's involuntary need to leave the Premises due to circumstances beyond its control.

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<sup>258</sup> To use Lord Radcliffe's words: see paragraph 22 above.

213. I shall return to this question in due course: my purpose in raising it now is simply to observe that foreseeability is something of a slippery concept, that needs careful handling.
214. For present purposes, however, it is simply necessary to note that the EMA contended that the frustrating event was the United Kingdom's withdrawal from the European Union, and that for its part CW contended that this was foreseeable.

#### Foreseeability

215. As at the relevant date, 5 August 2011, I conclude that the withdrawal of the United Kingdom from the European Union was foreseeable as a theoretical possibility, but that I can draw no inference from the parties' failure to cater for this specific possibility in the Lease. These days, and for the last two or so years, parties to contracts have no doubt been considering with some care what their contracts should say as regards the United Kingdom's withdrawal from the European Union. Thus, the failure of the parties to a contract, post-referendum, to consider the inclusion of a "Brexit clause", might be considered relevant to the allocation of risk. But, as Ms Summerfield has pointed out, the first time the withdrawal of the United Kingdom was considered by DLA Piper in the context of real estate transactions was in 2016, and it was at about this time that "Brexit clauses" began to be considered.<sup>259</sup> This is well after the Agreements.
216. I was greatly assisted by the reports of the experts. Bale 1, Jennings 1 and Bale 2 – as well as the voluminous materials appended to these reports – had the very beneficial effect of reminding me how matters stood when the Agreements came to be negotiated. They enabled me to distance myself from the present discourse. I conclude that the reports and materials provided by the experts supports and makes good the point made by Ms Summerfield, namely that it was only rather later than 2011 that the withdrawal of the United Kingdom from the European Union could be said to be relevantly foreseeable.<sup>260</sup> The most that CW could say was that as at August 2011:
- (1) The right of a signatory to a treaty to exit that treaty had, in the case of the Member States and the Treaties, been codified in the shape of Article 50 TEU. Any Member State – including the United Kingdom – could avail itself of that provision.
  - (2) Relations between the European Union and the United Kingdom – at least as reported in the press – might, from time-to-time be said to have been turbulent in the years up to 2011. That turbulence, from time-to-time, might be said to be very significant in terms of the political weather: the Treaty of Maastricht, for a time, overshadowed the government of Prime Minister John Major, and subsequent Prime Ministers and other politicians promised or urged referenda on the terms of the United Kingdom's membership of the European Union.
  - (3) Interestingly, despite the rise of parties, like the United Kingdom Independence Party, advocating a withdrawal, the terms of much of the political debate did not turn on the withdrawal of the United Kingdom from the European Union, but rather on the terms of the United Kingdom's continuing membership. Obviously, there were outliers in the debate – and I am prepared to accept that those outliers were

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<sup>259</sup> See Summerfield 1.

<sup>260</sup> By that I mean sufficiently foreseeable that a court could draw the sort of inference I describe in paragraph 211 above.



gaining in voice over time – but nevertheless the mainstream of the debate turned on the relationship of the United Kingdom with Europe as a Member State and not as a third country.

I find that the withdrawal of the United Kingdom from the European Union was not relevantly foreseeable when the Agreements were entered into.

(ii) *The “bespoke” nature of the Property and the Premises*

217. My conclusions regarding the bespoke nature of the Property and the Premises are at Section C(2) above. I have concluded that one of the advantages to the EMA of a pre-let was that the Premises could be sculpted in a such a way as to suit the EMA (and conceivably only the EMA). I also accept that CW saw this as a relevant factor in attracting the EMA to Canary Wharf to be the key-stone tenant. To this extent, there was a common purpose between the parties. But that common purpose never amounted to a mutual contemplation that one of the purposes of the Lease was to provide a permanent headquarters for the EMA for the next 25 years and that if that could not be achieved, the common purpose of the Lease had failed.

218. There are a number of reasons why I have reached this conclusion:

(1) First, the alienation provisions within the Lease, which have been described in paragraph 92(4) above, expressly cater for the complete departure of the EMA from the Premises. Although, of course, other eventualities were also catered for, the Lease expressly contemplated that the Premises might cease to be the EMA’s headquarters: the EMA might assign the Lease; or it might sub-let the entirety of the Premises. Either way, the Premises would cease to be the EMA’s headquarters. The alienation provisions in the Lease are long and extremely carefully worded. As I noted in paragraph 92 above, the object of these provisions of the Lease was to ensure that, were the EMA to depart the Premises, CW would be in as good a position – if not a better position – than if the EMA did not depart the Premises.

(2) Secondly, both parties approached the Lease from their own commercial standpoint, and the Lease represents the outcome not of a common purpose but of rival negotiations driven by different objectives. Thus, one sees in the course of the negotiations, the EMA’s attempt to insert a break clause, which CW successfully resisted. On the other hand, given the 25-year term, CW was prepared to agree the inducement package on rent.<sup>261</sup> Equally – and I will return to this – one sees the negotiations regarding the EMA’s Protocol 7 protections.

219. It is in this light that the alleged “common purpose” that the Premises would constitute the EMA’s headquarters must be seen. Common purpose is, in my judgment, a misnomer. The EMA wanted bespoke headquarters, and CW was prepared to supply these provided (i) it got a key-stone tenant and (ii) the bespoke elements of the build did not materially prejudice the continued user of the Property and/or the Premises. In other words, as I have found, CW was perfectly prepared to accommodate the EMA provided that CW’s long-term interests in the Property were not prejudiced – particularly if the EMA elected to leave.

220. Had the EMA proposed a design that was so at variance with CW’s long-term interests in the Property so as to materially prejudice them, and had CW acceded to that design

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<sup>261</sup> See paragraph 93 above.

request, then this might have been a matter of significance. In the event, that never occurred: the EMA's proposals fitted in with CW's own interests.

(iii) *Protocol 7*

221. The modification of the rights that CW would normally have had as a landlord, so as to reflect the EMA's Protocol 7 protections, was the subject of careful negotiation between the parties. It is entirely fair to say that the solicitors acting for CW were very keen to delete references to Protocol 7 and that the solicitors acting for the EMA were equally insistent that the Protocol 7 protections be incorporated into the Lease. In the end, the EMA prevailed, and CW acceded.

222. Again, I do not consider that this is in any way indicative of a common purpose. Indeed, it would have been far more compelling had CW recognised at the outset that the EMA required these protections and – against its apparent commercial interests – acceded to this. As it is, the fact that CW only accepted these Protocol 7 references after the EMA made clear that this was a “deal breaker” demonstrates that the common purpose of the parties is indistinguishable from the terms of the Lease.

(iv) *The length of term and the absence of a break clause*

223. The Lease had a term of 25 years, running until 2039. It is trite to say that this is a long period of time, and that many things – foreseen and unforeseen – can come to pass over such a time-scale.

224. A term of 25 years undoubtedly qualifies the Lease as a long-lease. The EMA quite consciously entered into the Lease without a break clause.<sup>262</sup> It is unlikely that CW would have agreed to a break clause, and certainly not to an early one. Any break clause would significantly have affected the inducement package to the EMA. From this, it is clear that the EMA assumed the risk of change over a 25-year period. The manner in which such changes would be managed would, in the first instance, be in accordance with the provisions of the Lease and – clearly – the alienation provisions, defining as they do the circumstances in which the EMA could depart the Premises, would obviously be critical.

225. By this, I do not mean to say that the United Kingdom's withdrawal from the European Union was in any way anticipated or in the contemplation of the parties, and that therefore the risk of the consequences of the United Kingdom's withdrawal was to be allocated to the EMA. I have made clear my conclusions as to the relevant foreseeability of the withdrawal of the United Kingdom from the European Union in paragraphs 211*ff* above.

226. However, I do consider that it was foreseeable that over this long period of time, there might be some development that would require the EMA involuntarily to have to leave the Premises due to circumstances beyond its control. What is more, the parties appear to have catered for this possibility in the Lease: the Lease contemplated the EMA would be committed to the Premises subject only to the alienation provisions which I have described.

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<sup>262</sup> See paragraph 76 above.

(v) *Insurance*

227. Insurance can be a relevant factor, indicative of how the parties see and allocate risk. In this case, as I have described,<sup>263</sup> CW did obtain insurance against non-payment of rent in the event that the EMA was entitled, pursuant to the terms of the Lease, to cease to pay rent that it would otherwise be obliged to pay. In short, insurance was obtained not to deal with an unforeseen risk, but to deal with an uncertain future contingency expressly contemplated and provided for in the Lease.
228. In these circumstances, I derive no assistance from the insurance CW was obliged to obtain.

(vi) *The Allen & Overy opinion letter*

229. Annex 17 to the Agreement for Lease contained an opinion letter from the Paris office of Allen & Overy LLP regarding the Agreements. The letter made clear that:

- (1) The Agreements and the Annexes to those Agreements – including the Annex 15 Draft Lease – had all been reviewed.<sup>264</sup> These were defined as the “Documents”.
- (2) The opinions expressed in the letter took account only of European Union law, and did not consider national laws, like English law, nor the inter-relationship between European Union law and national laws.<sup>265</sup>
- (3) “[T]he [EMA] has the power and legal capacity to enter into, execute and deliver the Documents and the [Annex 15 Draft Lease], to choose English law as the governing law for the Documents and the [Annex 15 Draft Lease], to submit to the jurisdiction of the English Courts and to observe and perform all its obligations under and the conditions of the Documents and the Proposed Lease.”<sup>266</sup>

230. I appreciate that the letter explicitly did not advise on the potential for future changes.<sup>267</sup> However, it did consider the EMA’s ability to enter into and perform a 25-year lease governed by English law. Whilst I do not derive very much from the opinion letter, it does seem to me that, as a result of this letter:

- (1) The matters I describe in paragraphs 223-227 above must have been considered by the EMA. The letter was, after all, written on the instructions of the EMA.<sup>268</sup>
- (2) CW received a degree of comfort regarding the EMA’s ability to perform a long lease.

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<sup>263</sup> See paragraph 92(6) above.

<sup>264</sup> See the definition of “Documents” and paragraph 1.2 of the letter.

<sup>265</sup> See paragraph 1.3 of the letter.

<sup>266</sup> See paragraph 2.1(a) of the letter. It is fair to point out that this was in the summary section of the letter.

<sup>267</sup> See paragraph 1.6(g) of the letter.

<sup>268</sup> See paragraph 1.1 of the letter.

(vii) *The EMA's budgetary process and the scrutiny of the financial implications of the Agreements (including the Annex 15 Draft Lease)*

231. I described the control over the EMA's budget and spending in Section C(3)(e) above. In his witness statement, Mr Steikunas put forward the view that the EMA did not have unlimited funds, and that if the EMA were required to pay for two premises – the “un-needed” Premises in London and the “needed” new premises in Amsterdam – then the savings it would have to make in order to pay this “double rent” would materially and detrimentally affect the EMA's future effectiveness:<sup>269</sup>

“17. As can be seen from the description at paragraphs 9-16 above, the EMA does not have access to unlimited funds. The EMA instead operates under a strict legislative and control framework which is imposed by the Parliament and Council. It is unlikely that the EMA will, under that strict legislative and control framework, be allocated funds (from either the EU contribution or by means of an increase in fees) to pay two full sets of rent for two headquarters buildings – one of which would be unoccupied in London – for the next 21 years.

18. The expected running costs for the EMA's new building in Amsterdam for the first full year in which it will be occupied by the EMA (2020) have been estimated at €13,627,720. These costs would be more than doubled, each and every year until 2039, if the EMA were compelled to go on paying under the Lease without any possibility of making any profitable use of the [Premises] for the reasons I have explained above.

19. These are highly material sums of money as regards the future effectiveness of the EMA. Paying rent for two sets of headquarters despite only need, and occupying, one headquarters, would be highly detrimental to the EMA. The requirement to fund such an ongoing and unnecessary deficit until 2039 would necessarily and fundamentally impact upon the EMA's institutional effectiveness. To illustrate the point, the EMA's rent and service charges for the [Premises] in 2017 were €17,655,515, and in 2016 were €19,082,844. These figures are, very approximately, 14% and 17% of the entire staff budget of the EMA for those respective years. In other words, meeting the additional costs associated with the double rent would be akin to requiring the EMA to do without a substantial proportion of its current workforce.”

232. I do not accept Mr Steikunas' assertion that the EMA will necessarily be required to fund out of its existing budget two sets of rent. It seems to me that the point that Mr Steikunas is making is essentially a forensic one and which disregards the reality of the EMA's present situation:

(1) As I have found, the EMA's entry into the Agreements and the assumption of its obligations under the Lease was the subject of careful scrutiny by the European Union and was approved.<sup>270</sup> The costs of the Lease will have been included in the EMA's and the European Union's past budgets and in assessments of the level of European Union contributions to the EMA in the multi-annual financial framework 2013-2020 (compiled and published in 2013).

(2) In these circumstances, the decision – which, I accept, has been imposed on the EMA by the 2018 Regulation – to re-locate to Amsterdam represents an additional cost that needs to be budgeted for and provided for. No doubt the EMA and the European Union will have followed the processes described by Mr Steikunas

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<sup>269</sup> Steikunas 1.

<sup>270</sup> See paragraphs 75-76 above.

regarding the entering into of building projects having significant financial implications for the budget of the EMA as regards the Amsterdam premises. If they have not, then they should have done.

- (3) Of course, it may be that the matters relied upon by the EMA – namely, the *ultra vires* point and the defeat of common purpose point – will eliminate the costs of the Premises from the EMA’s and the European Union’s budget. That may explain why the future costs of the Lease to the EMA are included as contingent items in the EMA’s budgetary documents produced since the question of relocation raised its head. But the inclusion of such costs as merely contingent – or indeed, the failure to budget for such costs – cannot affect whether the Lease is or is not frustrated.

233. Rather, to my mind, the significance of the budgetary process lies in how it was administered and applied at the time of the Agreements: clearly, as Mr Steikunas has shown, the obligations under the Lease that the EMA assumed would have been the subject of intense and careful scrutiny at the time the Agreements were concluded. The point that I derive from Mr Steikunas’ evidence is that at the time of entering into the Agreements, the financial commitments the Agreements entailed to the European Union over a 25-year period would have been the subject of the careful scrutiny Mr Steikunas describes in his statement.

(c) *Nature of the supervening event*

234. The supervening event is the withdrawal of the United Kingdom from the European Union. The consequences of the withdrawal of the United Kingdom from the European Union that I find to exist are as follows:

- (1) The liability regime under which the EMA operated for the purposes of non-contractual liability altered in the manner that I have described.<sup>271</sup> So far as the EMA was concerned, this was a materially adverse change, but not one that rendered the continued occupation of the Premises as its headquarters impossible.
- (2) The protection accorded to the EMA by virtue of Protocol 7 altered in the manner that I have described.<sup>272</sup> Again, so far as the EMA was concerned, this was a materially adverse change, but not one that rendered the continued occupation of the Premises as its headquarters impossible.
- (3) The EMA came under a legal obligation to move its headquarters from London to Amsterdam. That legal obligation arose because of the 2018 Regulation. For the reasons I have given, I find that the move from London to Amsterdam was not required as a matter of law: but it is readily understandable given the nature of the EMA’s functions and the essential desirability of having the EMA located within the territory of a Member State of the European Union. I do not find that the 2018 Regulation was actuated by any legal necessity arising out of the EMA’s capacity (or incapacity) to act in the territory of a third country.

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<sup>271</sup> See Section D(4)(b)(ii) above.

<sup>272</sup> See Section D(4)(b)(i) above.

(d) **“Radically different”**

(i) *Application of the test*

235. I turn to the question of whether – without default of either the EMA or CW – the Lease 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 Lease.<sup>273</sup>

236. Plainly, the changes described in paragraph 234(1) and (2) above – whilst adverse to the EMA and a consequence of the United Kingdom’s withdrawal from the European Union – are insufficiently fundamental to render the EMA’s performance under the Lease something “radically different”. Equally, as I say in paragraph 234(3) above, whilst the departure of the EMA from London was compelled by the 2018 Regulation, I have concluded that the 2018 Regulation was not actuated by any legal necessity arising out of the EMA’s capacity (or incapacity) to act in the territory of a third country.

237. The question is whether there can be said to be a common purpose as between the EMA and CW, at the time of the Agreements, going beyond what was agreed upon in the Lease, which has been rendered radically different by supervening events.

238. I approach this question in the following way:

(1) First, I consider what the parties actually provided for, in terms of risk allocation, in the Lease. As I have described, the parties’ actual agreement and how they allocated risks under it, can be of great significance when considering whether the contract has been frustrated. That is particularly so, where the contract is a sophisticated one, appearing to make provision for all subsequent contingencies or vicissitudes that may arise in the future.<sup>274</sup>

(2) Secondly, I consider the question of common purpose. One consequence of the “radically different” test for frustration is that, unlike with the construction of the contract theory, the construction of the contract does not – in all cases – determine whether the contract has been frustrated.<sup>275</sup> The “radically different” test recognises that even a sophisticated contract may find itself defeated by the truly unforeseen, and that it is the frustration of the parties’ “common purpose” that is determinative.<sup>276</sup> I explain why, in this case, I have concluded that that there was no “common purpose” beyond the purpose arising out of the Lease itself.

(ii) *The Lease*

239. Looking at the terms of the Lease – or, for they are materially identical, the terms for the Annex 15 Draft Lease – the following points are clear:

(1) The Lease expressly contemplated that – during its pendency – the EMA might and certainly as a matter of law could entirely divest itself of the Premises. I accept that

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<sup>273</sup> Applying the test in *Davis Contractors Ltd v. Fareham UDC*, quoted at paragraph 22 above.

<sup>274</sup> See paragraphs 26 and 29 above.

<sup>275</sup> See paragraphs 26(4) and 26(5) above.

<sup>276</sup> See Section B(3) above.

this was not considered likely by the EMA, but assignment or sub-letting of the whole of the Premises was expressly contemplated and provided for.

- (2) In other words, whilst the United Kingdom's withdrawal from the European Union was not contemplated by the parties as a potential future cause of the EMA's relocation, the question of wholesale relocation of the EMA away from the Premises and the Property (whether within or outside the United Kingdom) was contemplated and was provided for in the Lease.
- (3) Were the EMA entirely to divest itself of the Premises, that inevitably means that the Premises would cease to be the EMA's headquarters. The parties agreed exactly what would happen in such a case: the EMA would assign the Lease – pursuant to the terms of the Lease – or sub-let the whole – again, pursuant to the terms of the Lease. If it could neither assign nor sub-let the whole according to the terms of the Lease, it would retain the Premises, whether it wanted to or not, and would be obliged to pay the rent.
- (4) I accept that the assignment and sub-letting provisions in the Lease are onerous. They were quite clearly directed to protecting the interests of CW. The thinking – as a matter of construction – was that if there was to be an assignment or sub-letting of the whole of the Premises, then CW was not to be placed in a worse position. It is also quite clear, as a matter of construction, that the parties carefully considered not merely the EMA's need for more or less space,<sup>277</sup> but also the fact that it might need no space at all. As I say, the provisions regarding assignment and sub-letting (particularly of the whole) were onerous on the EMA. But the EMA agreed to them. I infer from this that CW considered the risk of the EMA leaving more seriously than the EMA itself, and that it therefore protected itself more assiduously. Or, to put the point another way: the EMA accepted the risk that it might be left holding Premises that it did not require for the balance of the term remaining, unless it could meet the sub-letting or assignment provisions.

240. The provisions of the Lease – or, rather, the provisions of the Annex 15 Draft Lease – were reviewed by Allen & Overy at the time of the Agreements, acting on the instructions of the EMA. Allen & Overy's opinion letter considered the terms of the Annex 15 Draft Lease. Even though the Lease was a long one, Allen & Overy stated that the EMA could observe and perform all its obligations under the Annex 15 Draft Lease.<sup>278</sup>

241. I accept – as anyone would – that the withdrawal of the United Kingdom from the European Union is a seismic event, and I have found that it is not one that was in the contemplation of either party at the time the Agreements were concluded. However, the involuntary departure of the EMA from its headquarters in the Premises, due to circumstances beyond its (or, indeed, the European Union's) control was something which – on the face of it – the Lease expressly provided for. I find that to be the true construction of the Lease, in particular, the alienation provisions of the Lease.

242. The EMA's frustration case requires a distinction to be drawn between reasons for the EMA's departure, and for that distinction either to be read into the Lease or to cause the doctrine of frustration to override the true meaning of the Lease. In other words, were the

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<sup>277</sup> Thus, there were options for the EMA to take more space; and the EMA could – by sub-letting parts of the Premises, reduce the amount of space it was letting.

<sup>278</sup> See paragraphs 229-230 above.

European Union to choose to cause the EMA to relocate (because, say, of the accession of another Member State, and nothing to do with withdrawal of the United Kingdom), that would be covered by the Lease; but an “involuntary” departure, caused by the United Kingdom’s withdrawal from the European Union, would not.

243. I find it impossible to read the alienation provisions in the Lease in this way. These provisions draw no distinction as between the reasons why the EMA might abandon its headquarters in the Premises. The provisions simply deal with the fact. That fact or eventuality has come to pass, and the Lease’s provisions must now do their job, unless there can be said to be an independent common purpose rendered radically different by the subsequent event of the United Kingdom’s withdrawal from the European Union. In short, I consider not only that the Lease contains provisions catering for the event that has occurred – the involuntary departure of the EMA from its headquarters due to the United Kingdom’s withdrawal from the European Union – but also that the operation of these provisions is consistent with the overall intention of the Lease and that there is in this case no need to mitigate the rigour of the common law’s insistence on literal performance of absolute promises.<sup>279</sup>

(iii) *Was there a common purpose in this case?*

244. I have held that it is possible – notwithstanding the true construction of a contract – for that contract nevertheless to be discharged if the common purpose of the bargain (which I have found to be something beyond the true construction of the contract) is frustrated. In this case, I find no common purpose beyond the purpose to be derived from a construction of the Lease. This is not a case like *Krell v. Henry* where the parties had a common purpose going beyond their agreement, which was thwarted. The parties approached the Agreements as counterparties, and they bargained hard – if amicably – to get what they wanted.

245. Outside the terms of the Lease, the parties’ purposes were not common, but divergent. The EMA was focussed on bespoke premises, with the greatest flexibility as to term, and the lowest rent. CW was focussed on long-term cash flow, at the highest rate, and was prepared to allow the EMA its say in the building’s configuration, provided that this was not adverse to CW’s interests. There was no common view or expectation between the parties that the risk of the consequences of the EMA abandoning its headquarters should be differently visited according to the reason for the EMA’s departure. I find that it was CW’s purpose that whatever the reason for the EMA’s intended departure, it should be protected: and, from the terms of the Lease, the EMA knew this. The divergent purposes of the parties can be seen from the arguments they had about the possibility of the break clause and the applicability of Protocol 7.

246. This is confirmed by the negative provision regarding user: the Lease contains no positive provision as to its use, but merely requires the EMA to abstain from using the building

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<sup>279</sup> Matters might well be different if CW were, for example, relying upon clause 4.25.1 of the Lease, which is set out at paragraph 92(5) above. This provision obliges the EMA to comply at its own expense with all subsequent regulations issued by the European Union. It might well be contended that this provision expressly imposes on the EMA the costs of complying with the 2018 Regulation. CW did not rely on this provision in this way, and it is easy to see why: this provision is not directed to the question of the EMA’s involuntary departure from the Premises due to the 2018 Regulation, but to the EMA’s obligation to comply with laws concerning its occupation of the Premises.



in breach of its permitted user.<sup>280</sup> This is in contrast to *Krell v. Henry* and the US “liquor prohibition” cases, where some “saloon” leases were very prescriptive about user.<sup>281</sup>

247. In short, I do not consider the present situation to come close to a case of frustration of common purpose. Considering the test articulated in paragraph 38 above, the fact is that hindsight has shown that the EMA has paid too high a price for the Premises it acquired, in that it failed to build into the lease the flexibility as to term that events have shown would have been in its commercial interests. But the fact is that such flexibility as to term would have been entirely inimical to CW’s interests.
248. In short, the supervening event, I find, is in reality the EMA’s involuntary departure from the Premises, due to circumstances beyond its control. I find that this involuntary departure was, in fact, not merely envisaged but expressly provided for in the Lease, and that there was no common purpose different to that contained in the Lease. The EMA cannot say this is not what it bargained for.

(iv) *Relative justice*

249. It follows that questions of relative justice in the context of a frustrating event do not really arise. There is, in this case, no frustrating event. However, because I was addressed on the point, I shall briefly consider it. Inevitably, my view is coloured by the risk allocation that I find was contained within the Lease:
- (1) Self-evidently, a cornerstone tenant like the EMA is critical to CW undertaking the building of the Property and to its future cash flows. The rental cash flow is essential to funding the financing of the building. That is why the Lease is so careful to ensure that if the EMA were to leave, CW’s position would not be prejudiced. As Mr Seitler, QC noted, the Lease is remarkably sophisticated, and much of that sophistication is devoted to ensuring that the rental cash flow is maintained, unaffected by any departure from the Premises of the EMA. Holding the Lease to be frustrated would cause considerable commercial damage to CW, in a manner entirely unexpected and – critically – unexpected because the Lease made provision in terms for the allocation of this risk.
  - (2) I accept that the EMA is suffering a financial hardship that is unexpected. I accept that the removal of the EMA out of London is not a matter it desired but which was caused by an event outside its control. If the Lease is not frustrated, the EMA will be obliged to pay rent – if it cannot assign or sub-let – and will, for the duration of the Lease, be obliged to pay for Premises it does not need. But 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.
  - (3) The EMA’s Ground 5 – which is that its efficacy would be prejudiced in having to pay rent twice over for premises in London and Amsterdam – I specifically reject as a ground for discharging the Lease. The original obligations assumed by the

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<sup>280</sup> See paragraph 92(2) above.

<sup>281</sup> *Treitel*, at [7-023].

EMA were the obligations under the Lease. These were carefully considered before they were entered into, pursuant to the budget process described by Mr Steikunas. What has not been considered – at least on the material before me – is how the EMA is to fund the additional costs of its new Amsterdam headquarters. That is a matter on which the 2018 Regulation is remarkably silent. It must have been obvious, when enacting the 2018 Regulation into law, that significant additional costs would be imposed upon the EMA. It lies ill in the mouth of the EMA to contend that simply because additional – and, as I find, voluntarily assumed – obligations have been entered into, without apparent consideration as to how they should be funded, the obligation to pay rent under a previously approved agreement should somehow be discharged. The EMA’s Ground 5 is a clear case of self-induced frustration, and I repeat my findings in paragraphs 201ff above.

250. I therefore conclude that, in the case of Scenario 1, the Lease has not been frustrated by reason of a failure of a common purpose.

### **F. FRUSTRATION OF THE LEASE IN THE CASE OF SCENARIO 3**

251. The ratification of the Withdrawal Agreement would ameliorate the effects of the United Kingdom’s withdrawal from the European Union, but it would not alter the fact that the United Kingdom would cease to be a Member State and become a third country. In these circumstances, it cannot be said that the Lease is frustrated in the case of Scenario 3. During the operation of the Withdrawal Agreement, Protocol 7 would apply unimpaired, as would the continued application of European Union law generally. The jurisdiction of the CJEU would continue. Equally, the winding down of the EMA’s operations in the United Kingdom is provided for.<sup>282</sup>

252. In these circumstances, I find it impossible to conclude that the Lease has been frustrated in the case of Scenario 3.

253. The EMA suggested that the Withdrawal Agreement itself – albeit capable of extension – would at some point come to an end and that all the adverse consequences of the United Kingdom’s withdrawal would then be visited on the EMA at that point. But this is a false point, given the case that the EMA advanced. The EMA’s case was based upon the withdrawal of the United Kingdom from the European Union and the transition of the United Kingdom from being a Member State to becoming a third country. This occurs (in the case of Scenario 3) on the ratification of the Withdrawal Agreement. The EMA’s case turns on the transition of the United Kingdom from Member State to third country. That – in the case of Scenario 3 – takes place when the Withdrawal Agreement is ratified.

### **G. THE EMA’S SELF-STANDING POINT**

254. So far as the EMA’s Self-Standing Point is concerned, paragraph 197 of the EMA’s written opening submissions provides:

“The question of whether the EMA has any given power – in particular to discharge future obligations under the Lease – is one of EU law. That the Lease is itself governed by English law (see clause 9.16) does not alter this position for two reasons:

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<sup>282</sup> In Article 119.

- (i) First, the capacity of a foreign public body to enter an English law contract must be determined according to the relevant body of foreign public or administrative law, and if there is no such capacity then the contract is void...
- (ii) Secondly, EU law is not, at least presently, “*foreign law*” anyway: by reason of section 2 [of the European Communities Act 1972], any restrictions on the capacity of the EMA under EU law are part of English law: where EU law is engaged, it has always been erroneous to “*speak or think of English law as something on its own*”...”
255. The EMA’s first proposition (in paragraph 197(i) of its written opening submissions) is correct but beside the point. I accept that the capacity of a foreign corporation to enter into an English law contract is governed by the law of that body’s incorporation.<sup>283</sup> However, in this case, it is accepted that the EMA had the capacity to enter into the Lease. What is at issue is whether a supervening lack of capacity can frustrate the Lease. For the reasons I have given, I hold that it cannot.
256. The EMA’s second proposition (in paragraph 197(ii) of its written opening submissions) is predicated on the continued application of European Union law in the United Kingdom. In Scenario 1, as I have described, although large swathes of European Union law are incorporated into English law, that incorporation does not extend to new propositions of European Union law.<sup>284</sup> The EMA’s Self-Standing Point undoubtedly constitutes new (European Union) law, as the EMA accepted. So far as Scenario 1 is concerned, the provisions of the European Union (Withdrawal) Act 2018 render the EMA’s Self-Standing Point unarguable. According to the express terms of the 2018 Act, new (post-exit-day) propositions of European Union law are not incorporated into the law of the United Kingdom.
257. In the case of Scenario 3, as I have described, European Union law continues in force without such fetters on its application. The question is whether European Union law knows of a remedy going beyond that of frustration as applied by the English courts. Certainly, the EMA was unable to take me to any law suggesting the existence of such a remedy, and I find that – under European Union law – no such remedy exists:
- (1) I shall assume that the EMA’s case regarding its own capacity – which I have rejected – is correct. Absent such an assumption, the EMA’s contention for a bespoke remedy, going beyond the doctrine of frustration, could not hope to succeed. The essence of the EMA’s argument was that it was in principle wrong for English law effectively to compel the EMA to act *ultra vires* by insisting on continued performance of the Lease, post withdrawal of the United Kingdom from the European Union.
- (2) It is quite clear that causes of action in English law can be created out of directly effective European Union law provisions. One such example is the tortious action for breach of statutory duty based upon infringements of Articles 101 and 102 TFEU. Many private law claims for damages have been founded on these provisions and, in *Courage v. Crehan*,<sup>285</sup> the CJEU made clear that such actions were a necessary adjunct to the effectiveness of European Union law.

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<sup>283</sup> See the earlier discussion on this point.

<sup>284</sup> See sections 5(1) and 6(1)(a) of the European Union (Withdrawal) Act 2018.

<sup>285</sup> Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297.

- (3) In this case, however, English law has evolved a doctrine of law – the law of frustration – that deals with supervening changes of circumstance and determines when the parties to a contract affected by such supervening changes might consider themselves to be discharged from future performance. The EMA has subscribed to a contract – the Lease – governed by English law, which it had the competence to do. It would seem a remarkable development – going well beyond the principle of equivalence – for a contract involving an agency of the European Union to receive different treatment compared to a contract not involving such an agency.
- (4) No law was cited in support of the EMA’s Self-Standing Point and I find that no such legal proposition exists. It seems to me that this is a case where if, contrary to my findings, performance of a contract involves an agency of the European Union in unavoidable illegality and the contract is not frustrated, that agency, instead of performing in breach of the law must pay damages for breach of its contract.

## **H. CONCLUSIONS AND DISPOSITION**

258. I conclude that the Lease will not be frustrated on the withdrawal of the United Kingdom from the European Union. This is neither a case of frustration by supervening illegality nor one of frustration of common purpose. 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.
259. The precise form of order disposing of this claim and the EMA’s counterclaim is a matter that will need to be considered by counsel and, if necessary, determined by the court. I do not propose, in this judgment, to frame the appropriate declarations.

## ANNEX 1

### TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(Judgment, footnote 1)

TERM OR ABBREVIATION	FIRST REFERENCE IN THE JUDGMENT
Acceptable Assignee	Paragraph 92(4)(e)(i)
AGA	Paragraph 92(4)(f)
Agreement for Lease	Paragraph 57(1)
Agreements	Paragraph 57(3)
Annex 15 Draft Lease	Paragraph 57(3)(c)
Archer 1	Paragraph 48(1)
Authorised Guarantee Agreement	Paragraph 92(4)(f)
Bale 1	Paragraph 54(1)
Bale 2	Paragraph 54(3)
<i>Bennion</i>	Paragraph 133(2) (footnote 179)
<i>Chitty</i>	Paragraph 41(2) (footnote 60)
CJEU	Paragraph 15(3) (footnote 21)
common purpose	Paragraph 29
Construction Management Agreement	Paragraph 57(2)
CW	Paragraph 1 Paragraph 56 (footnote 78)
<i>Dicey</i>	Paragraph 111 (footnote 154)
direct EU legislation	Paragraph 120(1)(b)
DLA	Paragraph 49(3)
Documents	Paragraph 229(1)
EMA	Paragraph 1
EMA's Financial Regulation	Paragraph 73 (in quotation)
EMA's Notification	Paragraph 76
EMA's Self-Standing Point	Paragraph 9
enforceable EU right	Paragraph 82 (in quotation)
EU derived domestic legislation	Paragraph 120(1)(a)
<i>European Union Treaties</i>	Paragraph 68 (footnote 95)
exit day	Paragraph 14(5)
fit out	Paragraph 63(3)(b)

Frustrating Grounds	Paragraph 7
frustration by supervening illegality	Paragraph 42
frustration of common purpose	Paragraph 42
Ground 1	Paragraph 7(1)
Ground 2	Paragraph 7(2)
Ground 3	Paragraph 7(3)
Ground 4	Paragraph 7(4)
Ground 5	Paragraph 7(5)
Hargreaves 1	Paragraph 48(3)
<i>Hartley</i>	Paragraph 125 (footnote 166)
Iacobescu 1	Paragraph 48(2)
Jennings 1	Paragraph 54(2)
law district	Paragraph 111 (in quotation)
Lease	Paragraph 1
Member State	Paragraph 13
Points of Claim	Paragraph 6
Points of Response	Paragraph 6
Pott 1	Paragraph 48(4)
preliminary reference	Paragraph 15(3) (footnote 21)
preliminary ruling	Paragraph 15(3) (footnote 21)
Premises	Paragraph 1
Proceedings	Paragraph 3
Property	Paragraph 1
Protocol 6	Paragraph 88
Protocol 7	Paragraph 7(1)
Rasi 1	Paragraph 49(1)
retained EU law	Paragraph 106(1)(a)
Scenario 1	Paragraph 15(1)
Scenario 2	Paragraph 15(2)
Scenario 3	Paragraph 15(3)
Scenario 4	Paragraph 15(4)
Scenario 5	Paragraph 15(5)
shell and core	Paragraph 57(3)(a)
Steikunas 1	Paragraph 48(5)
Summerfield 1	Paragraph 49(3)

supervening illegality	Paragraph 41(2) (footnote 60)
Tenant's Category A Works	Paragraph 57(3)(b)
Tenant's Category B Works	Paragraph 57(3)(b)
Term	Paragraph 1
TEC	Paragraph 87 (footnote 119)
TEU	Paragraph 7(1)
TFEU	Paragraph 7(1)
third country	Paragraph 96(2)
Treaties	Paragraph 14(1)
<i>Treitel</i>	Paragraph 35 (footnote 48)
Union	Paragraph 14(1)
Wathion 1	Paragraph 49(2)
Withdrawal Agreement	Paragraph 14(6)
1993 Decision	Paragraph 90
1993 Regulation	Paragraph 63
2004 Regulation	Paragraph 63
2018 Regulation	Paragraph 91