Building Society [1998] 1 W.L.R. 896 and *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38, [2009] 1 A.C. 1101). Yet Lord Sumption also recognised that although "the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive" it has done so in "muffled tones" ("A Question of Taste: The Supreme Court and the Interpretation of Contracts" [2017] O.U.C.L.J. 301, 313). Perhaps the retreat should have been sounded more loudly. In *Wells v Devani*, Lord Briggs said (at [59]) that "the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more, about the essential terms of the bargain than do the words themselves". The context of these remarks is, in turn, important: *Wells v Devani* did not concern a written contract, let alone a detailed agreement drafted by lawyers which is typical in commercial litigation. Nevertheless, Lord Briggs' remarks chime much better with Lord Hoffmann's approach than with Lord Neuberger's more recent leading decisions in cases such as *Arnold v Britton* and *Marks and Spencer v BNP Paribas* which have (it is suggested sensibly) stressed the primacy of the language chosen by the parties. Such tension in the authorities is regrettable, and it is to be hoped that it does not relaunch an apparently endless stream of appeals on points of interpretation to our apex court.

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ISN'T BREXIT FRUSTRATING?

IN *Canary Wharf (Bp4) T1 Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), the European Medicines Agency (EMA) unsuccessfully sought to escape a 25-year lease on a London skyscraper by arguing that the lease would be frustrated when UK ceased to be a Member State of the EU.

The EMA put its case two ways. One was that Brexit represented a frustration of common purpose. This is said to involve a "multi-factorial approach" (*The Sea Angel* [2007] EWCA Civ 547, [2007] 1 C.L.C. 876, at [111], per Rix L.J.):

> 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 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.

https://doi.org/10.1017/S0008197319000564 Published online by Cambridge University Press

The "multi-factorial" label is unhelpful, suggesting that this type of frustration is a question of judicial discretion. The construction theory of frustration is more persuasive: discharge for frustration is better viewed as determined by the terms of the contract. *The Sea Angel* "factors" should be treated as being part and parcel of the exercise in examining the express and implied terms of the contract to assess whether performance was conditional on the non-occurrence of a future event. The analysis should thus be the same for frustration as for common mistake (as to which, see J. Morgan, "Common Mistake in Contract: Rare Success and Common Misapprehensions" [2018] C.L.J. 559). Indeed, it was on the basis of the express terms of the lease that the dispute in *European Medicines Agency* was resolved. The contract contemplated that the EMA's headquarters might not remain in Canary Wharf for the duration of the lease. That was because, subject to (albeit onerous) conditions, the lease expressly permitted the EMA to assign or sublet the property in part or in its entirety.

Canary Wharf advanced the construction theory of frustration in *European Medicines Agency* but Marcus Smith J. rejected it. He reasoned that an examination of parties' knowledge, expectations, assumptions and contemplations "might very well arise out of the previous negotiations of the parties and their declarations of subjective intent", and that would be inadmissible if the analysis went no further than construing the contract (at [32]). With respect, this is not correct. The passage quoted above from *The Sea Angel* makes clear that its factors are questions of objective ascertainment. Given the limited utility of pre-contractual negotiations for an objective reading of the contract, it would be surprising to see a detailed examination of such negotiations in any frustration case; but, if it were necessary, even on the construction approach there is no absolute bar against looking at pre-contractual negotiations to establish objective background facts: *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38, [2009] 1 A.C. 1101, at [42], per Lord Hoffmann.

Nonetheless, for that reason, Marcus Smith J. went on to consider whether was a common purpose going *beyond* the terms of the lease that was frustrated. He found that, in fact, the parties had divergent interests: the EMA's objectives were bespoke premises, term flexibility and low rent; Canary Wharf wanted long-term cash flow at a high rent and security of income whatever reason could arise in the future for EMA's decision to depart the premises. The judge contrasted this with the famous coronation case, *Krell v Henry* [1903] 2 K.B. 740. In *Krell*, the contract was frustrated when the coronation was cancelled due to King Edward VII's ill-health because the parties shared a common purpose beyond the express terms of the contract that the Pall Mall flat was to be hired for two days to view the coronation processions. But it is wrong to say that *Krell* went beyond the terms of the contract. Rather, the case is an example of determining the terms of a contract not just by the express words (recorded in

https://doi.org/10.1017/S0008197319000564 Published online by Cambridge University Press

that case by two letters which did not refer to the coronation processions), but also its implied terms, bearing in mind the context in which the express words were uttered (in particular, publicity for the rooms which advertised their view of the coronation processions). As Vaughan Williams L.J. said (p. 752), the business efficacy test for implication of terms in fact was "of importance in the present case" and that "one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts". *Krell* does not therefore support the argument that this type of frustration goes beyond the terms of the contract.

The other way the EMA put its case was that Brexit would constitute a frustrating supervening illegality. In contrast to other types of frustration, this is better viewed as a contractual doctrine rather than based on the terms of the contract. Illegality, whether subsisting at the time of contracting or supervening at a later date, involves issues of public policy that cannot simply be sidestepped by the terms of the contract.

The thorny issue in *European Medicines Agency* was that the illegality was under foreign not English law. The parties were asking the court to determine the effect on the lease of the UK leaving the EU and therefore being treated as a third country for the purposes of EU law. Although the lease was governed by English law, it was contended by the EMA that EU law could be applied as the law of the place of incorporation (*lex incorporationis*). That made this case a novel one: in English law hitherto, contracts have *only* been discharged where the supervening illegality is one of English domestic law.

The prevailing academic view (see *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (London 2012), para. [32.100]) is that a contract can *also* be frustrated by foreign law illegality where the illegality arises in the place of performance. This is the *Ralli Bros* rule: [1920] 2 K.B. 287 (CA). However, the better view is that the *Ralli Bros* rule has nothing to do with frustration. Its effect is not to discharge a contract but rather for the English court to refuse enforce the contract in the interest of comity of nations. The Law Reform (Frustrated Contracts) Act 1943 therefore does not apply to contracts that fall within the scope of the *Ralli Bros* rule: see *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728, 771–72.

To the extent that some read-across is appropriate from the *Ralli Bros* cases to frustration, it is worth noting that the *Ralli Bros* line of cases have insisted that it is not possible to excuse performance by reason of illegality in the *lex incorporationis*. So, for example, neither the Hungarian cotton company in *Kleinwort Sons & Co. v Unigarische Baumwolle Industrie A.G.* [1939] 2 K.B. 678 (CA) nor the Turkish trading organisation in *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière S.A.* [1979] 2 Lloyd's Rep. 98

https://doi.org/10.1017/S0008197319000564 Published online by Cambridge University Press

(Comm. Ct. and CA) were able to avoid their cross-border payment obligations by reason of exchange controls in their country of origin.

Marcus Smith J. held that the English law of frustration should not take into account the *lex incorporationis*. However, rather than invoke the reasoning from the *Ralli Bros* line of authorities (save for oblique reference at paras. [187]–[188]), the judge instead based his decision on *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549. In *Haugesund*, the Court of Appeal held that while questions of capacity were governed by the *lex incorporationis*, questions of the consequences of incapacity were determined by the law governing the contract. The judge was plainly right to conclude that this choice of law rule precluded looking beyond English law for the purposes of frustration.

In any event, the foreign illegality point was academic for two reasons. First, Marcus Smith J. held that, since that the European Commission had capacity to act outside of the EU (Case C-131/03 P, *Reynolds v Commission* [2006] E.C.R. I-7795; *Council v Commission* C73/14, ECLI:EU:C:2015:663), so too the EMA had capacity to hold and deal with property outside the territory of the EU. There was, therefore, no supervening illegality. Second, any frustration would be self-induced and therefore could not discharge the lease. The specific legal requirement on the EMA to move its headquarters from London to Amsterdam came not from Brexit per se but rather from Regulation (EU) No 2018/1718 (OJ 2016 L 291/3). However, with respect, the elision of the EU and the EMA is questionable given each has separate legal personality. It is difficult to see how and why a regulation passed by the European Parliament and Council should be treated as an act of the EMA itself.

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(NET) CURTAINS FOR MODERN ARCHITECTURE? PRIVACY, NUISANCE AND HUMAN RIGHTS

A nuisance case, with engaging facts, attracted unusual popular attention: *Fearn v Trustees of the Tate Gallery* [2019] EWHC 246 (Ch). The claims were brought by owners of four thirteenth- to twenty-first-floor flats in central London. The flats' living areas were glazed from floor to ceiling with "rather splendid" panoramic views. "Unfortunately" as Mann J. said at [8], "if occupants can see out then outsiders can see in (absent some protective measure), which is the problem in this case". Specifically, the owner-occupants complained that an exterior viewing platform on the tenth floor of the adjacent Tate Modern art gallery was an actionable

https://doi.org/10.1017/S0008197319000564 Published online by Cambridge University Press