

Supreme Court: no change of control despite departure of majority shareholder

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Introduction

The Rent Act includes a number of special provisions for commercial leases of premises in certain older buildings. Among other things, the landlord may increase the rent to market levels if a change of control occurs in the tenant company.

In a recent decision,⁽¹⁾ the Supreme Court considered whether a landlord can increase the rent if the majority shareholder of a partnership dies and his or her shares are distributed equally among the remaining partners, none of whom holds a majority in the partnership.

In the decision, the Supreme Court offered an insight into how to assess the change of control in a company that is not a corporation.

Facts

The case concerned a commercial lease agreement between the building owner as landlord and a family business organised in the form of a tenant partnership. The tenant partnership had four partners. One of the partners, the majority shareholder, died. His shares in the partnership were distributed equally to the remaining three partners. As a consequence, none of the three remaining partners had a majority share in the partnership.

After being informed of the change, the landlord considered this a change of control and raised the rent to market level.

Background

The Austrian Rent Act provides that landlords can terminate lease agreements only for good cause. For certain older buildings (ie, buildings built before 1953 and, in certain cases, those built before 1945), the act also limits the maximum rent. The act also applies to commercial leases. As a result of this tenant protection, landlords are often faced with older lease agreements where the rent – although indexed on the basis of the consumer price index – no longer reflects the market rent. In the absence of a good cause, landlords cannot terminate these leases.

The Rent Act further provides that a landlord may increase the rent – for premises in such older buildings – to market levels if a change in control occurs in the tenant company or its shareholders. However, the Rent Act does not define what constitutes a change of control.

According to the prevailing case law, a change of control is deemed to occur if one shareholder acquires the majority of the shares in a corporation (limited liability company or joint stock

AUTHOR

[Martin Foerster](#)



company). If, on the other hand, only a number of minority shareholdings change, this is not considered a change of control, even if these minority shareholdings together represent more than 50% of the company's shares.

In the case of a partnership, a change of the partner who is personally liable is deemed to lead to a change in control. Further, where a partner is a corporation, a transfer of a majority shareholding in that corporation is deemed to be a change of control in the partnership.

Supreme Court's appraisal

In the present case, one of the partners left the partnership (by reason of his death) and his shares were distributed equally among the remaining three shareholders. Although the leaving partner held a majority of the shares and, after the transfer, no other partner held the majority, the Supreme Court nevertheless did not see this as a shift in power in the form required to constitute a change of control. Therefore, the landlord could not raise the rent to market levels.

Comment

In this case, the Supreme Court saw no reason to overturn the court of appeal's decision and therefore did not fully analyse the questions at hand. Two issues seem noteworthy.

First, the case concerned a partnership and not a corporation. In previous case law, the Supreme Court had held that if there are more than two personally liable partners in a partnership, the departure of one partner does not lead to a change of control as, by law, each partner has the right to veto the decisions of other partners. Thus, as long as there is more than one partner, a partner will always be subject to the control of the other partners and thus not have full control over the partnership.

The present case is in line with that case law, because none of the remaining three partners had the right to take decisions for the company by themselves. In light of this, it is clear why the Supreme Court did not see a change of control here, even though a person who had previously held more than 50% of the shares had left the partnership. If the tenant were a corporation (rather than a partnership), the outcome would probably have been different.

Second, the court highlighted that the tenant was a family office and thus the increase in the share of the minority shareholders by itself did not lead to a change of the control over the company. It was unclear why the Supreme Court addressed the fact that this was a family office. Possibly, the court wanted to suggest that there are no special circumstances where one partner dominates the other partners for reasons other than the percentage of the shares held in the partnership.

For further information on this topic please contact [Martin Foerster](#) at Graf & Pitkowitz by telephone (+43 1 401 17 0) or email (foerster@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) Case 5 Ob 127/17p.

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