REAL ESTATE - AUSTRIA

Supreme Court manages shopping centre management costs

June 08 2018 | Contributed by Graf & Pitkowitz Rechtsanwälte GmbH

AUTHOR

Martin Foerster

Service charge provisions in shopping centre lease agreements frequently give rise to disputes between landlords and shop operators. In a recent decision on such costs, the Supreme Court offered some insights into shopping centre lease agreements which go beyond service charge provisions.

Facts

The plaintiff was a large fashion retailer who contemplated renting space in a well-known shopping centre. In the first round of contract negotiations, the landlord provided his standard contract draft. This draft contained a separate section on the service charges, including a non-exhaustive list of items which the landlord could charge to the plaintiff. One of these items was the "cost of administration and centre management". In the first round of negotiations, the plaintiff requested that these costs be capped at 5% of all other ancillary expenses.

The parties soon agreed to use an entirely different contract template. This new draft was derived from a template used in a different shopping centre, which was owned by a different landlord, but managed by the same management company. The plaintiff had also rented a shop in the other shopping centre based on the contract template. The parties thus thought it would be easier to reach an agreement based on that template.

The new contract draft also included a non-exhaustive list of service charge items. This list included the item "administrative costs", but without reference to "centre management cost". Again, at the plaintiff's request, the administrative costs were capped at 5% of the other ancillary expenses. The section further contained a catch-all clause pursuant to which the landlord could charge a proportionate part of all other costs arising in connection with the operation of the shopping centre. This contract was ultimately signed, and the plaintiff opened and operated his shop in the shopping centre.

Subsequently, the landlord charged – among others – administrative costs (capped at 5% of the other cost) and centre management costs (without limitation) to the tenant. The landlord argued that the centre management costs were not covered as individual items and could therefore be charged based on the catch-all clause.

The plaintiff argued that the catch-all clause could not serve as a basis for charging centre management costs, as these costs were not transparent and this would allow the landlord to charge non-specified costs to the tenant without limitation. This would violate the Austrian law on general terms of business and contract templates (Section 879(3) of the General Civil Code). The clause was thus invalid insofar as it included centre management cost.

Decision

The Supreme Court chose a different approach and made the following points.

First, the Austrian law on general terms of business and contract templates did not apply here. The contract template was not provided by the landlord; it was drafted by a different landlord for a different shopping centre. The fact that the landlord's representative (ie, the administrative company) was also in charge of managing that other centre was of no legal relevance.

Second, the contractual clause stipulating that administrative costs would be capped at 5% of all other ancillary costs had to be construed to include both administrative costs and centre management costs. This was apparent from the contract negotiations. The tenant had made clear that he did not accept unlimited centre management costs. The landlord had clarified that he insisted on charging some centre management costs to the tenant. Therefore, the centre management costs had to be considered a part of the administration costs, which the landlord may charge to the tenant, subject to a cap of 5% of all other ancillary expenses charged to the tenant.

Comment

The Supreme Court's decision not to apply the Austrian law on general contract terms and contract templates is surprising. While it was true that the contract template had not been drafted by the landlord (but rather by a different landlord for a different shopping centre), the centre management company had used this template for numerous transactions.

The very idea of the law on general contract terms and contract templates is that one party has intimate knowledge of all aspects of a template which it frequently uses, whereas the other party uses the contract only once or twice. The law seeks to level this information disparity between the parties by eliminating those clauses which are most disadvantageous to the other party.

In this transaction, the centre management company was well aware of the contract template because it had used the template extensively for a number of shops, albeit in a different shopping centre. It is interesting that the Supreme Court did not ascribe that knowledge and experience to the landlord, who had engaged the services of the management company.

Further, the court's interpretation of the contract clause is surprising. The contract negotiations showed that the clause originally included both administrative costs and centre management costs; however, the final version of the lease agreement ultimately referred only to administrative costs. Thus, for contract drafters, this would mean that if they wished to exclude costs which were included in a first draft, they would have to explicitly state this in the contract.

Unfortunately, the Supreme Court gave no guidance on centre management costs. There is no definition in place on which costs can be charged as centre management costs.

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.
