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Supreme Court issues landlord-friendly decision on pandemic-related rent reductions

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Background

On 25 January 2022, the Austrian Supreme Court held that a tenant that operates a restaurant is not entitled to a 100% rent reduction during the covid-19 lockdown periods if takeaway and delivery were permitted, irrespective of whether the tenant had actually offered these services during that time.⁽¹⁾

In previous decisions concerning a sunbed studio, a cosmetics studio and a fitness centre, the Supreme Court had not ruled so favourably towards the landlord and had held instead that the tenant was entitled to a 100% rent reduction for the time during which the government's covid-19 regulations had prohibited the tenant from opening their business to the general public (for further details please see "First Supreme Court decision on covid-19-related rent reductions").

Facts

The tenant had rented premises for the purpose of operating a restaurant – any other use required the written consent of the landlord. The tenant stopped paying rent as of November 2020, during the second lockdown in Austria. The tenant had not offered takeaway or delivery services before or during the lockdown.

Decision

The Supreme Court held that the agreed use as a restaurant included the provision of takeaway and delivery services, unless this provision was excluded in the lease. Therefore, the tenant was permitted to use the premises for takeaway or delivery services without having to obtain an additional consent from the landlord.

The Court held that if it was possible for the tenant to provide takeaway or delivery services, it meant that they could make at least partial use of the premises; thus, the rent was only partially reduced.

This was irrespective of whether the tenant had provided takeaway or delivery services before or during the pandemic. Even if the tenant chose not to do so, this did not exempt them from paying rent.

This would not have been the case where the tenant could have operated the takeaway or delivery services only at a loss. The Court held that, if there had been insufficient demand, the tenant could not have offered these services without incurring a loss. The burden of proof in this respect lies with the tenant, and the percentage of the rent reduction depends on how profitable the takeaway or delivery services was during a lockdown period.

The Court eventually referred the case to the lower court, as the facts had not been sufficiently established.

Comment

It is refreshing to see that the Supreme Court is prepared to take a more landlord-friendly approach than in its first decisions.

This decision is of particular importance where the lease is in the form of a broader-use lease agreement (*Pachtvertrag*) rather than a basic rent contract (*Mietvertrag*), because in the former case the tenant is not entitled to any rent reduction if they could at least partially use the leased premises. Thus, if the tenant could offer a takeaway or delivery service, they must pay the full rent.

The tenants will likely argue that they could not profitably operate takeaway or delivery services (eg, due to lack of footfall or demand). As the burden of proof is with the tenant, they will have to provide a calculation of the estimated cost and potential profit of operating these services, and, in particular, show what efforts they have taken in trying to establish their operation.

For further information on this topic please contact *Martin Foerster* at Pitkowitz & Partners by telephone (+43 1 413 01 0) or email (m.foerster@pitkowitz.com). The Pitkowitz & Partners website can be accessed at www.pitkowitz.com.

Endnotes

(1) Decision 8 Ob 131/21d.