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Court decides on the provisional deferral of rent for the hotel W Amsterdam – A trend for the jurisdiction in the Netherlands?

August 2020

In summary proceedings (kort geding) the tenant of the hotel W Amsterdam has obtained an injunction in the form of a provisional order pending a final decision. The provisional order provides that the tenant may postpone its rent payments for the 2nd to 4th quarter of 2020 due to the consequences of the COVID-19 pandemic. According to the court's reasoning, the COVID-19 pandemic is an unforeseen event whose financial consequences must be borne by both the tenant and the landlord.

The W Amsterdam, which is a hotel of the Marriot luxury brand of the same name, has three restaurants, commercial premises, a night club, wellness and fitness areas and a rooftop pool. The tenant is Palace Hotel Operational B.V. and landlord is Deka Immobilien Investment GmbH. The monthly fixed rent amounts to EUR 580,255.00 which will increase to EUR 833,333.33 as of 1 October 2020. The underlying triple net lease is based on the 2012 standard model of the Dutch Council for Real Estate (Raad voor Onroerende Zaken) which stipulates that the tenant is not entitled to any deferral, discount, deduction and set-off.

In the Netherlands, restaurants were closed from 15 March until 31 May 2020 due to a government injunction. The wellness and fitness facilities and the pool also had to be closed. Due to the loss of turnover, the tenant then also closed the hotel. The tenant stopped paying rent as of April 2020. Negotiations with the landlord about a rent deduction failed. The tenant therefore requested a provisional order in summary proceedings due to a feared insolvency.

The lack of undisturbed use of the rental object due to the closing served the tenant as an argument for a rent deduction. The deduction was requested to be 100% for the period of the closure and 75% for the rest of the year. Arguments are the strict conditions imposed by the government due to the pandemic and the lack of business travellers and guests from non-European countries. The landlord requested payment of the full rent but offered payments of the rent for April to July 2020 in 18 instalments. According to the landlord, decreasing bookings, cancellations and the closing of the hotel are no reasons to change the contractual agreements.

The court decided by injunction that the COVID-19 pandemic is an unforeseen event, which is not regulated in the lease. According to the court it was reasonable to close the hotel for lack of turnover. The tenant had already suffered considerable operating losses and this is expected to

continue until the end of 2020. Since neither party was responsible for the outbreak of the COVID-19 pandemic, financial losses should be shared between the parties. Due to this reason the tenant was entitled to initially withheld the rent for the 2nd quarter 2020 in the amount of 50%, for the 3rd quarter in the amount of 40% and for the 4th quarter in the amount of 25% which corresponds to a deferred amount of approximately EUR 2 million. However, it is a condition that the tenant initiates the proceedings on merits against Deka within one month. The decision also mentions that precisely this arrangement corresponds to an arrangement which the landlord had concluded with another hotel operator in Amsterdam.

If an unforeseen event occurs in such a way that one party cannot, in the light of reasonableness and fairness, expect the contract to remain unchanged, a Dutch court may, on application by the other party, amend the contract, modify the consequences of a contract or cancel the contract in whole or in part. Dutch courts are usually reluctant to make such a decision, as it usually involves a realised business risk. However, Dutch courts have repeatedly ruled several times in recent months (all decisions so far are only injunctions) that the COVID-19 pandemic is an unforeseen event. In this respect, this indicates a trend in the Netherlands, which has yet to be confirmed in pending proceedings on merits.

This is a provisional decision, the final outcome of which is reserved for the proceedings on merits. In summary proceedings, which only end with a provisional order, it is rarely possible to clarify the legal question in detail. When weighing up where the damage would have been greater in the event of an incorrect provisional order, the threat of the tenant's insolvency may have been the main consideration. If the court had ruled in favour of the landlord, it could have been that the tenant would have already been obliged to file for insolvency before the proceedings on merits.

In Austria there is a legal regulation, according to which the tenant can reduce the rent if the rented object cannot be used or can only be used to a limited extent due to extraordinary coincidences. Irrespective of the fact that in Austria it is not yet clear either whether this applies to official measures due to the COVID-19 pandemic, it will ultimately be significant in Austria as well to what extent the legal model has been followed in each individual case in the respective contract or to what extent a distribution of risk has already been contractually agreed between the parties (e.g. turnover rent or profit rental shares), which deviates from the legal model.

In the German Civil Code there is no explicit right to reduce the rent in case of extraordinary coincidences or unforeseen events. This is assessed according to whether there is a defect in the rental object or an interference with the basis for the transaction (Sec. 313 of the German Civil Code). Please also refer to our other blog entries. Just how difficult it would have been to decide what the parties would have agreed if they had been aware of the scope of the current situation can already be seen in current lease negotiations, in which we provide advice. The parties are trying to cover a potential second outbreak by the terms and conditions of the lease agreement and are finding it extremely difficult to reach a consensus on what should apply in this case.

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