

Insights

OBLIGATION TO PAY RENT IN THE EVENT OF CORONA-RELATED BUSINESS CLOSURE

GERMAN FEDERAL COURT OF JUSTICE DECISION FROM 12 JANUARY 2022 - XII ZR 8/21

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Germany's Federal Court of Justice (Bundesgerichtshof – "BGH") handed down a landmark decision affecting commercial tenancy law to start the new year. It considered whether a commercial tenant of commercially used premises is obliged to pay rent in full for the period of an officially ordered business closure during the COVID-19 pandemic.

Per se, the rent of commercial rented premises cannot simply be reduced by half on the basis of Section 313 of the German Civil Code (cessation of the basis of business) if COVID-19-related measures lead to the closure of commercially used rented premises. However, it seems that a 100% rent payment obligation cannot be assumed either. As was to be expected, a consideration of the concrete circumstances is required. This means that a (i) comprehensive and (ii) case-by-case assessment is required, in which the disadvantages suffered by the tenant due to the closure of the business and its duration are decisive. In the case of a commercial tenant, these will primarily consist of a concrete decrease in turnover for the time of the closure, whereby, however, only the concrete rental object and not a possible group turnover is to be taken into account. It may also have to be taken into account which measures the tenant has taken or could have taken in order to reduce the impending losses during the closure of the business. Furthermore, the contractual adjustment to be made must not lead to an overcompensation of the losses incurred and any (state) benefits received to compensate for the disadvantages caused by the pandemic must be taken into account (including any benefits from a business insurance policy subject to a duty to indemnify). It should also be noted that state support measures that were only granted on the basis of a loan must be disregarded in the required weighing because the tenant does not achieve any final compensation for the turnover losses suffered through them. An actual threat to the economic existence of the tenant is not required. Finally, the interests of the landlord must also be taken into account in the required weighing.

The BGH referred the decision back to the Higher Regional Court ("OLG") of Dresden to examine what concrete economic effects the closure of the business had on the tenant as defendant during

the period at issue (March/April 2020) and whether these disadvantages had reached an extent that required an adjustment of the lease. The OLG had determined that the rent was simply to be reduced by half, after the Regional Court of Chemnitz had previously ordered payment of the rent.

In its decision, the BGH also mentions that the officially ordered closure of the business did not constitute a rental defect within the meaning of Section 536 (2) sentence 1 of the German Civil Code, so that a right to reduce the rent could not be attributed to it. Legislative measures can only constitute a rental defect if the restriction of use is directly related to the concrete condition, state or location of the rental object (in this case it would have to be examined which measures are open to the landlord, either to take recourse against the government measures or to claim compensation for the disadvantages). In the case at hand, the impairment of use was solely linked to the type of use. The rental property itself continued to be available for the agreed rental purpose despite the closure order. In the present case, the tenant could not assume that the landlord, by agreeing on the specific purpose of the lease, intended to assume an unconditional obligation to accept responsibility even in the event of a sovereign order prohibiting opening in the event of a pandemic.

With increased vaccinations and the COVID-19 pandemic phase passing into an endemic, this decision can only be viewed as a guideline for other cases. It will always depend on the individual case consideration in the concrete case, which can/should be countered in good time by negotiations in advance or even, in the best case, by including provisions in the lease already, without having to resort to legal action. It should also be borne in mind that the decision dates back to the early days of the pandemic and that commercial tenants should meanwhile be better prepared for what official measures or orders mean for their own business.

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