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Interim rent reduction due to covid-19 is not easy to achieve

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Introduction

Covid-19 has significantly affected the performance of lease agreements. The pandemic and its associated effects, including a shift in consumer behaviour and the sanitary restrictions imposed on entrepreneurs, have created significant uncertainty on the rental market for both landlords and tenants. This is particularly applicable to the catering and hotel industry, as well as shopping centres.

As a result of the pandemic, many tenants have taken steps to seek changes to their existing lease terms in court. However, Polish case law indicates that obtaining security for tenants in the form of a rent reduction in the course of such a procedure is not easy.

Action for formation

In article 357(1) of the Civil Code, the law provides for a special legal remedy that allows for the amendment of the terms of an agreement or even its termination through the courts in the event of circumstances unforeseen by the parties.

This remedy is not widely used. However, the pandemic has reminded people, tenants in particular, that it exists. They have rushed to the courts to reshape the rules for paying rent during the period affected by covid-19.

Security in form of rent reduction

Practice shows that an action for the formation of new lease conditions is often connected with a request to grant tenants temporary protection even before the court makes a final decision – this can be done by way of securing the claim.

Security measures requested by tenants include prohibiting the landlord from terminating the agreement or using securities established in the agreement (eg, prohibiting the deduction of the amount of rent due from a deposit paid by the tenant or prohibiting the release of a bank guarantee). However, above all, the primary form of security requested is a temporary reduction (ie, for the duration of the court proceedings) in the amount of rent payable to the landlord.

The possibility of granting such security depends on:

- making the claim plausible – namely, making its legitimacy plausible; and
- making the legal interest in granting security plausible.

These prerequisites must both be fulfilled. The absence of either results in dismissal of the request for security (this is not tantamount to dismissal of the claim itself).

Therefore, the tenant must make the prerequisites for the rebus sic stantibus claim set out in article 357(1)(1) of the Civil Code plausible before the court. These are:

- an extraordinary change of relations;
- excessive difficulty in performing the service or a threat of a gross loss for one of the parties;
- a causal link between the change of relations and the difficulty in performing the obligation or a threat of loss; and
- the parties having not foreseen the effect that the change of relations would have on the performance of the obligation when concluding the agreement.

Moreover, the tenant must make plausible that its situation will deteriorate if the requested security is not applied.

When formulating the request for security, tenants must also bear in mind the rule set out in article 730(1)(3) of the Code of Civil Procedure, according to which, when choosing the manner of security, the court will consider the interests of the parties or participants to the proceedings to such an extent as to provide appropriate legal protection to the entitled party and not to burden the obligee beyond necessity.

Obstacles to granting temporary rent reduction

Polish case law on covid-19 indicates that it is not easy for a tenant to obtain this type of security.

To convince the court that the pandemic and its associated effects constitute an extraordinary change in relations and that, at the time of concluding the agreement, the parties did not foresee the impact of these circumstances on the lease relationship is relatively easy. The assessment of these prerequisites requires an examination of the circumstances of the conclusion of the specific agreement and any annexes thereto. At the same time, according to the case law, depending on the particular circumstances of the case, even the conclusion of an annex during the pandemic does not necessarily mean that the tenant may not effectively invoke the rebus sic stantibus clause.[(1)]

Making other prerequisites of a claim under article 357(1)(1) of the Civil Code plausible requires further actions from the tenant. For instance, in a case where a tenant from the hotel industry demanded rent reduction for the period of the pandemic and in the following months, the court dismissed the request for security. As the court pointed out, the tenant should make plausible, in particular, their current financial standing and the reduction of income in the values that they indicated. The court in that case held that it was insufficient to present only general data (eg, hotel booking charts) or correspondence of the parties. Instead, first and foremost, real accounting documents and data concerning the actual decrease in income and number of guests in the hotel must be presented.[(2)]

In the case discussed above, the tenant submitted the complaint and attached new documents to the case file. However, while examining the complaint, the court shared its earlier opinion and indicated especially that the private printouts without any signature or designation cannot be considered reliable documents and that the relevant source data and the financial statements for the period before the pandemic had still not been presented by the tenant. As a result, the court was unable to fully assess the tenant's financial situation. This was important because, as the court noted, the tenant may have had savings or other capital which could be used in order to settle payments due to the landlord.[(3)]

In a case involving restaurant premises in a shopping centre, the court also held that the tenant had failed to make the threat of a gross loss or excessive difficulty in meeting its obligations plausible. In taking such a position, the court referred, among other things, to the fact that the tenant had failed to:

- present calculations concerning the entire period relevant to the case;
- produce any source documents or disclose the manner in which it made its calculations.[(4)]

In another case concerning a shopping centre, the court pointed out that the prerequisite of the threat of gross loss was not substantiated because the tenant had failed to indicate the effect of a decrease in revenue in the leased premises on its overall assets in a situation where it also conducted the retail sale of products in other premises and, moreover, engaged in e-commerce sales.[(5)]

Landlord's interests also matter

The case law emphasises that even meeting the above prerequisites does not automatically mean that the court is obligated to interfere in the lease relationship. In article 357(1)(1) of the Civil Code, the legislature specified additional prerequisites for such interference, which are:

- the interests of both parties; and
- the principles of social coexistence.

Consequently, the court must consider not only the interest of the party claiming an extraordinary change in relations (the tenant), but also the interest of its counterparty (the landlord). When analysing the parties'

interests, in one case concerning the lease of space in a shopping centre, the court compared the public aid received by the tenant and the landlord. Thus, the court considered the fact that in large-format shops, some tenants were statutorily exempt from paying rent, whereas the legislature did not provide for any related monetary aid for the landlord, which must also bear, among other things, the costs of proper maintenance of the shopping centre, as well as legal, credit, employee and tax costs.[(6)]

In another covid-19-related case, the court indicated that if the tenant did not make use of the privileges provided for in aid programmes offered by the state, this might be evidence of its good financial standing. So, the failure to secure the claim would not result in a significant deterioration of its financial status.[(7)]

At the same time, it follows from the case law that the tenant may not shift the entire covid-related burden onto the landlord. For example, in the case cited above, in which the tenant of a fitness club in a shopping centre sought security in the form of making the amount of rent dependent on the turnover generated, the court held that the security method requested by the tenant burdened the landlord beyond need. As the court observed, such a method of security not only transfers all of the negative consequences of the pandemic to the landlord, but also transfers the normal economic risks related to the tenant's business to the landlord.[(8)]

Comment

These rulings provide valuable guidance for the future – both for tenants that would like to claim a rent reduction, and for landlords that defend themselves against such security.

In particular, it should be remembered that the rebus sic stantibus clause requires an analysis of the specific circumstances of a given case, and it is difficult to offer universal solutions that the parties will be able to invoke in any case.

The corrective prerequisite in the form of an analysis of the interests of both parties to the agreement is essential. As a rule, security claims that result in an excessive preference for the tenant and a disproportionate burden on the landlord are doomed to fail.

For further information on this topic please contact Barbara Jelonek-Jarco or Magdalena Krzemińska at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (barbara.jelonek@kkg.pl or magdalena.krzeminska@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.

Endnotes

(1) See the Warsaw Regional Court decision of 27 January 2021, XXVI GCo 269 /20.

(2) See the Warsaw Regional Court decision of 17 June 2020, XVI GC 564/20.

(3) See the Warsaw Regional Court decision of 7 January 2020, XVI Gz 110/20.

(4) See the Warsaw Regional Court decision of 25 September 2020, XVI GC 1012/20.

(5) See the Warsaw Regional Court decision of 28 August 2020, XVI GCo 195/20.

(6) See the Warsaw Regional Court decision of 27 January 2021, XXVI GCo 269/20.

(7) See the Warsaw Regional Court decision of 28 August 2020, XVI GCo 195/20.

(8) See the Warsaw Regional Court decision of 27 January 2021, XXVI GCo 269/20.