

Austria

Supreme Court (OGH) confirms: Entry ban in lockdown entitles to rent exemption

COVID-19 is an epidemic that leads to the applicability of § 1104 ABGB (rent exemption in connection with inadvertent unusability) in case of pandemic-related entry bans. This has now also been confirmed by the OGH in its decision on 3 Ob 78/21y. However, it is still unclear whether all sectors affected by official entry bans can claim full exemption from rent. It therefore remains exciting.

As a reminder: The content of § 1104 ABGB

The (dispositive (!)) provision of § 1104 of the Austrian General Civil Code (ABGB) systematically pursues the exemption of the lessor from the obligation to restore a property that has inadvertently become unusable. The law gives examples of such coincidences, including "epidemic". Pursuant to § 1096 ABGB and § 7 of the Act on Tenancy Law (MRG), the landlord is in principle obliged to carry out comprehensive repairs, even in the case of incidental unusability of the property (i.e. not caused by anyone). § 1104 ABGB is thus an exception to this duty of restoration. In return, however, the tenant is also exempt from paying the rent for the relevant period.

When entry bans were issued for the first time in spring as a measure to prevent the spread of COVID-19, the possibility of rent reductions or rent exemptions for tenants was increasingly discussed with reference to § 1104 ABGB.

In its decision on 3 Ob 78/21y, the OGH commented for the first time on the question of the applicability of § 1104 ABGB to the tenancies of business premises affected by the measures taken in the course of the COVID-19 pandemic.

The facts

The defendant is the owner of a house in which there is a business premises.

The plaintiff is the tenant of this business premises and operates a tanning salon there as well as related activities including typical ancillary services such as serving drinks, selling accessories/care products, etc.

The plaintiff requested a declaratory judgment stating she had been exempt from paying the rent in full in the period from April 1 to April 30, 2020.

The arguments

The plaintiff argued that the agreed purpose of the lease was the operation of a tanning salon. As a result of the COVID-19 pandemic, the plaintiff was not allowed to use the business premises from March 16, 2020 up to and including April 30, 2020, because the business did not fall under an exception under the COVID-19 Regulation, and the entry ban therefore also applied to this business premises.

The defendant replied that there could be no complete exemption from rent for business premises. The plaintiff would have had to pay conditional payments. In any case, she would have been obliged to pay the operating and heating costs. In addition, it was "publicised in the media that small entrepreneurs receive immediate

Written by:

Mag. Irena Goglj-Hassanin

✉ irena.goglj-hassanin@benn-ibler.com

☎ +43 1 531 55-163

Benn-Ibler Rechtsanwälte GmbH
Tuchlauben 8, 1010 Vienna

If you have any questions, please contact your direct contact person or write to us at covid19@benn-ibler.com.

For notifications of further developments, please subscribe to our newsletter at www.benn-ibler.com/newsletter

payments and fixed cost subsidies", and the plaintiff had so far not provided any "basic information" on this. The plaintiff could have received up to 75% of the rent by the granting of a fixed cost subsidy and therefore the claim was "vexatious". Finally, the plaintiff had used the premises because the property was still furnished.

Obiter dictum of the OGH

In its decision, the OGH clarified that COVID-19 is to be qualified as an "epidemic" in the sense of § 1104 ABGB and therefore § 1104 ABGB also applies in principle. In order to prevent the spread of COVID-19, a ban on entering the property in question was in force in the relevant month of April 2020, due to the closure regulation. During this period, the business premises "could not be used or occupied at all". This fulfils the criteria of § 1104 ABGB when - as in the present case – it rises directly from this governmental order (ban on entering) that the property rented for certain business purposes could not be used in accordance with the contractual agreement. This corresponds to the understanding of § 1104 ABGB, according to which governmental interventions resulting from elementary events can also be relevant.

The mere leaving of the inventory in the property is not a "use" of the property for the contractually agreed purpose. From this the OGH concludes that there is neither an obligation to remove the inventory nor does this cause wear and tear of the property, so a complete exemption from rent is justified even if the inventory is left in the business premises.

Comments

Thus it is clear that - at least if the applicability of § 1104 ABGB has not

been contractually excluded - bans of entry to combat the COVID-19 pandemic lead to a rent exemption.

However, the OGH did not discuss the extent to which the rent exemption also applies to the operating costs. This question is answered differently in the legal literature.

The OGH also did not clarify whether and to what extent fixed cost subsidies and other economic aids that were granted or could be applied for on the basis of the measures, since in the case at hand the legal basis for these economic aids was only published after the period at issue, so that the OGH did not even address this question. This question therefore remains open - and exciting - as it will probably always be a case-by-case decision as to which aid could actually be claimed, which conditions were stipulated in the guidelines for the respective aid and, finally, which measures and applications were reasonable for the tenant in the specific case.

Another question that still leaves room for discussion after the present decision is the question of partial use by take-away in gastronomy or click & collect or online sales. Since the present case concerned close-proximity services which can neither be offered by click & collect nor online, this question did not arise here, so the OGH did not have to deal with the question in detail.

Nevertheless, the basic decision is now available that a rent exemption is possible with reference to § 1104 ABGB for pandemic-related measures. The finer points are left to the individual case and will probably also play a role in the drafting of future tenancy agreements.