HAUCKSCHUCHARDT

Real Real Estate

47.

REAL ESTATE LAW
NEWSLETTER

23. September 2019

01 / 11

End of rental agreement – what must the tenant clear from the property?

Federal Supreme Court, ruling of 11.04.2019 - IX ZR 79/219

SUBJECT AND CONTENT

A rental agreement was ended with a termination agreement. In the termination agreement, the parties agreed, amongst other things, that all objects, with the exception of the building materials, compost etc on the property, were to be removed. The tenant becomes insolvent and the insolvency administrator hands over the property to the landlord without fulfilling the obligation concerning the removal of all the objects here. The landlord now demands compensation for his clearing costs. The Federal Supreme Court acknowledges the claims of the landlord. The clearance right of the landlord is part of the return right in accordance with § 546 para. 1 German Civil Code which includes the removal of all the tenant's objects and fittings on a property or those which were assumed by him from the previous tenant for which no regulation was made in the termination agreement.

CONSEQUENCE IN PRACTICE

The condition of the property which is returned should always be clearly and comprehensively agreed and defined between both parties. In particular, it should be clear what items can or should remain in the property and if there is compensation for this.

Water supply constitutes part of normal use in accordance with the rental agreement!

Frankfurt/Oder Regional Court, ruling of 29.11.2018 - 15 S 112/17

SUBJECT AND CONTENT

In a dispute concerning the termination of a residential tenancy, the landlord ensured that the utility company cut off the water supply to the flat. As a result, the tenant reduces his rental payments. The Frankfurt/Oder Regional Court has now ruled that the tenant is entitled to do so. An intact water supply belongs to the normal use of a property in accordance with the rental agreement. As a result of essential rooms such as the bathroom and kitchen now being limited in use, or out of use all together, due to the lack of water supply, a reduction of 50 % is justified.

CONSEQUENCE IN PRACTICE

The water supply constitutes part of the normal use of a rental object in accordance with the contract. A reduction of 50 % is recognised by law. As a result, cutting off the water supply, or having this cut off due to a dismissal dispute, can therefore lead to valid rental reductions by the tenant.

03 / 11

Official usage ban – landlord liable to tenant!

Brandenburg Higher Regional Court, ruling of 04.04.2019 - 3 W 95/18

SUBJECT AND CONTENT

A tenancy agreement for premises for a paintball facility outlines that the tenant must present all the necessary approvals for the operation of the facility and that the landlord does not assume liability for adherence to the requirements of the approvals. After the start-up of operation, the tenant receives an official usage ban and claims for compensation from the landlord. He has the right to do so! The rental object was expressly rented “for the operation of a paintball facility” and if the purpose has been officially banned for reasons relating to the building it is the landlord who must assume liable for this.

CONSEQUENCE IN PRACTICE

The object-related suitability of a lease or rental object is the responsibility of the landlord who must also assume liable for this. He cannot release himself from this liability with contractual regulations. In this respect it is important that the suitability of the rental object for the intended purpose is assessed before the contract completion and that the purpose of the rental relationship is clearly defined in the rental agreement.

04 / 11

Is there a duty to grit and clear up on New Year's Eve?

KG, ruling of 15.05.2018 - 21 U 16/18

SUBJECT AND CONTENT

A pedestrian slips and falls between 10.40 pm and 11.30 pm on New Year's Eve and claims this occurred because of the icy pavement. She is taking legal action against the land owner as well as the winter road clearance service employed by him. This was unsuccessful! Ice which occurs after 8.00 pm does not need to be cleared by the winter road clearance service until the following day, by 7.00 am, or by 9.00 am on Sundays and bank holidays. No Legal duty to maintain road safety was therefore infringed.

CONSEQUENCE IN PRACTICE

The provisions for clearing roads and winter road clearing services are given by the road laws governed by federal state law and possibly also bylaws; these also particularly include specific clearing times for winter clearing services. However, in individual cases, a winter road clearing obligation may exist also outside these times. This particularly applies to busy places e.g. pubs, event locations, train stations etc.

Large construction site on the neighbouring property: is a reduction of the rent justified?

Berlin Regional Court, ruling of 15.01.2019 - 67 S 309/18

SUBJECT AND CONTENT

At the time the rental agreement was completed in 1983 there was only an underground garage on the neighbouring property. In building work which occurred between 2015 and 2017 this was replaced by a building above ground level. The landlord agreed there would be a reduction in rent with the tenant only after the building work was completed. The tenant agreed to this and once the work on the neighbouring property was completed, requested a repayment of the excess rent which had been paid to an extent of 20%. He is entitled to do so! If the usage value of a property is restricted due to building work in the neighbourhood, this is regarded as a deficit which justifies a reduction in the rent. Here the Berlin Regional Court accepted a uniform reduction rate of 20% for the entire period of the building work.

CONSEQUENCE IN PRACTICE

The ruling of the Berlin Regional Court to calculate a uniform rate for the entire building period on the neighbouring property has not yet been cleared by the High Court. A reduction in the rent is only justified if the use of the property has been impaired. It is therefore recommended to keep a log on the type, duration, intensity etc of the impairment and name witnesses as well as other evidence.

06 / 11

Written form: to request determination of rental property (here: determination of outdoor areas)

Dresden Higher Regional Court, ruling of 26.02.20019 - 5 U 1894/18

SUBJECT AND CONTENT

The new property owner has prematurely terminated the rental agreement in which he is named due to the lack of the written form. The rental object has not been sufficiently determined with view to the garden area which is also being rented as the rental agreement / corresponding attachment only stated the word “Terrace / Balcony / Loggia” for the outdoor area and there is no spatial demarcation / marking in the site plan. However, in the view of the Dresden Higher Regional Court, the written form has been given. The area is regarded as being sufficiently determined if this area is cleared through the scope of actual use within the framework of the rental agreement. Here the rental agreement was based on a follow-on rental agreement and there was no dispute concerning the site of the areas until the new tenant gave his notice.

CONSEQUENCE IN PRACTICE

The basic terms of the rental agreement, in particular also the rental object, must be included in the rental agreement and sufficiently determined or described as such. There is otherwise the risk that the requirement of the written form has not been fulfilled. In exceptional cases the written form may exist even with insufficient written determinability if this can be established from the actual viewpoints and circumstances. However, to avoid any uncertainties, it is recommended that the rental object is always clearly named and drawn in a site plan as attachment to be enclosed with the rental agreement.

“No cosmetic repairs if property is handed over unrenovated” – this also applies to commercial property law!

Dresden Higher Regional Court, ruling 06.03.2019 - 5 U 1613/18

SUBJECT AND CONTENT

A tenant rented several flats for his employees and exhibition guests. When the flats were handed over to the tenant they were in a partly inadequate and very worn condition. After the rental agreement ended, the landlord wanted the tenant to carry out cosmetic repairs. The tenant refused this after which the landlord carried out the work himself and then asked the tenant for compensation for the costs involved. This was unsuccessful! The jurisdiction that cosmetic repair clauses in tenancy agreements are void if the property was handed over in an unrenovated state also applies to rental agreements for commercial property.

CONSEQUENCE IN PRACTICE

The tendency of jurisdiction to partly transfer the strict standards of residential property law to commercial property law continues also in the area of cosmetic repairs. A void cosmetic repair clause will mean that the responsibility and costs for this must be assumed by the landlord. The rental agreement should therefore include a clear contractual regulation concerning cosmetic repairs.

“Rental agreement begins with the handover” – sufficient for the requirement of the written form?

Cologne Higher Regional Court, ruling of 29.01.2019 - 22 U 30/17

SUBJECT AND CONTENT

The rental agreement stated that this would begin on 01.10.2003 and end 10 years after the property was handed over although no exact date was given for this. The tenant terminates, stating the lack of the written form due to the insufficiently determined rental period. The Cologne Higher Regional Court, however, rules that the written form has been provided: the written form is given if the start and the end of the rental period can be sufficiently determined in the rental agreement at the time that this was completed. Even if the rental period begins when the property is handed over at a date which is not yet fixed, this can be established by the possible purchaser of the property.

CONSEQUENCE IN PRACTICE

The rental period is one of the fundamental points of the rental agreement concerning the written form. Attention should therefore always be given to ensuring that the rental agreement clearly states the start and end of the rental period. An exact calendar date with start and end date is not required although the contract should clearly state the rental period. It is, however, best to determine this with a date to prevent any uncertainties or failure to comply with the written form requirement.

Landlord is, in accordance with the rental agreement, permitted to postpone the handover date indefinitely: compliant with the terms and conditions?

Cologne Higher Regional Court, ruling of 29.01.2019 - 22 U 30/17

SUBJECT AND CONTENT

The rental agreement only states a period for the handover of the property but not a specific date. Furthermore, the landlord has the unlimited and unconditional right, in accordance with the rental agreement, to postpone the handover date. The agreement excludes the right for a specific date as well as other tenant rights such as a reduction in the rent or termination. The tenant regards this as being ineffective and this is also recognised by the Cologne Higher Regional Court. The unlimited and unconditional right to postpone the handover date under the exclusion of all tenant rights represents an unfair disadvantage to the tenant.

CONSEQUENCE IN PRACTICE

With a rental “from the drawing board”, or of property which is still being planned, the exact handover date may not be given. In this respect, the parties must find a practical and flexible answer. If a corresponding clause is included it should be ensured that the tenant is not unfairly disadvantaged. In individual cases, the ineffectiveness of a provision for the handover may otherwise lead to a claim for damages or termination rights etc for the tenant.

Unoccupied premises in a shopping centre – is the tenant permitted to terminate the rental agreement?

Cologne Higher Regional Court, ruling of 29.01.2019 - 22 U 30/17

SUBJECT AND CONTENT

The tenant of a store in a shopping centre is, in accordance with the rental agreement, entitled to a special termination right if 30 % of the total retail area is empty for more than six months. The tenant views this requirement as being fulfilled, terminates the agreement and requests that the rental contract ends with his termination. The Cologne Higher Regional Court rejects this. As the tenant is calling upon a termination right, he is also responsible for the presentation and evidence of fulfilment of the corresponding termination requirements. As part of the secondary burden of proof, the landlord presented plans and area details. As a result, the tenant was unable to precisely and clearly prove that 30 % of the premises were, in fact, empty.

CONSEQUENCE IN PRACTICE

Contractual termination rights may principally be freely agreed between the contract parties and special requirements may also be defined. In the event of a termination, the terminating party is responsible for the presentation and evidence of the fulfilment of these requirements of a termination. In this respect, if a contractual special termination right is exercised, it should be ensured that it can be proven that the requirements for this are fulfilled, if necessary, also in front of a court.

Roadworks – access impaired but entrance clear: shortcoming of the rental object?

Hamburg District Court, ruling of 16.11.2018 - 412 HKO 159/17

SUBJECT AND CONTENT

The rental agreement for a furniture store in Hamburg's centre expressly regulated that there will be various building works on the building as well as in the surrounding area and there may therefore be disturbances to the use of the rental object. Any claims of the tenant involving this were therefore excluded. There were various private and city building works in and on the road. This effected the accessibility of the store whereby the entrance was always clear. As a result, the tenant reduced the rent up to 100 %. The Hamburg District Court rejected this. The contractual exclusion of a reduction of the rent is ineffective here yet, at the same time, there is no right to reduce the rent. The adverse effects due to the roadworks did not have a direct effect on the rental object and access was always possible. Building work may put some passers-by off but the contractually agreed use of the property was possible at all times.

CONSEQUENCE IN PRACTICE

Besides shortcomings in the rental object, external circumstances and influences may, in individual cases, lead to a right to reduced rent for the tenant. Decisive here is whether there is an immediate impairment of the suitability of the rental object or an impact on the suitability of use. Roadworks usually represent a circumstance which is customary to a place and is to be accepted and tolerated and doesn't entitle the tenant to a reduction in the rent. The rental contract should include provisions on known or foreseeable building work in, on or near the rental object.

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