

# C&A Case: Munich Regional Court confirms received state aid and failure to build up reserves are at the expense of the tenant

## Update

Since our last Smart News in December 2020, numerous judgements have been issued regarding the impact of the Covid-19-pandemic on the tenant's obligation to pay rent.

Those judgements have in common that the question of a rent reduction is to be taken into account solely in the context of a possible adjustment of the lease agreement due to a material adverse change (*Wegfall der Geschäftsgrundlage*) pursuant to Sec. 313 of the German Civil Code. In this regard, with the insertion of Article 240 Sec. 7 Introductory Act to the German Civil Code (EGBGB) as of 31 December 2020, the legislator has now clarified that the applicability of Sec. 313 German Civil Code is disputably presumed. The main point of review by the courts thus remains the question of reasonableness of Sec. 313 of the German Civil Code which always is a purely case-by-case decision.

In its judgement dated 12 February 2021 – file no. 31 O 11516/20 ("**C&A-Judgement**") the Munich Regional Court ("**Court**") confirms the above, whereby it assumes an obligation of the tenant to build up reserves and whereby it expressly states that state aids received by the tenant must be taken into account in the context of Sec. 313 of the German Civil Code. However, this judgment does not represent a novelty in the jurisdiction of the Court, but a continuation of its judgment dated 25 January 2021 – file no 31 O 7743/20.

## Facts

The parties concluded a commercial lease agreement for a retail building in Munich's City Centre in which the defendant operates a retail store. Since the tenant was prohibited from opening the commercial building due to the Bavarian Infection Control Measures Ordinance (BayIfSMV) dated 27 March 2020 it had not paid rent for the month of

April 2020. The landlord therefore asserted its claim for the April 2020 rent payment in court.

## Ruling

The Court ruled that the tenant has to pay the full rent for April 2020 as the reserves to be reasonably expected to be built up by the tenant already exceed a possible adjustment amount. Therefore, there was no need to assess risk distribution among the parties and within the scope of Sec. 313 of the German Civil Code.

### 1 In principle: Right to adjust the contract exists

In the opinion of the Court, there was neither a rental defect nor a case of impossibility of performance.

Due to the newly introduced Article 240 Sec. 7 EGBGB, application of Sec. 313 of the German Civil Code is disputably presumed whether as a result of government measures to combat the Covid-19-pandemic, the leased object cannot be used for the tenant's business or can only be used with considerable restrictions. The landlord had not disproved this presumption in the lawsuit.

### 2 Circumstances of the individual case justify maintenance of the obligation to pay rent

As a starting point for the distribution of risk bearing regarding Covid-19-consequences the Court assumes a 50/50 ratio. However, here the claim for adjustment of the lease agreement fails due to special circumstances of the individual case. The figures presented by the tenant did not justify a reduction of the rent. The Court further clarified, that the reasonableness test within the meaning of Sec. 313 of the German Civil Code related solely to the tenant's specific store.

### a. Subject of risk distribution per se limited to 70%

The Court already performs a correction with regard to the subject of risk distribution before at all entering into the assessment of the risk distribution. Starting from 100% of the monthly rent, the subject of the risk distribution was in advance already limited to 70% by the Court.

Various deductions were made: Firstly, because the tenant could have made interior improvements during the closure order that would not have been possible during regular operations. Secondly, because the leased object continued to be usable for the storage and warehousing of the assortment inventory. Furthermore, the Court had made a deduction for turnover generated by the tenant in the course of operating its online store on the basis of an estimate pursuant to Sec. 287 (2) of the German Code of Civil Procedure (ZPO), if and to the extent that such turnover is caused by the pandemic-related change in customer behaviour.

### b. Building up reserves and receipt of state aids as circumstances to be taken into account

Based on the figures presented by the tenant, the Court considered building up a reserve in the amount of one month's rent to be reasonable. The Court was neither convinced by the tenant's objections that negative interest rates would have led to an uneconomic decrease of capital nor that investments would have been more profitable for the company. The Court also affirmed the partial crediting of the short-time allowance (*Kurzarbeitergeld*) received. In this regard, the ruling also contains helpful statements as to the weighting and calculation level at which state aids are to be taken into account in the reasonableness test.

## 3 Hypothetical reserves exceed rent owed

The monthly rent is only accessible for risk distribution in the amount of 66.5% (100% minus 30% deductions minus short-time allowance received). Since the Court considered building up a reserve in the amount of a full month's rent to be reasonable, this applies even more to two thirds of the monthly rent.

## Judgement dated 25 January 2021

file no 31 O 7743/20

In its C&A judgement, the Court referred to a judgement it had issued shortly before, in which the Court had dealt with the effects of the (partial) closure orders on hotel businesses for the first time.

Also, in this earlier judgment the Court initially made deductions with regard to the subject of risk distribution

among the parties and within the scope of Sec. 313 of the German Civil Code. Firstly, for the independent decision of the tenants to close their hotel completely and secondly, for the continuing possession of the hotel, the Court had made deductions totalling 27.2%. Again, the Court had affirmed the tenant's obligation to build up reserves. Since the hypothetical reserve sum had already exceeded the 72.8% of the rent share before a risk distribution was made, the tenant was ordered to pay the complete monthly rent, too.

## LPA-Conclusion

In our opinion, the judicial trend of the Court, which is evident from the two detailed reasons for the judgment, is correct and comprehensible. However, it remains to be seen whether this tendency will also be adopted accordingly by other courts and higher instances.



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