

THE LAWYER

Property

BRIEFING:
Switzerland

Landlords beware of tenant lease continuation rights

Commercial tenants in Switzerland can defer a lease termination on the grounds of hardship, but a recent case extends previous interpretations of the law



By Dr Gion Christian Casanova, partner, Prager Dreifuss

The Swiss Code of Obligations (CO) governing lease contracts gives a commercial tenant the right to apply in court for a continuation of the lease “where termination of the lease would cause a degree of hardship for [the tenant] that cannot be justified by the interests of the landlord”. This extension can be granted for up to six years.

In its constant jurisprudence the Federal Tribunal, Switzerland’s highest court, affirms that the court needs to take into account all relevant circumstances of the case while determining whether and for what duration to extend the lease. The CO itself enumerates the primary interests, such as the duration of the lease, the personal, family and financial circumstances of the parties, as well as their conduct, any need that the landlord might have to use the premises for himself as well as the urgency of such need, and the prevailing local market conditions for residential and commercial premises.

Not all of the enumerated elements are relevant for the commercial lease to the same extent. The Federal Tribunal, however, has repeatedly reminded in its judgments that the courts need to weigh the specific interests of both parties, and also emphasises that the courts need to keep in their mind the extension’s aim to “provide time in order to find an alternative location”. An extension appears justified if it provides the chance that the hardship will be mitigated by postponing the relocation. A tenant is, however, obliged to prove sufficient efforts made to find an alternative location.

In a decision rendered last year (case reference 4A_699/2014) the Federal Tribunal appears, however, to have somewhat broadened the grounds on which it is ready to extend a commercial lease.

Facts of the case

The dispute concerned a family-owned fashion store at a prime location in Zurich. Founded in 1884 at the same place, later generations separated the ownership of the business and of the building and transferred both into separate companies. The last lease contract dated from the year 2000 and was terminated by the landlord in mid-2015.

The tenant started court proceedings asking for a first extension of the lease for the duration of four years. The first instance court granted a one-year extension starting after the end of the contract, i.e. lasting till mid-2016. The second instance judgment confirmed this extension, an important

element of the decision being that the tenant had been too selective in its search efforts and was thereby not able to claim a hardship from the fact that it was not able to find an alternative location.

Judgment of the Federal Tribunal

The Federal Tribunal, on appeal, went well beyond the judgment of the lower instances and granted a prolongation of the lease for three years, i.e. until mid-2018. Contrary to the second instance the Federal Tribunal came to the conclusion that the tenant had not been unwilling, but unable to find an adequate alternative for its premises. The Federal Tribunal accepted the tenant’s argument that, in view of its specific needs, other locations on the market would not have been reasonably suitable.

The Federal Tribunal came to the conclusion that there was no reasonable chance that the tenant would be able to find such a suitable alternative within the six years during which the lease could be extended at the maximum. In this situation the hardship justifying the extension for the tenant could not be based on a need for additional time to find a scarce alternative. Rather, the hardship consists in the fact that the tenant is forced to find and accept a solution with a different content, i.e. to change its business model.

Implications of the decision

Taking into account the formula that the Federal Tribunal most often uses in its judgments, it would not have been surprising if the court had decided that no particular extension should be granted. As the court had assumed that no valid alternative could be found in time, the extension of the lease seems, on the first glance, only to postpone the hardship of leaving the premises, but not to mitigate it.

By expressly accepting a forced change of the business structure as a relevant hardship, and by clearly increasing the duration of the extension granted by the lower instances, the Federal Tribunal has now – although it referred to older jurisprudence – clarified and in fact expanded the commercial tenant’s claim to an extension of the lease.

While the implications of this decision in local courts’ practice remains to be seen, it is certainly advisable for a prudent landlord to keep in mind this jurisprudence when planning the termination or renewal of its leases.

PRAGER DREIFUSS
ATTORNEYS AT LAW

Prager Dreifuss AG

Mühlebachstrasse 6

CH-8008 Zürich

Tel: +41 44 254 55 55

Fax: +41 44 254 55 99

E-mail: christian.casanova@prager-dreifuss.com

Web: www.prager-dreifuss.com