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Commercial Property - Switzerland



Transfer of lease regarding commercial premises – effects on sublease contract

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The Federal Supreme Court⁽¹⁾ recently confirmed that the contract for the transfer of a lease is a contract between the former tenant and the new tenant, and that the landlord's written consent is a condition precedent for the validity of such a contract.

In case of a transfer of a main lease, and without any reservation under the transfer contract, a sublease for the same lease object ends with the main lease. The existence of the sublease is dependent on the existence of the main lease to which it relates.

Facts

Two restaurants located next door to each other were leased by two different tenants. Y leased Property 7 and Z leased Property 9. Further, a storage room in Property 7 was subleased by Y to his neighbour Z.

Subsequently, Y and Z transferred their leases to third parties. In 2004, Z transferred both his main lease regarding Property 9 and his sublease regarding the storage room in Property 7 to a new tenant A. The transfer of the main lease and sublease was made with the consent of the respective landlords, so that A became the main tenant of Property 9 and the subtenant of Y regarding the storage room in Property 7. In 2009, with the consent of his landlord, Y transferred his main lease in Property 7 to a third party X, as a new tenant.

Thereafter, a disagreement regarding the legal status of the storage room arose between X and A. On one hand, X, the tenant of Property 7, wanted to use the storage room for himself, while A, the tenant of Property 9, considered that he was still the subtenant of that storage room. On the request of X, pending this dispute, A continued to pay the rent for the storage room to X.

At the end of October 2009, A received two notices of termination regarding the sublease of the storage room – one signed by X and the other signed by Y. A challenged the validity of these notices of termination before the courts. In the event that one of the termination notices should be considered valid by the court, A requested a six-year extension of the sublease. On June 28 2013 the Federal Supreme Court, confirming the previous decisions of the rental court and the Geneva Supreme Court, decided that only the notice of termination sent by X was valid and that the extension of the sublease should be limited to three years.

The Federal Supreme Court based its decision on the following considerations.

Transfer of lease

First, the Federal Supreme Court examined whether the transfer of the main lease from Y to X was valid. The court held that the transfer of the main lease from Y to X regarding Property 7 was in accordance with Article 263 of the Code of Obligations and was therefore valid.

Article 263 gives the tenant of commercial premises a right to transfer its lease to a third party, subject to the written consent of the landlord. The transfer of a lease is a contract between the former tenant and the third party. Thereby, the third party replaces the former tenant as a party to the lease contract. Such a transfer results in a fundamental change in the contractual relationship. For that reason, the consent of the landlord is necessary and must be qualified as a condition precedent to the validity of the transfer.⁽²⁾ However, the landlord may withhold its consent only for good cause. If the landlord consents, the new tenant is subrogated to all rights and obligations of the former tenant under the lease.

In this case, the landlord consented to the transfer of the main lease from Y to X. Since subtenant A was also involved, the court further examined the question of whether the valid transfer of a main

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lease – in addition to the landlord's written consent – also requires the consent of the subtenant.

According to the court, the subtenant's consent is not a prerequisite for the valid transfer of the main lease under Article 263.⁽³⁾ The court stated that the transfer of the main lease deploys its effects only among the parties to that contract. In principle, such a transfer has no effect on obligations undertaken by such parties towards third parties (eg, a subtenant). Therefore, the consent of the latter cannot be a prerequisite for the transfer of the main lease.

Legal status

With regard to the sublease between Y and A, the court held that with the change of the tenant from Y to X following the transfer of the main lease, the sublease between Y and A came to an end.

According to the court, a sublease ends together with the main lease and a sublease cannot be extended for a longer period than the end of the main lease. A sub-letter cannot grant more rights to its subtenant than it has itself.

Accordingly, the termination notice sent by Y to A was invalid and an extension of the sublease after the main lease ended was impossible.

However, the court held that X had entered into a new sublease with A by conclusive conduct.⁽⁴⁾ In particular, X, by requesting the payment of rent from Y, notably presented himself as sub-letter. Likewise, Y declared himself as subtenant. Therefore, the court decided that the notice of termination sent by X to A was valid, and that a limited extension of the sublease for three years must be granted to A.

Comment

The interest of this decision lies primarily in the court's responses on:

- the consents necessary for the transfer of a main lease, in case there is a sublease under the main lease; and
- the legal status of a sublease, in case of transfer of the main lease to a third party.

Further, the court noted that a tenant requires the landlord's consent in order to enter into a sublease. However, in the published considerations about the conclusion of the new sublease between X and A by conclusive conduct, the court did not cover this point. Even though a landlord may withhold its consent for good cause only, obtaining such consent should be kept in mind, especially if a sublease is entered into by conclusive conduct.

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Endnotes

(1) Federal Supreme Court, BGE 139 III 353 (BGer 4A_37/2013), June 28 2013.

(2) Federal Supreme Court, BGE 139 III 353 (BGer 4A_37/2013), cons 2.1.1.

(3) Federal Supreme Court, BGE 139 III 353 (BGer 4A_37/2013), cons 2.1.2.

(4) Article 1 of the Code of Obligations; Federal Supreme Court, BGE 139 III 353 (BGer 4A_37/2013), cons 2.1.3.

Comment or question for author

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