



## **COVID-19: Is a lessee entitled to rent reduction during the corona crisis?**

In this Law Alert we discuss the first court decisions and the relevant points for attention in practice.

## The first judgments in preliminary relief proceedings

On 27 May 2020 and 29 May 2020 judgments were made in preliminary relief proceedings on whether lessees could claim a rent reduction or a suspension of payment of the rent as a result of the corona measures.

It concerns the decisions *Sigismund/InBev* of 27 May 2020 and *Stadion Arnhem/Vitesse* of 29 May 2020. On 3 June 2020, the decision *A./Urbana Zwolle* was sentenced.

## Is mandatory closure due to coronavirus a defect under the lease?

In the rulings *Sigismund/InBev* and *Arnhem/Vitesse*, 2 courts ruled that a closure of the leased premises as a result of a government measure (in these cases an Emergency Regulation) constitutes a defect under the lease.

The premises were a football stadium and a café, but it is likely to assume that this applies to all premises that were temporarily closed to the public as a result of the Emergency Regulations. Whether partial opening up after easing government measures could lead to a (less serious) defect has not been addressed in these proceedings.

Next question is whether the lessee is entitled to a proportional reduction of the rental price because of that defect.

The claim for rent reduction is based on regulatory law and can therefore be excluded from the agreement. In the *Sigismund/InBev* judgment, this was not excluded according to the court. The lease was based on an old template (ROZ from 1980). And so it was provisionally ruled that Inbev can claim a rent reduction.

In the more recent ROZ templates, rent reduction due to a defect is excluded, but the ruling *Stadium Arnhem/Vitesse* states that this provision can be set aside and changed on the grounds of reasonableness and fairness and (above all) on the basis of unforeseen circumstances.

Not all courts agree on whether a forced closure of the leased premises as a result of a government decision in the context of the corona crisis always qualifies as a defect.

For example, in proceedings *A./Urbana Zwolle*, the court of Overijssel ruled that the forced closure of a restaurant is a circumstance attributable to the lessee. The court came to this decision on the basis of the general provisions of the lease (ROZ template 1994), on the basis of which the lessee must take care of the operational permits he needs and where the withdrawal of a permit cannot give rise to any action against the lessor.

That court considered that the risk of closure by the parties had been contractually deposited with the lessee and did not result in a defect. Such provisions are also included in most recent ROZ templates.

## Is the coronavirus an unforeseen circumstance?

In the Ruling *Stadium Arnhem/Vitesse*, the court ruled that the restrictions relating to the corona crisis should be regarded as an unforeseen circumstance. Now that most leases are based on similar templates, it is plausible that this will become the general view.

However, there are strict conditions for any party to claim (temporarily) amendment of the lease on the basis of unforeseen circumstances: unaltered maintenance must be unacceptable. The court in the *Stadium Arnhem/Vitesse* proceedings considered the following aspects relevant:

- ▶ the social position and the relationship between the parties;
- ▶ the nature and seriousness of the interests involved;
- ▶ the extent of the loss (but also the savings) for lessee as a result of the corona crisis;
- ▶ the financial situation of lessee before the start of the crisis;
- ▶ lessee's financial situation in coming months if there had not been a corona crisis;
- ▶ lessor's dependence on the rent payment in relation to, for example, financing expenses.

In this ruling, the court concludes that the lessee had not sufficiently substantiated the financial

consequences of the corona crisis and (therefore) does not meet the strict conditions.  
The lease agreement remains unchanged in this summary proceeding.

## Tools for practice

Although these are judgments of (several) court judges in summary proceedings, a number of important principles can be derived from them:

- ▶ A lessee can make an appeal to unforeseen circumstances, even if the lease agreement states that the lessee is not entitled to a rent reduction in the event of a defect.
- ▶ It is important for lessors to remain critical towards lessee's requests for temporary adjustment of the rental payment. Lessors should carefully assess the information provided, based on the specific arrangements in the lease and the circumstances of the case.
- ▶ Unforeseen corona conditions do not always lead to rent reduction, but only if unaltered rental payment is unacceptable. That strict condition continues to apply fully, also during this corona crisis.
- ▶ All circumstances of the case are important.
- ▶ A lessee will have to substantiate its deteriorating financial position. The single reference to sales statements and annual accounts is insufficient.
- ▶ In general, lessees will want to give no or limited insight into their underlying financial data, in view of confidentiality or competitive position. In order to address the objections of lessees, the lessee could ask the lessor to sign a non-disclosure agreement. Should the provision take place in the context of proceedings, it is also possible to ask the court to declare that it is forbidden for parties to make communications to third parties about that information and that such information does not appear in the judgment or be omitted upon publication thereof.
- ▶ Qualifying corona measures as a defect will only help the lessee if the lease agreement does NOT exclude rent reduction in case of defects.

The question of whether a forced closure of the leased premises in the context of the coronavirus qualifies as a defect is not yet unambiguously answered in the case law. This is expected to be clarified in the near future with the release of new court decisions.



## What HVG Law can do for you

The coronavirus hits the Netherlands hard. We stand ready to help you meet all the challenges in these profound and intense times. We understand what happens to you and think along with you. With practical advice and solutions we take care of you.

### COVID-19 helpdesk

Contact our helpdesk via [info@hvglaw.nl](mailto:info@hvglaw.nl) or visit our special coronavirus webpage for more alerts: [www.hvglaw.nl/en/corona-updates-english](http://www.hvglaw.nl/en/corona-updates-english)



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