

Commercial Property - Austria

Supreme Court rules that neighbours must consent to short-term letting

Contributed by [Graf & Pitkowitz Rechtsanwälte GmbH](#)

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Background

The residential real estate market currently faces soaring prices on the one hand and stable rents on the other. In a bid to increase their yield in this hostile environment, investors are generating a number of creative solutions. One of these is to rent out fully furnished apartments to tourists or business travellers for short periods, ranging from a couple of days to several months. Landlords typically provide basic services, such as bed linen, towels, cleaning and food vouchers for nearby restaurants. Similar to a hotel agreement, guests pay a fixed price per week, which includes all operating costs, heating, air conditioning, wireless internet access, taxes and any other charges. Such short-term rental agreements do not fall within the scope of the Rent Act, thus giving the landlord greater flexibility in structuring the agreement and no limit on rent.

While short-term leases are highly attractive to respective lessors, owners of neighbouring apartments within a complex are usually not fond of such agreements, due to the high turnover of guests and the resultant issues with noise disturbance and increased damage to communal areas.

The Supreme Court recently dealt with cease and desist proceedings instituted by apartment owners.

Facts

The claimants and the respondents were co-owners of a property development comprising 27 apartments. Their respective condominium agreements provided that the apartments could be used for residential purposes only. The claimants filed a motion for a cease and desist order, according to which the respondents would have to refrain from letting any of their apartments to tourists on a short-term basis.

While it is clear that the owner of a condominium can rent it out, provided that the tenant uses it for the agreed purpose (ie, residential use), the question is where to draw the line - that is, what additional elements render the agreement as outside the boundaries of a regular rent agreement?

Decision

The Supreme Court ruled that the lease activity in question went beyond a regular lease contract because the landlord offered additional services such as bed linen, towels and cleaning. This constituted a change of the agreed use of the apartments. A change of agreed use requires the unanimous consent of all the owners if the alternative use affects the interests of the co-owners. In the present case, the co-owners had not consented to the use of the apartments for the purpose of short-term letting. The court therefore granted the cease and desist order.

The court further stated that the co-owners had to consent even if their interests were in fact not impaired by the new use of the apartments. If they refused to consent, then the owner could file a motion with the local district court.

Comment

The Condominium Act is formalistic in this regard. If a certain use of the property is not in line with the existing condominium agreement, then it is prohibited until a formal consent (or a court judgment replacing such consent) is granted. Even in cases where

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it is clear that the interests of the co-owners are not impaired and that they must consent, the activity in question remains prohibited until formal approval is in place.

This formalistic approach usually leads to a race to judgment - if a co-owner is faced with a statement of claims requesting it to refrain from a certain use of the property, it generally hastens to file a counter claim against the co-owners, requesting them to consent to the activity in question. If these proceedings are faster than the cease and desist proceedings, then the counter claim will most likely succeed.

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