Unequal treatment of tenants as an act of unfair competition and the landlord’s obligation to pay damages

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landlords who, as part of their business, rent space to various entrepreneurs, as is the case, for example, in shopping centres. Equal treatment of counterparties requires shaping contracts with tenants and settling costs in such a way that some of them are not favoured and others are not disadvantaged.

The model of settling operating costs

The model of settling operating costs may be considered unfair in which the tenant is obliged to incur costs not only proportionately to the area of the occupied venue in relation to the total leasable area in the shopping centre, but also increased by the amount resulting from the difference between the costs actually incurred and **the fee paid by anchor tenants.** The latter are entrepreneurs who, due to the fact that they are to attract customers to the shopping centre, enjoy preferential terms not only in terms of rent or duration of the lease but also as to the share in joint costs.

The court judgment concerning equal treatment of the tenant

The issue of violation of the principle of equal treatment of a tenant not classified as key clients and the method of compensation for the damage caused to the tenant was the subject of the Supreme Court's judgement of 28 October 2022 in case II CSKP 456/22, by which the Supreme Court overturned the earlier judgment of the Court of Appeal in Warsaw and referred the case to re-examination.

Importantly, the Supreme Court found it undisputed that the above-described differentiated charging of operating costs to tenants of premises in a shopping centre consisting in materially unjustified differential treatment of some customers should be qualified as an act of unfair competition within the meaning of the Art. 15(1)(3) of

the Act on Combating Unfair Competition.

Pursuant to this provision, an act of unfair competition is making it difficult for other entrepreneurs to access the market by materially unjustified, differentiated treatment of certain customers.

In the described case, the tenant was charged with part of the operating costs which, if fairly divided between individual tenants according to an objective criterion known in advance, should be charged to other tenants.

The issue that was assessed by the Supreme Court differently than by the courts of previous instances was the legitimacy of the tenant’s claim for damages, including the impact of rent reductions granted to the tenant by the landlord on the amount of compensation for **an act of unfair competition.**

Compensation in the case of unfair competition acts

Compensation in the case of unfair competition acts may be claimed pursuant to Art. 18(1)(4) of the Act, however, this claim is subject to the general principles of civil law.

The Supreme Court pointed out that the obligation to compensate, within the limits of adequate causal link, covers the losses that the aggrieved party has suffered and the benefits that he could have gained had the damage not been done to him. The analysed act of unfair competition related to unequal – without proper justification for this differentiation – treatment of counterparties requires the determination of a reference level, the level of “equal treatment”. This should be the same level for all counterparties.

The principle of compensatio lucri cum damno

The condition for applying the principle of compensatio l**ucri cum**

damno, i.e. equalising benefits with detriments, is the identity of the event that is the source of the harm and the benefits. Therefore, the damaging event must be a necessary condition for obtaining the benefit by the aggrieved party. In case of unequal treatment of the tenant, the source of damage is therefore this act of unfair competition consisting in charging the claimant higher operating costs in connection with exemption of certain other tenants from such costs.

On the other hand, any additional agreements between the parties as to the amount of rent (in the described case, the landlord have the tenant discounts as to the amount of rent under the lease) may not be qualified as an event identical to the above-mentioned act of unfair competition. Therefore, the Supreme Court emphasised that when the condition of the identity of the event is not met (i.e. when the benefit and the disadvantage resulted from different events), it is not possible to apply the principle of equalising the benefit with the disadvantage.

In addition, the Supreme Court drew attention to the admissibility of cumulating the claim for damages and a claim for unjustly obtained benefits under the provision on unjust enrichment. This follows from Art. 414 of the Civil Code, according to which the provisions of the chapter on unjust enrichment do not infringe the provisions on the obligation to remedy the damage. Therefore, an entrepreneur suffering the damage by an act of unfair competition may demand both damages and handing over the unjustly obtained benefits.

Rent reductions and tenant impoverishment

Importantly, in the described case, the Supreme court also found that the fact of granting rent reduction to the tenant under the

lease agreement does not exclude impoverishment on the part of the tenant which occurred as a result of an act of unfair competition under Art. 15(15)(1)($) of the Act on combating unfair competition. Unjustified burdening with excessive operating costs leads to a decrease in the tenant’s assets and to the simultaneous enrichment of the landlord.[/vc_column_text]

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