



## German Federal Court of Justice strengthens tenant rights

### Cosmetic repair clauses in the handover of rented premises having not undergone renovation remain invalid

A cosmetic repair clause is not valid even if the new landlord undertakes to carry out cosmetic repairs.

September 2018, Markus Ruhmann

Nothing changes with the German Federal Court of Justice's new ruling (ruling dated 22.08.2018, Az. VIII ZR 277/16). The Court continues to uphold its landmark ruling (ruling dated 18.03.2015, Az. VIII ZR 185/14), which states that passing on the duty of cosmetic repairs to the tenant under the tenancy agreement is invalid if the rented premises are handed over to the latter without having undergone renovation or in need of renovation. This also applies if no appropriate compensation has been granted. A renovation agreement concluded between the previous tenant and the new tenant does not change this.

### Agreement between previous tenant and new tenant is ineffective for landlord

The case: The previous tenant had taken over the rented premises from the landlord in a non-renovated condition. When he moved out, he concluded an agreement with the new tenant to take the items remaining in the flat. A compensation payment was agreed and the obligation to carry out the renovation work was established.

When moving out, the tenant carried out the cosmetic repairs – but not to the full satisfaction of the landlord. He demanded the costs incurred for the repair work. The tenant, however, was of the opinion that the cosmetic repair clause was invalid because the flat had been handed over non-renovated, or rather in need of renovation. This was irrelevant in the landlord's view. He referred to the renovation agreement concluded between the previous tenant and the new tenant.

The Federal Court of Justice ruled in favour of the tenant. According to the Court, the landlord cannot derive any obligation of the tenant from the agreement, as the bilateral agreement is limited only to the parties involved, i.e. the previous tenant and the new tenant.

## Landlord must bear renovation costs himself

An ineffectively agreed cosmetic repair clause can therefore become expensive for the landlord. The landlord must bear the full cost of cosmetic repairs himself.

## Recommendation

The Federal Court of Justice further strengthens the tenants' rights with this ruling, which landlords must take into account. In the past, the Court has already issued a number of rulings that are detrimental to landlords. Landlords must therefore be careful when drafting standard form tenancy agreements. In concrete terms, it is advisable to take a close look at the following:

- **Quota compensation clauses**

The Federal Court of Justice has ruled that quota compensation clauses are invalid if they unreasonably disadvantage the tenant. An unreasonable disadvantage exists if the proportion of costs attributable to the tenant cannot be precisely determined and if, when concluding the agreement, it is not clear and understandable which burden will be borne by the tenant. According to the Federal Court of Justice, this applies regardless of whether the flat has been left renovated or not.

- **Cosmetic repair clauses**

If the rented premises have been handed over in a renovated state, cosmetic repair clauses in the tenancy agreement are unproblematic. Rented premises are considered "renovated" if they convey the overall impression of renovated rented premises. It is therefore not necessary to completely renovate the rented premises before the start of the rental period. In individual cases refreshment work may be sufficient.

However, for the handover of non-renovated rented premises, cosmetic repair clauses can be validly agreed if the tenant has been granted appropriate compensation.

Appropriate compensation can be, for instance, a rent-free period. The compensation must be comparable to the expenditure of the renovation work (costs).

- **Rigid renovation terms**

Another obstacle is rigid renovation terms. The Federal Court of Justice has declared rigid renovation terms invalid, as they do not take into account the time of causation. The terms refer to the time when renovation is needed and thus involve a need for

renovation caused by the previous tenant. The tenant could therefore be obliged to renovate immediately after the start of the rental period, even if the wear and tear of the rented premises is not attributable to him.

Landlords should ensure that such terms are “flexible”. This means that the tenant is only obliged to carry out cosmetic repairs if the (worn) condition of the rented premises requires it.

Furthermore, agreements between new tenants and previous tenants generally do not favour the landlord. For this reason, the landlord would need to be part of a tripartite agreement. It remains to be seen whether the Federal Court of Justice will affirm the tenant’s obligation in such a case

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