

SUPREME COURT DECISION OF 26 SEPTEMBER 2011

The case in brief

On 26 September 2011, the Danish Supreme Court made a ruling regarding the application of the declaratory provision in Section 13 of the Danish Business Rent Act, particularly the provision's interaction with other rent adjustment clauses agreed by the parties.

The case concerned the question of whether the rent could be adjusted according to Section 13 when a price index adjustment clause was integrated in the contract, without including a clause reserving the right to claim the rent adjusted using the principles in Section 13.

The question was whether or not the inclusion of an adjustment clause into the business rent contract leads to the loss of the parties' right according to Section 13 to regulate the rent to market rent if they do not specifically reserve their right to do so in the contract.

The legal basis

The Danish Business Rent Act, Section 4, states that:

The Act's declaratory provisions, are considered part of the contract, unless the parties have agreed otherwise or they must be considered not to be a part of the contract.

In regards to Section 4, the bill to the Danish Business Rent Act states that:

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It is proposed, that the requirement to explicitly consider a deviation, of the provisions laid down in the Business Rent Act, in the contract, is not included. The decision of whether or not a deviation of the declaratory provisions has been agreed between the parties, should be based on a specific interpretation of the contract, utilising the principles and provisions laid down in the Danish Contracts Act

According to the bill, an assessment of whether the Business Rent Act has been deviated from must be made with each individual tenancy agreement.

According to Section 13, the parties to the contract may demand that the rent be regulated if it varies materially from the market rent.

With regards to Section 13, the bill to the Danish Business Rent Act states that:

The parties to the contract may deviate from the declaratory rule laid down in section 13. This will mean that the parties are completely free in regards to regulating the rent in the tenancy period. The parties may both individually and together, without any requirements regarding form etc. renounce their right to have rent regulated to market rent.

Since the amendment of the Danish Business Rent Act it has been unclear whether the parties' declaratory right laid down in Section 13 may be invoked when the parties have agreed to another rent adjustment clause and have not reserved the right to regulate the rent to market rent.

The uncertainty has been cleared up by the decision made by the Danish Supreme court.

The Supreme Court's Decision

The Supreme Court declared that the declaratory provision in Section 13 of the Business Rent Act, according to Section 4, is applicable if nothing else has been agreed by the parties.

In the specific case, the Supreme Court found no evidence to support the claim that, despite the price index clause, the parties had reserved their right to have the rent regulated to market rent.

The Supreme Court was therefore of the conviction that the parties' right to have the rent regulated according to market rent pursuant to Section 13 cannot be invoked in cases where the parties have agreed that rent adjustment must be made according to a

specifically defined index, unless the parties specifically have reserved their right to do so.

Future implications

The decision made by the Supreme Court entails that the tenants and landlords in business tenancies who have agreed on other price adjustment clauses than the one described in Section 13 will not be able to invoke their right according to Section 13, unless they specifically reserve their right to do so in the contract.

This means that landlords and tenants who have previously agreed to other rent adjustment clauses will have to revise their current tenancy agreements and consider whether or not they need to specifically reserve the declaratory right laid down in Section 13. Correspondingly, the parties to business tenancies will have to be aware of the need to reserve the right laid down in Section 13 to have the rent regulated to market rent in contracts where the parties have also agreed on other rent adjustment clauses e.g. a price indexing clause.

If you have any questions or require additional information on the decision, please contact Attorney Thomas Weitemeyer (twe@mwblaw.dk) or junior associate Anders Kjær Dybdahl Pedersen (akd@mwblaw.dk).

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