SWISS CONTRACT LAW

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No Causation, No Commission, Even If the Agent Had Identified the Buyer?

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In this decision, the Federal Supreme Court had to determine whether a broker who had merely identified the buyer could nevertheless claim commission after a second broker completed the transaction. The Federal Supreme Court considered that the second agreement concluded between the client and the first broker only amended the initial contract, that the first broker's activity had no causal effect on the sale, and that the contractual provision relied upon was not clear enough to derogate from Art. 413 para. 1 SCO.

Judgment of the Federal Supreme Court of 20 September 2024

Case Reference : 4A_529/2023

Facts

On July 13, 2017, A. (the "Client") and B. (the "First Broker") concluded an exclusive brokerage contract (the "First Contract") for the sale of a 7.5-room apartment (the "Property") at a price of CHF 6,000,000. The Contract stipulated at article 6.1 of the terms of service that the brokerage fees were due in particular "upon conclusion of the sales contract with the person introduced by the broker"[1] and "when the principal sells the property to a person introduced by the broker (exclusive or not) within one year of the end of the contract".[2]

On January 16, 2018, the First Broker sent an activity report to the Client, stating that the company had shared the listing to approximately one hundred people, including the future buyer (the "Buyer") who would eventually be purchasing the apartment with his wife. On January 17, 2018, an employee of the First Broker's employees conducted a viewing of the Property with the Buyer. However, the Buyer did not put in an offer after the viewing.

Seven months later, with no buyer in sight, the Client requested to revoke the exclusivity clause of the First Contract in order to hire other brokers to search for potential buyers. On March 1, 2018, the parties entered into a new agreement (the "Second Contract"), which retained the same terms of service but removed the exclusivity clause. It also included a lump-sum fee of CHF 15,0000 payable to the First Broker in the event the sale was concluded through another broker.

That same month, the client also entered into brokerage agreements with C. (the "Second Broker") and D., two real estate brokerage companies.

In November 2018, after continued difficulties selling the Property, the Client reduced the asking price to CHF 4,800,000. The First Broker informed the Buyer of the new price on November 15, 2018. The Second Broker, informed of the price change on November 21, 2018, shared the listing and subsequently arranged a viewing with the Buyer in late December.

On January 7, 2019, the Buyer put in an offer to buy the Property. The accepted the offer later that month and paid the brokerage fee to the Second Broker. Upon learning of the sale, the First Broker, issued an invoice for CHF 155,088 to the Client, who refused to pay. Following debt collection proceedings, both the Court of first instance and the Cantonal court upheld the First Broker's claim and ordered the Client to pay the brokerage fee.

The Client appealed the judgment of the Cantonal court to the Federal Supreme Court.

Issue

The Federal Supreme Court reviewed the three motives that led to the Cantonal court's decision, answering three legal questions:

1. Did the Second Contract cancel and replace the First Contract, or merely modified it?;
2. Was there a direct causal or psychological link between the actions of the First Broker and the sale of the Property?; and
3. Did article 6.1 of the terms of service (common to the First and Second Contract) constitute a valid derogation from 413 para. 1 of the Swiss Code of Obligations (SCO)?

Decision

1. *Conclusion of the Second Contract*

In order to determine whether the Second Contract replaced or modified the First Contract, the Federal Supreme Court applied the general rules of contract interpretation. Under Swiss law, when interpreting a contract, the judge has to first ascertain the true and common intent of the parties (art. 18 para. 1 SCO). Finding this true and common intent is a matter of fact that the Federal Supreme Court cannot review as a matter of principle (art. 105 of the Federal Supreme Court Act [FSCA]). Thus, the findings of the Cantonal court are binding on that matter.

If a true and common intent cannot be determined, the judge must interpret the contract in light of the principle of trust, where the contract is interpreted according to the rules of good faith, and based on the meaning that each party could and should reasonably have attributed to the other's declarations of will. This principle allows a party to be bound by the objective meaning of its statements or conduct, even if that meaning does not correspond to its innermost will. This interpretation is a matter of law that the Federal Supreme Court can freely review (art. 106 para. 1 FSCA).

In the case at hand, the Cantonal court had left this entire question unresolved in its preliminary ruling, before deciding in its final ruling that the Second Contract had cancelled and replaced the First Contract. However, it relied on facts from the First Contract period to establish causation, thus creating an internal contradiction. For this reason, the Federal Supreme Court sought the true and common intention of the parties.

Considering that the Client had specifically asked to sign a new contract without the exclusivity clause of the First Contract, and that the rest of the contractual relationship did not change, the Federal Supreme Court ruled that the parties' intent was not to cancel/replace the contract but merely modify it.

2. *Causal/Psychological link*

Under art. 412 para. 1 SCO a brokerage contract is either:

- an indication brokerage, where the broker merely identifies a contractual opportunity without influencing the third party's intent; or
- a negotiation brokerage, where the broker actively participates in the negotiation process and must influence the third party's decision to enter a contract.

In an indication brokerage contract, the role of the broker is only to identify a potential party for a transaction and does not exert an influence on the will of the potential co-contractor(s). Hence, the payment of the fees does not require any psychological link between the broker's work and the conclusion of the contract, unlike in a negotiation brokerage contract where the broker must convince the potential co-contractor(s) to conclude a contract.

In the case at hand, the parties were bound by an indication brokerage contract. The Federal Supreme Court underlined that it was indeed the First Broker that had communicated the Buyer's name to the Client first (on January 16, 2018), and had conducted the first viewing (on January 17, 2018). However, at this moment in time, the asking price was CHF 6,000,000, which was too high for the Buyer. No offer to purchase the Property was made after the viewing, and no negotiations followed.

When the price of the Property was reduced to CHF 4,800,000 in November of 2018, the First Broker had notified the Buyer first, but had received no reply. However, simply informing a potential buyer of a price change does not equate to informing the broker's client of an opportunity to sell. The decisive factor in the sale was the Second Broker's communication with both the Buyer and the Client in December, which led directly to the transaction..

3. *Derogation from art. 413 para. 1 SCO*

In the absence of a causal link, the First Broker's only remaining basis for claiming a fee was the argument that art. 6.1 of

the general terms constituted a valid derogation from art. 413 para. 1 SCO.

Art. 413 para. 1 SCO is not considered to be imperative law; parties to a brokerage contract can agree on a different method to remunerate a broker. Said alternative method is often agreed upon to ensure that the broker's remuneration does not depend solely on the conclusion of the targeted contract, and to better account for the time and effort invested, particularly in non-exclusive contracts.

In the case at hand, article 6.1 of the terms of service stated that the sale of the property to a "person introduced by the broker"[3] was sufficient to trigger the obligation to pay the fees. It was, however, not considered as a valid derogation by the Federal Supreme Court.

The contract between the First Broker and the Client had been modified on March 1, 2018, to remove the exclusivity clause, precisely because the Client wanted to have more brokers seeking a potential buyer. It would be inconsistent to allow the First Broker to claim the brokerage fee merely because it had previously communicated the names of individuals who viewed the property but were unwilling to purchase it at the original price of CHF 6,000,000, especially if the sale was ultimately concluded by another broker at a lower price. Moreover, the Second Contract contained a clause that would grant the First Broker a lump-sum fee of CHF 15,000, clearly demonstrating that the parties anticipated and accounted for the possibility of a sale being completed by another broker.

As a result, the Federal Supreme Court allowed the appeal and ruled that the First Broker was not entitled to the fees of CHF 155,088.

Key Takeaways

1. A contract amendment is merely a specific modality of contract formation and, as such, is governed by the same legal principles that apply to the formation of contracts (art. 1 seq. SCO).
2. The psychological link requirement established by case law is only relevant in negotiation brokerage. In contract, in indication brokerage, the broker merely identifies and refers potential contracting parties to the principal without influencing their decision to contract.
3. Art. 413 para. 1 SCO is a default rule. However, according to case law, a party wishing to derogate from art. 413 para. 1 SCO, which is intended to safeguard the interests of both parties, must do so with sufficient clarity. In other words, the clause must be unequivocal. Any ambiguity in a pre-formulated contract must be interpreted against the party who drafted it.

Comments

1. **Contract amendment**

A contract amendment is merely a particular form of contract formation and is therefore governed by the same rules governing contracts (art. 1 seq. SCO). In this case, the Federal Supreme Court found that the parties intended to maintain their existing contractual relationship while introducing specific modifications, namely removing the exclusivity clause and adding a provision entitling the broker to remuneration if the sale resulted from the activity of another broker. The fact that the parties signed a new contract at the principal's request to formalize these changes does not, according to their true intent, amount to two separate contracts.

2. **Psychological link requirement to establish causation**

- *Negotiation brokerage*

In negotiation brokerage, the broker is entrusted with negotiating with a third party on behalf of the principal. To establish causation under such an arrangement, there must be a psychological link between the broker's efforts and the third party's decision to conclude the contract. It is not necessary for the broker's actions to be the immediate cause of the main contract; a remote or indirect influence may suffice., as long as it contributed to the result that aligns with the principal's objective. This psychological link may persist even if negotiations are interrupted. It is also irrelevant whether the broker was involved in the final stages of negotiation or whether another broker later became involved. In such cases, causation is only absent when the broker's efforts had no result, the subsequent negotiations were definitively broken off, and the transaction was ultimately concluded with the same third party under entirely new terms.

- *Indication brokerage*

In indication brokerage, the broker merely identifies persons potentially interested in the transaction and does not influence their decision to contract. In this context, to be entitled to remuneration under art. 413 para. 1 SCO, the broker must demonstrate causation, meaning that the information provided to the principal ultimately led to the conclusion of main contract.

Accordingly, the broker must prove: (1) that he or she was the first to identify the person who eventually purchased the property; and (2) that it was precisely as a result of this indication that contact was made between the parties and the sale was concluded.

- *Psychological link requirement applies only to negotiation brokerage*

Accordingly, the psychological link requirement established by case law is only relevant in negotiation brokerage, as in indication brokerage the broker merely communicates the names of interested persons to the principal without influencing their intent.

In the case at hand, as the parties were bound by an indication brokerage contract, only the existence of a causal link had to be examined, without any requirement of a psychological link between the broker's efforts and the third party's decision to contract.

Moreover, the Federal Supreme Court found that no such link existed. Merely informing potential buyers of a price reduction, via email, does not amount to providing the principal with a concrete indication of a person ready to buy at the new price. The causal link was instead established through the actions of the Second Broker, who reinitiated contact and arranged the decisive viewing that led to the sale.

3. **413 para. 1 SCO as a default rule**

Art. 413 para. 1 SCO is a default rule and parties are free to derogate from it by explicit agreement. However, such a derogation must be clear and unambiguous. Once the parties had entered into a non-exclusive contract, the First Broker could not successfully rely on art 6.1 to claim that merely introducing potential buyers, whether by showing them the apartment when it was listed at CHF 6,000,000 or by sending the listing, was sufficient to trigger the right to brokerage commission. A party seeking to derogate from art. 413 para. 1 SCO, which is intended to safeguard the interests of both parties, must do so with sufficient clarity. In other words, the clause must be unequivocal. Any ambiguity in a pre-formulated contract must be interpreted against the party who drafted it (ATF 113 II 49, para. 1b).

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[1] The relevant contract excerpt reads as follows in the original French version : "*personne présentée par le courtier*".

[2] The relevant contract excerpt reads as follows in the original French version : "*lorsque le mandant vend l'objet à une personne présentée par le courtier (exclusif ou non) dans l'année suivant la fin du contrat*".

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