Liable for remaining silent: Broker found liable for failing to disclose relevant information which had an impact on the sale of his client's apartment

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A broker was held liable for breach of contractual obligations to his client by failing to disclose relevant information regarding the potential sale of his client's apartment at a higher price.

Judgment of the Federal Supreme Court of 5 May 2021
Case Reference : 4A_229/2020

Facts

The dispute concerns the following (summarised) facts:

The owner of an apartment (also known as the Owner or the Principal in a brokerage contract) had contacted a broker (hereafter the Broker) who introduced her to a buyer (hereafter the Buyer).

The Buyer had put in an offer to purchase the Owner's apartment for CHF 2,100,000 through the Broker, which the Owner had accepted immediately. However, the Broker did not disclose the acceptance to the Buyer.

At the same time, the Buyer had planned to buy another (more expensive) apartment, however the Broker later learned that he could not follow through with this plan because he had not been able to obtain the required financing. Nonetheless, the Broker did not inform the Buyer that it was still possible to acquire the Owner's apartment (knowing that the Broker had not previously informed the Buyer that the Owner had accepted the purchase offer).

Given that the Owner had not found an interested buyer for the desired price of CHF 2,100,000 (even though the Buyer had in fact made an offer at this price), she agreed to reduce the sale price of the apartment to CHF 2,000,000.

Through another broker, the Buyer ultimately bought the Owner's apartment for CHF 2,000,000.

Following a first legal proceeding, the Owner was ordered to pay the Broker CHF 20,000 for having provided the Owner with the name of the Buyer who ultimately bought the apartment. In this first trial, the Broker's fees were reduced by CHF 10,000.

The Owner sued the Broker for breach of the brokerage contract and for the damage suffered as a result of failing – on the part of the Broker – to sell the apartment for CHF 2,100,000 (the price the Buyer was initially willing to pay), which the Owner calculated at CHF 87,000.

Issue

The issue in this case is whether the Broker broke its contractual obligations and, if so, what are the damages that the Broker should pay the Principal.

Decision

1. The definition of brokerage contract and the Broker's contractual liability

The Federal Supreme Court first reviewed the definition of brokerage contract and the Broker's contractual liability.

According to Art. 412 para. 1 of the Swiss Code of Obligations (SCO), a brokerage contract is a contract whereby the

Broker is instructed to alert the Principal to an opportunity to conclude a contract (indication brokerage) or to facilitate the conclusion of a contract in exchange for a fee (negotiation brokerage).

As a matter of principle, the broker has no obligation to be active (and can thus remain inactive). However, once the broker becomes active, the broker is liable for the proper and faithful execution of the contract (Art. 398 para. 2 SCO applicable by reference from Art. 412 para. 2 SCO). Art. 398 para. 1 SCO refers to the rules governing the liability of the worker in the employment relationship, that is to say to Art. 321e SCO. It follows that the liability of the Broker presupposes that four cumulative conditions are met: (1) a breach of a duty of care, (2) a damage, (3) a relationship of causality (natural and adequate) between the culpable breach of the duty of care and the damage that has occurred, and (4) a fault. The onus is on the Principal to provide proof of the facts showing that each of these conditions has been met (Art. 8 of the Swiss Civil Code [SCC]), except for the alleged fault (Art. 97 para. 1 SCO).

In this case, the Federal Supreme Court found that the parties were bound by an indication and negotiation brokerage contract. It also held that all four conditions of the contractual liability of the Broker had been fulfilled and that the cantonal court had not erred in arbitrariness when stating the facts.

2. Loss of an opportunity theory

The Federal Supreme Court analysed the *loss of an opportunity theory* on which the Broker relied in an attempt to deny his contractual liability. The Broker claimed that the Principal had not suffered any damage on the grounds that the Principal would have merely lost an opportunity to sell her apartment at the price of CHF 2,100,000, knowing that the loss of an opportunity does not lead to damage claims under Swiss law. The Federal Supreme Court recalled that, based on the loss of an opportunity theory, the repairable damage consists of the loss of a measurable chance of an actual gain or of avoiding harm. It thus corresponds to the probability for the injured party obtaining this profit or not suffering any harm. The value of the lost opportunity is in principle the value of the total stake multiplied by the probability of obtaining it. The reasoning behind this method is to limit compensation to the damage that corresponds to the degree of probability of damage caused by the liable party.

However, the Federal Supreme Court noted that, in addition to the fact that the loss of an opportunity theory is not applicable under Swiss law, the Broker had wrongly invoked it. In fact, the Principal had not been deprived of an opportunity to a gain, but the fact that the Broker had violated its obligations of due diligence had directly deprived the Principal of the gain in question (i.e. the gain resulting from the sale of the apartment at a higher price, keeping in mind that the Principal had accepted the offer made by the Buyer and that the Broker had failed to notify the Buyer of the Owner's acceptance).

3. No reduction of the damage claim

The Federal Supreme Court also had to decide whether the damage claim raised by the Principal should be reduced on the grounds that the Principal would have caused her own damage by reducing the sale price of her apartment (as claimed by the Broker) by application of Art. 44 SCO thus challenging the establishment of a causal link between the breach of contract committed by the Broker and the damage suffered by the Principal. The Federal Supreme Court ultimately established a causal link between the breach of contract committed by the Broker (i.e. failure to disclose information) and the damages suffered by the Principal, and dismissed the claim brought forth by the Broker based on Art. 44 SCO.

4. The amount of the damage

Lastly, the Federal Supreme Court had to determine the amount of damages to award to the Principal as a result of the breach of contract committed by the Broker. The Broker claimed in this respect that the Principal could not claim full damages (i.e. CHF 87,000) given that the other legal proceedings had reduced the Broker's fees by CHF 10,000. The Federal Supreme Court had to determine whether it is possible to combine the Principal's right to compensation for the damage caused by the improper performance of contractual obligations (Art. 398 para. 1-2 SCO applicable by reference from Art. 412 para. 2 SCO) and the Principal's right to a reduction of the Broker's fees (Art. 394 para. 3 SCO applicable by reference from Art. 412 para. 2 SCO) in the event of a breach of the brokerage contract. The Federal Supreme Court stated (in line with its case law) that the compensation for the damage shall not allow the Principal to obtain a second compensation for the same purpose, that is to say compensation by reduction of fees and in addition to compensation for damages. In application by analogy of Art. 397 para. 2 SCO, case law has thus admitted that if the broker has already remedied the damage that he/she had caused, it can be considered as if he/she had correctly performed the brokerage

contract and thus be entitled to full fees.

In this case, the Federal Supreme Court decided that the Principal was not entitled to receive a second compensation for damages, in view of what had already been awarded to her in the other case (i.e. a reduction of the Broker's fees of CHF 10,000). Consequently, the Broker, whose fees were reduced in the first proceedings, was entitled to either the reduction of CHF 10,000 or owed the amount to be allocated in the second trial. The Federal Supreme Court admitted part of this claim and set the Principal's damage at CHF 77,000 by taking into account the reduction of CHF 10,000 in fees which had been obtained in the related case concerning the amount of Broker fees.

In conclusion, the Federal Supreme Court granted the appeal and ordered the Broker to pay CHF 77,000 (plus interest).

Key takeaway

This case constitutes an important reminder of the conditions related to the broker's contractual liability and of the risks that a broker faces if the broker does not disclose relevant information that may lead to the conclusion of a contract for his/her client.

Comments

The judgment prompts three comments.

1) This judgment is interesting because it shows that, even though as a matter of principle, a broker has no obligation to be active (and can thus remain inactive). Once a broker becomes active, he/she becomes liable for the proper and faithful execution of the contract (Art. 398 para. 2 SCO). In this case, this meant that the Broker had to *actively* disclose the relevant information with its client in order to facilitate the sale of the apartment: the Broker's silence triggered its contractual liability. Consequently, once the Broker became active, it had to remain active and to actively disclose any information. In this context, the Federal Supreme Court rightly did not apply Art. 321e para. 2 SCO (the extent of the duty of care) to the Broker's contractual liability even if Art. 412 para. 2 and Art. 398 para. 1 SCO refer to the rules of the employment contract regarding the liability of the employees and thus to Art. 321e SCO. According to Art. 321e para. 2 SCO, "*the extent of the duty of care owed by the employee is determined by the individual employment contract, taking due account of the occupational risk, level of training and technical knowledge associated with the work as well as the employee's aptitudes and skills of which the employer was or should have been aware*." As mentioned in our PhD thesis (Kaveh Mirfakhraei, Les indemnités de fin de contrat dans le contrat d'agence et le contrat de distribution exclusive, Basel/Zurich/Geneva 2014, p. 135-136, N 449), Art. 321e para. 2 SCO (the extent of the duty of care) is specific to the employment contract.

2) Instead of dismissing the loss of an opportunity theory from the outset, the Federal Supreme Court examined it before determining that it was inadmissible under Swiss law and that the appellant had wrongly invoked it. We believe that by doing so, the Federal Supreme Court left the door open to the possibility of admitting the loss of an opportunity theory in future cases.

3) The Federal Supreme Court confirmed its previous case law whereby a Principal who suffers a loss resulting from a contractual breach committed by the Agent cannot cumulatively claim full damages and a reduction of the fees due to the Agent. The Federal Supreme Court decided that, in application of Art. 397 para. 2 SCO, if the Agent has remedied the damage caused, the it can be considered that the Agent had correctly performed the mandate and consequently be entitled to full fees. One should, however, note that this issue is controversial and is still a subject of debate in legal literature (see e.g. Franz Werro, Le mandat et ses effets, thesis Fribourg 1993, N 1069; see also the doctrinal sources cited in the Judgment of the Federal Supreme Court of 5 March 2014, case reference 4A_364/2013).

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