Are broker fees on a real estate transaction conditional on a minimum sale price?

MÉLANIE TRITTEN (AS GUEST CONTRIBUTOR)

A contract for the renovation and sale of a property by an architect stated that the sale price "could" fall within a specified range. This clause, when properly interpreted, did not make the architect's entitlement to fees contingent on achieving a minimum sale price. In the absence of an express or implied agreement between the parties on such a condition, the architect remained fully entitled to the agreed fees, even if the property was sold at a price significantly below the client's expectations.

Judgment of the Federal Supreme Court of 12 September 2023

Case Reference: 4A_502/2022, 4A_504/2022

Facts

A. ("the Client") and B. ("the Architect"), together referred herein as "the Parties", entered into an agreement ("the Agreement") on September 26, 2011 to extend and renovate A's property ("the Property"), with a view to sell it.

The Agreement, which consisted of a letter from the Architect countersigned by the Client, notably provided for fees of CHF 446,000 for the Architect to obtain a building permit ("the Building Permit Fee"), as part of the overall operation.

The original French version of the letter also stated that:

« Le prix de vente, comme nous l'avons évoqué[,] pourrait se situer dans une fourchette comprise entre 85 et 100 Millions [sic] de francs. […]

Dans l'éventualité où je trouverais un acquéreur pour un montant qui vous agrée, je serai rémunéré par une commission de 1,5% sur le montant de la vente. »

Unofficial English translation:

"The sale price, as we have discussed[,] could lie in the range of 85 to 100 million francs.[…]" (the "Expected Sale Price Range").

"In the event that I find a buyer for an amount that is acceptable to you, I will be remunerated with a brokerage fee of 1.5% of the sale price." (the "Brokerage Fee").

The Architect obtained a building permit in February 2013.

That same year, the Architect contacted a long-standing professional acquaintance working at company D. ("the Neighbor Company") that occupied the plot next to the Property to ask him to pass on the proposed sale project to the company's CEO. This connection led to negotiations for the sale of the Property between the Client, the Architect and the Neighbor Company. These negotiations lasted several years but never led to the sale of the Property as the Client and the Neighbor Company could not agree on the sale price. Throughout this time, the Client and her family repeatedly congratulated the Architect for his work and progress.

During that same period, a bank holding a mortgage on the Property initiated proceedings against the Client to enforce the mortgage. A few days before the auction of the Property, the bank informed the Client of an offer from an undisclosed third party to buy the Property for CHF 29,500,000. The Client accepted the offer that same day. The third party was eventually disclosed to be the Neighbor Company. The Client sold the Property on May 15, 2018 ("the Sale").

A few months later, the Architect submitted two invoices to the Client. The first one for a total of CHF 480,342 (incl. VAT) for the Building Permit Fee, and the second one for a total of CHF 476,572.50 (incl. VAT) for the Brokerage Fee, which corresponded to 1.5% of the sale price of the Property.

Following debt collection proceedings, the First Instance Court of the Canton of Geneva dismissed the Client's claim for debt release and confirmed that the two amounts claimed by the Architect were due.

By judgment of September 27, 2022, the Civil Chamber of the Court of Justice (the "Cantonal Court") partially upheld the Client's appeal. It confirmed that the Client owed CHF 480,342 for the Building Permit Fee; however, it reduced the Brokerage Fee from CHF 476,572.50 to CHF 79,250.

- With regard to the entitlement to the Building Permit Fee, the Cantonal Court first pointed out that it was irrelevant whether the Agreement was characterized as a complex agreement providing for both the Building Permit Fee and the Brokerage Fee or as two separate and independent contracts (i.e. one for the Building Permit Fee and one for the Brokerage Fee). It then proceeded to determine the common will of the Parties and held that they had no intention of making the Building Permit Fee conditional on the sale of the Property within the Expected Sale Price Range (i.e. between CHF 85,000,000 and CHF 100,000,000) that was mentioned in the Agreement.
- With regard to the Brokerage Fee, the Cantonal Court applied 413 para. 1 SCO as well as the so-called principle of equivalence (according to which a brokerage fee is due where a transaction which has taken place is economically equivalent to the transaction that was contemplated by the Parties to the brokerage agreement). It held that the Brokerage Fee should be reduced, given that the Sale (CHF 29.5 MM) was not economically equivalent to the sale price that was desired by the Client (i.e. the Expected Sale Price Range between CHF 85 MM and CHF 100 MM).

Both the Client and the Architect appealed the judgment of the Cantonal Court to the Federal Supreme Court.

Issue

The Federal Supreme Court first had to determine whether or not the interpretation of the Agreement confirmed the Architect had a valid claim of CHF 480,342 for the Building Permit Fee or if, on the contrary, such fee was conditional on the sale of the Property within the Expected Sale Price Range. It then had to determine the amount of the Brokerage Fee and more specifically whether the Cantonal Court was correct in reducing it from CHF 476,572.50 to CHF 79,250.

Decision

The Federal Supreme Court dismissed the Client's appeal, which challenged the right of the Architect to obtain the Building Permit Fee and the Brokerage Fee (1) and upheld the Architect's appeal regarding the amount of the Brokerage Fee (2).

On the Client's appeal

The Client claimed that the Cantonal Court's interpretation of the Agreement constituted a violation of Art. 18 para. 1 SCO and was arbitrary (Art. 9 of the Federal Constitution of the Swiss Confederation).

According to the general rules of contract interpretation under Swiss law, the judge shall first research the real and common will of the parties (subjective interpretation), if necessary through empirical means such as clues. Clues are not limited to the content of the declarations of will – whether written or oral – but also extend to the general context, i.e. all circumstances making it possible to determine the (real) will of the parties. In the event the court is unable to determine the real and common will of the parties, only then can it resort to the objective method of contract interpretation based on the principle of good faith.

In this case, the Federal Supreme Court first noted that the Cantonal Court had correctly applied the subjective method of contract interpretation to determine the meaning of the Agreement. Consequently, the Federal Supreme Court held that the Cantonal Court had not violated Art. 18 SCO contrary to the Client's argument.

The Federal Supreme Court then addressed the Client's criticism of the Cantonal Court's interpretation of the Agreement. The Client argued that the Parties had entered into a complex contract, which imposed four obligations on the Architect, including obtaining a building permit and selling the Property within the Expected Sale Price Range, and that she would not have signed the Agreement if the fees were due regardless of the sale price of the Property. She considered that the Cantonal Court did not ascertain the real will of the Parties and had confined itself to a literal interpretation of the Agreement.

According to the Federal Supreme Court, however, it is clear from the judgment that the Cantonal Court did examine the wills of the Parties. The wording of the Agreement (which is the primary expression of the parties' real intent) was

convincing enough. In particular, by the use of the conditional tense in the phrase of the Agreement relating to the Brokerage Fee according to which the sale price 'could' fall within the range mentioned. No other clause in the Agreement provided that the Brokerage Fee would only be payable in the event of a sale at such a price. The Cantonal Court also took into account factual elements following the conclusion of the Agreement, which confirmed its interpretation of the text of the Agreement. In particular, the Client expressed in 2015 a wish to discuss the sale price she wished to propose with the Architect. Her son also mentioned a sale price of between CHF 55,000,000 and CHF 57,000,000 in 2016.

The Federal Supreme Court, therefore, ruled that the Client's criticism did not demonstrate how the Cantonal Court's analysis was untenable.

The Federal Supreme Court therefore dismissed the Client's appeal.

On the Architect's appeal

The Architect challenged the judgment from the Cantonal Court which applied the principle of equivalence and Art. 413 SCO to reduce the Brokerage Fee from the initial amount claimed by the Architect of CHF 476,572.50 down to CHF 79,250.

The Federal Supreme Court reminded that parties are free to determine the terms of their contract, within the limits of the law (Art. 19 SCO). The characterization of the contract is only necessary if the application of a mandatory norm is at stake or if it is necessary to look for a suppletive law because the parties' agreement was incomplete. The need to find a suppletive law to resolve an issue only arises when the issue is not addressed in the contract. Conversely, if the issue is addressed in the contract, it is sufficient to ensure that the rule is valid with regard to the mandatory rules of Swiss contract law.

Art. 413 para. 1 SCO on the broker's entitlement to his brokerage fee is not a mandatory law. The parties can thus agree that the brokerage fee will be due even if the main contract is not concluded or, on the contrary, that it will only be due on the condition that the contract is not only concluded, but also performed. Therefore, Art. 413 para. 1 SCO is a default rule which applies only if the parties have not addressed this issue in their contract.

Thus, in a dispute over the interpretation of a clause in an agreement providing for a brokerage fee of 1.5% on the sale price, the judge must apply the general principles relating to the interpretation of contracts. It is only if the interpretation does not help resolve the issue in question that the court shall apply the default rule of Art. 413 para. 1 SCO.

In this case, the Federal Supreme Court held that the Cantonal Court had not analyzed the issue logically. When it interpreted the Parties' Agreement in relation to the Building Permit Fee (see section 1 above), the Cantonal Court considered that, according to the parties' real and common will, the Expected Sale Price Range was merely indicative and thus did not constitute a commitment on behalf of the Architect to sell the Property within the Expected Sale Price Range. However, when the Cantonal Court analyzed the same clause in relation to the Brokerage Fee to be paid on the Sale (whereby the clause providing for the Brokerage Fee stated that such fee would be due in the event that the Architect would find a buyer for an "amount acceptable to the client"), it directly applied Art. 413 para. 1 SCO as well as the principle of equivalence. In so doing, the Cantonal Court contradicted its previous finding relating to the real intent of the Parties. The Federal Supreme Court found that this was arbitrary (art. 9 of the Federal Constitution of the Swiss Confederation). The Cantonal Court had failed to take into account that the Parties had contractually agreed on the Brokerage Fee in the Agreement and, as a result, it had violated the principle of freedom of contract.

Therefore, the Federal Supreme Court held that the Architect was fully entitled to the Brokerage Fee for the Sale of the Property (i.e. to 1.5% on the sale price of CHF 29,500,000). The Federal Supreme Court also noted that, as the Brokerage Fee was calculated on the basis of a percentage of the agreed sale price, its amount was reduced in proportion to the difference between the final sale price and the Expected Sale Price Range. For this reason, the Federal Supreme Court held that there was no need to apply Art. 417 SCO which makes it possible for a court to reduce the brokerage fee equitably if such fee is deemed excessive.

Key takeaway

Unless the parties to a brokerage agreement have agreed that the brokerage fee is contingent on the related contemplated transaction (in this case, the sale of the Property) obtaining a minimal value, the brokerage fee must be paid to the broker (in this case, the Architect) even if the sale of said item was significantly lower than the expected sale price.

In terms of methods of contract interpretation/filling contractual gaps, this case also constitutes an important reminder that the default rules of the Code of Obligations (in this case Art. 413 SCO) can only be applied in cases where there is a contractual gap ("lacune contractuelle"/"Vertragslücke"), i.e. in the absence of a contractual solution agreed upon by the parties. The courts must apply the usual methods of contract interpretation to determine whether the parties have agreed on a contractual solution. In this particular case, this was not done adequately by the Cantonal Court.

Comments

In this interesting case, the Client tried to claim that the different parts of the Agreement (i.e. the part relating to the Building Permit Fee and the one relating to the Brokerage Fee) were interdependent and formed a single agreement, with the ultimate objective pursued by the Parties to sell the Property at a value within the Expected Sale Price Range. The Client therefore claimed that these fees were not due because the Property was sold by the Client under involuntary circumstances at a price which was nearly three times lower than the Expected Sale Price Range.

First of all, the argument relating to the conclusion of a single global contract could not be successfully claimed in this case. As the Cantonal Court recalled in its judgment (see ACJC/1256/2022 of 27 September 2022, para. 3.1), a convention constitutes a complex contract ("*zusammengesetzter Vertrag*", "*contrat compose*" ou "*contrat complexe*") or a mixed contract ("*gemischter Vertrag*"; "*contrat mixte*") when, according to the will of the parties, the various relationships that bind them do not constitute independent agreements, but rather represent elements of a complex agreement that are linked together and dependent on one another. With such agreements, the different issues to be resolved must be governed by the legal rules or principles that are appropriate to each of them.[1]

In this case, the Cantonal Court rightly held that the question of whether the Agreement constituted one global agreement, or several independent contracts could remain open, as the Architect's rights to obtain the Building Permit Fee and the Brokerage Fee were in any case different issues, subject to rules adapted to each of them. It is worth noting that the Parties did not dispute the application of the rules governing the contract for work and services for the Building Permit Fee and those of the brokerage contract for the Brokerage Fee. The Client's argument relating to the existence of a single agreement was therefore irrelevant to matters relating to the Architect's right to both the Building Permit Fee and the Brokerage Fee.

Furthermore, the mere argument that the Agreement constituted a complex agreement was insufficient to assert that the Building Permit Fee and the Brokerage Fee were conditional on the sale of the Property at the Expected Sale Price Range. Even if it is not apparent from the Federal Supreme Court's reasoning, it can be recalled that even if a suspensive condition may be tacit, its existence must still be inferred from the interpretation of the contract, the circumstances or the general context.[2] In this respect, the Client claimed that the Cantonal Court only examined the wording of the Agreement before rejecting the existence of a suspensive condition. It is certain that a sole analysis of the wording of a contract might be insufficient to determine the will of the parties, especially if a party is able to demonstrate that the interpretation is untenable by providing other relevant evidence contradicting the wording of the contract. In this case, however, the Federal Supreme Court's decision clearly states that the Cantonal Court also took into account factual elements subsequent to the conclusion of the Agreement, which confirmed its interpretation of the text of the Agreement (see section 1 above). In the absence of any concrete evidence to contradict the Cantonal Court's interpretation, the Federal Supreme Court rightly held that the Client failed to demonstrate that the Parties had made the Building Permit Fee and the Brokerage Fee conditional on the sale of the Property within the Expected Sale Price Range.

The Federal Supreme Court also rejected the Client's argument that the total remuneration of the Architect, amounting to 40% of the gain made by the Client from the Sale of the Property led to a shocking result. The Client claimed a violation of her right to be heard in this regard, by alleging that the Cantonal Court had not analyzed the issue of the breach of the Agreement allegedly committed by the Architect. However, the Federal Supreme Court held that the Cantonal Court, in its interpretation of the unclear claim raised by the Client, had found that the Client had not demonstrated that the circumstances had changed in an inevitable and unforeseeable manner, as required by the theory of unforeseeability ("*clausula rebus sic stantibus*"), and that the sale of the Property at a lower-than-expected price could consequently not be considered as such. Therefore, the Federal Supreme Court rightly held that the Cantonal Court had not violated the right to be heard of the Client. Additionally, it can be noted that although the Federal Supreme Court did not refer to Art. 417 SCO with regard to this Client's argument, it still concluded in its judgment that there was no reason to apply this provision in this case in order to reduce the Brokerage Fee (see *supra* section 2 above).

Finally, it is interesting to note that the Federal Supreme Court did not have the opportunity to rule on the requirement of

a causal link between the Architect's activity and the sale of the Property in relation to the Architect's right to the Brokerage Fee. The Agreement provided that the Brokerage fee was due in the event that the Architect "[found] *a buyer for an amount that is acceptable to* [the Client]". Based on this wording, it could be argued that, to be entitled to the Brokerage Fee, the Architect had to have a real influence on the sale of the Property, including on the final price accepted by the Client. It is therefore questionable whether it was sufficient for the Architect to simply put the Client in touch with the CEO of the Neighbor Company to obtain the Brokerage Fee. The negotiations led in part by the Architect were never successful due to a disagreement on the sale price. Therefore, the Architect had no further influence on the subsequent sale of the Property, specifically the final sale price. Given that the Cantonal Court refused to consider the matter because of a lack of sufficient arguments in the Client's appeal and thus holding that the requirement of the existence of a causal link was met, the Federal Supreme Court was unfortunately unable to consider this issue.

[1] For an in depth study of this topic, see Mélanie Tritten, Les contrats complexes et les complexes de contrat – Étude sur les contrats liés en droit suisse, Genève, Zurich (Schulthess) 2024, N 258 et seq.

[2] Pascal Pichonnaz, in: Luc Thévenoz/Franz Werro (edit.), Commentaire romand, Code des obligations I, 3rd ed., Basel (Helbing Lichtenhahn) 2021, Art. 151 N 2; Mélanie Tritten, Les contrats complexes et les complexes de contrat – Étude sur les contrats liés en droit suisse, Genève, Zurich (Schulthess) 2024, N 375.

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Selling by mistake: good faith as an impediment to avoiding the contract

A Seller who fails to clarify a point of essence and mention it to the Buyer(s) prior to concluding a contract cannot rely on its mistake in order to avoid the contract or to refuse its performance.