Can the higher (hidden) price obtained by a broker for the sale of a Ferrari Daytona constitute a ground for invalidating a brokerage agreement?

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In a dispute over a brokerage agreement, regarding the sale price of a Ferrari Daytona, the Federal Supreme Court held that the contract was not null and void for willful deception as the alleged fraud (in the form of a hidden higher price obtained by the Broker) occurred after the conclusion of the Brokerage contract, during performance. Therefore, all claims by the principal on contractual invalidity and related damages were dismissed. Moreover, the Court confirmed that a broker cannot remove expenses from the Principal unless expressed agreed in the contract.

Judgment of the Federal Supreme Court of 11 February 2025

Case References : 4A_139/2024 & 4A_141/2024 (joint cases)

Facts

In November 2012, A. (the "Principal) contacted B. (the "Broker") to sell a Ferrari Berlinetta Boxer (the "Berlinetta"). In early March 2012, the Broker collected the vehicle in Reims (France) and transported it to Sion (Switzerland) to sell.

The parties later discussed the sale of another vehicle owned by the Principal, a Ferrari 365 GTS4 Daytona Cabriolet (the "Daytona"). Under contract dated March 7, 2013 (the "Contract"), the Broker was commissioned to sell the Daytona at a minimum price of €1,150,000, with the broker's fee to be determined upon completion of the sale. Until then, the Broker was to keep the Daytona in custody.

On April 5, 2013, the Broker sold the Daytona for €1,400,000 but informed the Principal that the car had been sold for €1,150,000, falsely claiming to have received no commission from the buyer. Of the €250,000 concealed from the Principal, the Broker used €150,000 to pay intermediaries and kept the remaining €100,000 for herself. She then invoiced the Principal €30,000 for broker's fees, half paid by deduction from the sale price and half by an Austin Princess belonging to the Principal. On April 9, 2013, the Principal signed a document (entitled "Sales invoice"[1]) drawn up by the Broker, which listed the sale price of the Daytona as €1,135,000 (i.e. €1,150,000, minus €15,000 broker's commission), to which the Principal had added the handwritten note "+1 Austin Princess car […]".

Between August 28, 2013 and November 26, 2013, the Broker stored and repaired a Ferrari 250 LWB California (the "California") for the Principal for a total price of CHF 11,141.60. The Berlinetta, stayed in her custody until November 2013, and the Principal was charged CHF 4,777.20 for this service.

In late 2013, the relationship between the Principal and the Broker started to deteriorate. The Broker refused to disclose the identity of the Daytona's buyer to the Principal despite repeated requests, or to give him a copy of the sales contract. In April 15, 2014, the Broker demanded payment of two invoices dated November 26, 2013 by April 26. The Principal disputed the validity of the invoice for the custody of the Berlinetta and claimed compensation with respect to the invoice for the Ferrari California, which he did not dispute.

Between March 2014 and June 2014, the Principal independently contacted the buyer of the Ferrari Daytona and obtained a copy of the sales contract.

On June 26, 2014, the Principal filed a claim before the Court of First Instance. He demanded in essence that the Broker be ordered to return the Austin Princess, repayment of overpaid commissions (CHF 327,487 + 5% interest from April 5, 2013), as well as additional damages (CHF 835,000 + 5% interest from August 26, 2016). The Broker denied all claims and counterclaimed CHF 16,718.85 + 5% interest from April 26, 2014.

The Court of First Instance ordered the Broker to pay the Principal €167,219.25 + 5% interest, and the Principal to pay the Broker CHF 4,777.20 + 5% interest. It rejected all other or further claims. Following the appeal of these decisions by both parties, the Cantonal Court of Valais overturned the judgment and ordered the Broker to pay the Principal €242,376.10 + 5% interest from November 26, 2013, and the Principal to pay the Broker CHF 4,777.20 + 5% interest from April 26, 2014.

Both parties appealed to the Federal Supreme Court.

Issue

The Federal Supreme Court had to rule on the following issues:

- Whether the Principal had concluded the contract under willful deception, rendering it null and void under 28 para. 1 of the Swiss Code of Obligations (SCO) ;
- Whether the Principal was entitled to damages under 41 SCO for the Broker's deceptive conduct ;
- Whether the commissions that the Broker received constituted expenses performed during the contract, that the Principal should pay under 402 para. 1 SCO.

Decision

- *Willful deception*

The Principal, trying to render the contract null and void, argued before the Federal Supreme Court that the document signed on March 7, 2013, did not constitute a valid brokerage contract yet. He claimed that, when this document was signed, there was no agreement regarding the amount of the broker fees yet. The absence of an agreement on such an essential element, according to him, made it impossible for the document to be considered as a duly concluded brokerage contract.

The actual brokerage contract, according to the Principal, was concluded on April 9, 2013, when the parties signed the "Sales invoice" document settling the amount of the fees awarded to the Broker. However, this document was signed after the Broker had already concealed the existence of the commissions she had received from the Principal. The agreement on the fees was hence concluded under willful deception, rendering the contract null and void according to the Principal.

Under Swiss law, a contract is concluded as soon as an agreement has been reached on all its essential elements by both parties (art. 1 SCO). According to the Federal Supreme Court, however, the exact fee amount is not an essential element of this contract and an agreement on the principle of remuneration is deemed enough for the contract to be concluded. The Principal, arguing that no agreement on the fees had been reached because the Broker wanted to be paid by a commission from the Daytona's buyer, failed to recognize that agreeing to such a payout corresponds to an agreement on the principle of the Broker's remuneration. Hence, the brokerage contract was concluded on March 7, 2013.

Pursuant to art. 28 para. 1 SCO, a party that has been led to conclude a contract through the willful deception of the other party is not legally bound by it. Willful deception refers to an intentional act of fraud that decisively influences a party's decision to enter into a contract, in such a way that the contract would not have been concluded had the fraudulent act not occurred. Hence, and as the Federal Supreme Court recalled, a fraudulent act that takes place after the conclusion of a contract can never be considered willful deception. The contract having been concluded on March 7, 2013, and the fraud having only taken place a month later, the Federal Supreme Court dismissed the willful deception claim.

- *Damages*

In his second legal claim, the Principal claimed that the fraudulent act of the Broker led him to sell the car, and that if he had known about the concealed commissions, he would have kept it and been able to sell it for €3,000,000. For this reason, the Principal was asking for damages under art. 41 SCO.

This claim, however, was still based on the assumption that the brokerage agreement was concluded after the fraudulent act. For the same reasons that led it to reject the claim of willful deception, i.e. in the absence of a causal link between the fraudulent act and the sale of the Daytona, the Federal Supreme Court rejected the claim for damages.

- *Broker commissions*

Contesting the Cantonal Court's decision, the Broker argued that the commissions she paid for the sale of the Daytona were not owed back to the Principal but were instead personal expenses that her client had to reimburse under art. 402 para. 1 SCO.

According to art. 413 para. 1 SCO, the fees are due to the broker as soon as the indication he/she gave or negotiation he/she conducted leads to the conclusion of the contract. Under art. 413 para. 3 SCO, the broker's expenses are reimbursed by the principal if the parties expressly agreed on such a reimbursement. However, as found by the Cantonal

Court, no such agreement existed between the Broker and the Principal.

The Broker, however, argued that the expenses had to be reimbursed either way under art. 402 para. 1 SCO, this article being applicable thanks to the half-brokerage half-custodial nature of the Contract. If it is true that, in Swiss law, the provisions governing simple mandates apply to brokerage contracts (art. 412 para. 2 SCO), they only apply if neither the law nor the contract states otherwise, and art. 413 para. 3 SCO applied in priority in this case.

For all these reasons, both appeals were ultimately rejected, and the Cantonal Court's decision was upheld.

Key takeaway

In a brokerage agreement, once the broker's mandate is clearly defined and the principle of remuneration is agreed – even if payment is to be made by a third party – a valid contract exists. Deception arising after the contract formation cannot retroactively invalidate the agreement.

This decision highlights the importance of clarity and transparency in brokerage relationships and reaffirms the strict approach of Swiss law to annulment or liability claims arising from post-contractual misconduct, particularly in mixed contracts combining elements of agency, deposit, and brokerage.

Comments

The Federal Supreme Court's judgment provides important clarification on contract formation, brokerage law, and civil liability. The Court's reasoning hinged on determining the precise moment of contract conclusion and the consequences of that timing for claims based on fraud (art. 28 SCO) and tort liability (art. 41 SCO).

The Federal Supreme Court rightly confirmed that a brokerage agreement was formed under art. 412 SCO when the parties agreed on the broker's mandate (sale of a specified vehicle at a minimum price) and the principle of remuneration , albeit from the purchaser.

Because there was no causal link between the Broker's undisclosed commissions and payments to intermediaries, and the decision to enter into the agreement, subsequent concealment could not invalidate the contract under art. 28 SCO. Even assuming the Broker's conduct was unlawful and that, in the absence of it, the Principal would have retained a car now allegedly worth €3,000,000, such damage arose independently of the wrongdoing, as the contract had already been validly concluded. Liability under art. 41 SCO was therefore precluded.

The case reinforces a fundamental principle: causality is decisive. Both civil fraud (art. 28 SCO) and criminal fraud (art. 146 of the Swiss Criminal Code (SCC)) require that the deception directly induce the injured party to act – in this case, to conclude the brokerage agreement. The strict temporal and causal requirements highlight the importance of pinpointing the moment of contract formation when alleging vitiated consent or claiming damages.

The Federal Supreme Court also left open whether non-disclosure of dual remuneration – i.e. concealing a commission from the purchaser and paying commissions to intermediaries – might constitute an illicit act. While this issue was not dispositive in the case at hand, it invites further scrutiny, particularly from the perspective of fiduciary duties in brokerage contracts.

From a fiduciary perspective, such conduct could amount to criminal mismanagement under art. 158 para. 2 SCC, which punishes the abuse of authority conferred by statute, an official order or a legal transaction to act on behalf of another, with intent to secure unlawful gain, thereby causing financial loss.

In this case, the Broker was entrusted to sell the vehicle and safeguard the Principal's interests. By concealing the true sale price and secretly receiving a commission from the buyer – while diverting part to intermediaries – the Broker breached fiduciary duties, misused her mandate, and appropriated part of the sale proceeds. This conduct would satisfy both the objective and subjective elements of art. 158 para. 2 SCC.

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[1] The relevant excerpt reads as follow in the original French version : "*Facture de vente*".

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