

Court upholds principal's right to conclude contract in agency agreement

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Introduction

Agency agreements typically differ from other agreements with regard to the way in which agents share risk: if the principal does not conclude the purchase transaction, the agent does not get paid. On the other hand, if the transaction is successful, the agent receives above-average remuneration. As such, agents try to limit their risk by including clauses in agency agreements which entitle them to remuneration even if the principal refuses to conclude the agreement. The Supreme Court recently ruled on such a clause and upheld the principal's right to choose whether to conclude the envisaged agreement.

Facts

The defendant owned a bed and breakfast which he intended to sell. He hired the claimant as an estate agent. The parties agreed on a 1.6% commission. The claimant was also entitled to the commission if the defendant refused to sell the bed and breakfast in violation of the principle of good faith.

Eight months later, in March 2012, the claimant presented a potential buyer to the defendant. This potential buyer was interested in acquiring the bed and breakfast together with a business partner. When the business partner could not be reached, they asked for a deadline of April 30 2012 to decide on whether to buy the property, to which the defendant consented.

The defendant was subsequently put under increasing pressure by his bank, which threatened to foreclose on the bed and breakfast's mortgage. The defendant thus informed the claimant that he needed the decision by March 24 2012. The claimant replied that it was impossible to reach a decision by that date. The defendant then terminated the agency agreement with immediate effect and sold the bed and breakfast to a third-party buyer.

The claimant filed an action in damages for breach of the agency agreement and requested payment of both the seller's and the potential buyer's commission.

Agent Act

The Agent Act is based on the principle that an agent is entitled to commission only if he or she has completed the activities agreed between the parties and these activities have led to the conclusion of the envisaged transaction. The Agent Act allows for two exceptions to this rule:

- The agent is entitled to commission if he or she presents a party that is suitable and willing to conclude the transaction, provided that:

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- the principal refuses to perform a legal act which is necessary for completion of the agreement, in violation of the principle of good faith and in contrast to the course of negotiations;
- the principal concludes a different transaction with the same person presented by the agent;
- the agreement is concluded by a third party which was informed of the prospective business opportunity; or
- the transaction could not be concluded because an existing right of first refusal or another pre-emption right was exercised.
- In the case of sole agency agreements only, the parties may agree on commission if:
 - the agency agreement is terminated by the principal without a valid reason; or
 - the transaction is concluded without involving the agent during the term of the sole agency agreement – in particular, if the principal violates the agency agreement by engaging another agent.

In both cases the agent is entitled to commission only if this was expressly agreed between the parties in the agency agreement.

Decision

The court confirmed that the parties had agreed on an agency agreement which obliged the principal to pay the agent's commission if he refused to complete the transaction in violation of the principle of good faith. The parties had not agreed on a sole agency agreement or on the payment of commission if the sole agency agreement was terminated without cause. As such, the only question was whether the defendant had violated the principle of good faith when he refused to sell the bed and breakfast to the potential buyer presented by the claimant.

The court held that the refusal to perform a certain legal act can be seen as a sudden deviation from the principal's earlier stance if the parties have already entered into negotiations. In this context, the term 'negotiations' means that the parties must have held discussions in which they have resolved some issues and aligned their respective positions. The refusal to perform an act can be considered sudden only if it occurs towards the end of negotiations. Discussions in which each party merely confirms its position and agreement is reached on minor issues cannot be considered negotiations. Likewise, if a party refuses to enter into negotiations, this cannot be seen as a sudden termination of the negotiations and thus does not amount to a violation of the principle of good faith.

In the case at hand, the agent merely sought to arrange an inspection of the property by the interested party. The parties had not engaged in any negotiations about the terms of the potential sale. Therefore, the court held that the preconditions for commission were not fulfilled and thus found in favour of the defendant.

Comment

The court showed a good understanding of the commercial background of agency agreements. In the case at hand, the principal not only wanted to sell the property, but also was forced to do so by his bank. In such a situation, the principal cannot wait to see whether a potential buyer – such as that presented by the agent – will eventually buy the property. The court clarified that the principal can sell the property to someone else without having to pay the commission to the unsuccessful agent. The court went so far as to say that the principal need not enter into negotiations with the potential buyer presented by the agent, although this may render the principal liable for the costs incurred by the agent.

On the other hand, if an agent presents a potential buyer that has a genuine interest in buying the property, then he or she must ensure that the relevant steps are taken – that is, he or she must initiate negotiations and ensure that progress is made. Only in such cases will the agent be entitled to commission.

For further information on this topic please contact [Martin Foerster](#) at Graf & Pitkowitz by telephone (+43 1 401 17 0) or email (foerster@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

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