The Supreme Court rules on a broker’s right to a commission when no sale is concluded

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Standard real estate brokerage contracts generally stipulate the obligation for the seller to pay a commission to the broker in the event that an agreement for the sale of the property occurs during the term of the brokerage contract or where the seller voluntarily prevents the free performance of the contract. It is not unusual, even in the absence of an actual sale, that real estate brokers claim the payment of the commission stipulated in the brokerage contract. Such was the situation in the case of *Société en commandite Place Mullins* v. *Services immobiliers Diane Bisson inc*.[1], on which the Supreme Court of Canada recently ruled.

THE FACTS

In this matter, Place Mullins gave a mandate to a brokerage firm for the sale of its immovable through an exclusive brokerage contract written on a standard form of the Association des courtiers et agents immobiliers du Québec (since replaced by the Organisme d’autoréglementation du courtage immobilier du Québec). According to the terms of the brokerage contract entered into in September 2007, which are to the same effect as those in the current standard form, the obligation of Place Mullins to pay the commission to the brokerage firm was triggered, inter alia, where an “agreement to sell the immovable” was concluded during the term of the contract, or if “the seller voluntarily prevents the free performance of the contract”.

A conditional promise to purchase was initially entered into between Place Mullins and Mr. Douek, the buyer, through the brokerage firm. This promise to purchase gave Mr. Douek the possibility to withdraw the promise if he was not completely satisfied with the due diligence on the immovable. The due diligence having revealed the existence of potential soil contamination, Mr. Douek withdrew from the initial promise and submitted a new offer, conditional upon Place Mullins decontaminating the property at its own expense. Place Mullins refused to do so and the sale was never concluded.

The brokerage firm claimed the amount of the commission from Place Mullins despite the fact that the immovable was not sold during the term of the contract.

ISSUES IN DISPUTE

The dispute raised two issues, namely:

1. Was an “agreement to sell the immovable” validly concluded within the meaning of the brokerage contract?
2. Did Place Mullins voluntarily prevent the free performance of the brokerage contract?

DECISIONS OF THE LOWER COURTS

The Superior Court of Québec dismissed the claim of the brokerage firm while in a split decision; the Court of Appeal of Québec set aside this judgment and decided in favour of the brokerage firm.

ANALYSIS OF THE SUPREME COURT

As to the first issue, Mr. Justice Wagner, on behalf of the Supreme Court, indicated that a sale was not necessary for the broker to be entitled to the commission, since the contract provides that he is entitled to it once an “agreement to sell the immovable” is concluded. He went on to say that the wording of the clause was broad enough to encompass an accepted promise to purchase, but the obligations that flow from such a promise must become certain, that is, unconditional.

The Court was of the view that so long as a promise to purchase is not unconditionally binding on the buyer and the seller and it is not yet possible for one of them to bring an action to compel transfer of title, there is no “agreement to sell the immovable”. In the case under review, since Mr. Douek was entitled to withdraw the promise if he was not entirely satisfied with the results of the due diligence, the promise to purchase remained conditional. By sending a formal notice to Place Mullins in which he was reiterating his interest to purchase the immovable provided Place Mullins decontaminated it at its own expense, Mr. Douek was repudiating the initial promise and submitting a new offer to purchase, which was never accepted.

The second issue was based on the argument of the brokerage firm whereby Place Mullins, by refusing to decontaminate the immovable, prevented the brokerage contract to be performed. The Court mentioned that to be successful, the brokerage firm had to prove, among other things, that Place Mullins had committed a fault which prevented the performance of the brokerage contract. To rule on the existence of a fault, the Court reviewed to obligations to which Place Mullins was bound pursuant to the promise to purchase, on the one hand, and, on the other hand, the brokerage contract.

The Court came to the conclusion that under the promise to purchase, Place Mullins had neither the obligation to decontaminate the property, nor that of negotiating anew the conditions of the initial promise to purchase.

As to the brokerage contract, it is true that it stipulated that Place Mullins was required to provide an immovable which was in accordance with the environmental protection laws and regulations. However, the Court stated that this provision of the brokerage contract on its own, absent proof of bad faith, cannot serve as a basis for arguing that the seller voluntarily prevented the free performance of the contract. The Superior Court and the Court of Appeal having both recognized the good faith of Place Mullins and the fact that it was unaware of the contamination at the time the brokerage contract was entered into, it cannot be said that, through its fault, it prevented the sale from being concluded.

Furthermore, the Court noted that contrary to what the brokerage firm maintained, the declarations of the seller in the brokerage contract did not constitute warranties. The legal warranties could not apply since no sale had been concluded. Under art. 1396 of the Civil Code of Québec, a promise to enter a contract is not equivalent to the proposed contract. Therefore, the accepted promise to purchase is not equivalent to the sale and does not produce any of its effects.

CONCLUSION

In short, Place Mullins had committed no fault respecting its obligations both under the promise to purchase and the brokerage contract. Therefore, it had not voluntarily prevented the free performance of this brokerage contract. Accordingly, the brokerage firm was not entitled to the commission.

COMMENTS

According to the Court, the seller was acting in good faith since it was unaware of the contamination at the time the brokerage contract was entered into. However, had it been aware of the contamination, the seller could have been considered to be in bad faith and ordered to pay the commission on the basis of the stipulation in the brokerage contract whereby it was required to provide an immovable that complied with the environmental protection laws and regulations.

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[1] 2015 SCC 36.