



Supreme Court's position on agent's information claims

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Introduction

In a judgment on 26 January 2023,⁽¹⁾ the Polish Supreme Court addressed an interesting issue concerning the relationship between an agent's information claims and the expiry of the limitation period for a claim for payment of a commission. The Court answered the question of whether it is possible for an agent to successfully pursue information claims aimed at determining the commission due to them, even if the limitation period for claims for the payment of that commission has already expired.

In this judgment, the Court also addressed other issues of interest from the point of view of those using an agency contract in their business. Following the Court of Justice of the European Union (CJEU) judgment of 13 October 2022, in *Rigall Arteria Management*⁽²⁾, the Court confirmed the possibility of contractually excluding the agent's commission for subsequent transactions concluded with clients previously acquired by the agent.

Background

In the case at hand, the following provisions were particularly relevant:

- Article 761 of the Civil Code concerned the agent's claim for an agency commission:

Article 761. § 1. The agent may demand a commission for the contracts concluded within the duration of the contract of agency, if their conclusion was effected as a result of his activities or if they were concluded with the clients previously obtained by the agent for the contracts of the same type.

§ 2. If the agent was granted the exclusive right with respect to a designated group of clients or a geographical area and, within the duration of the contract, a contract with a client from that group or area was concluded without the agent's participation, the agent shall have the right to demand a commission for that contract. The principal shall be obliged to notify the agent, within a reasonable time, of the conclusion of such contract.

- Article 761(5) of the Civil Code concerned the rules for the settlement of agency commissions:

Article 761⁵ § 1. The principal is obliged to submit a statement to the agent with information on the commission due not later than on the last day of the month following the quarter in which the agent acquired the right to the commission. This statement should show all the data constituting the basis for calculating the commission due. Any provision of an agency contract less favourable for the agent is invalid.

§ 2. The agent may demand to be given access to the information needed to determine whether the amount of the commission due to him has been correctly calculated; he may especially demand excerpts from the principal's commercial books or demand that a certified auditor chosen by the parties be given access to and provided with an excerpt from those commercial books. Any provision of an agency contract less favourable for the agent is invalid.

§ 3. If the information referred to in § 2 is not made available to the agent, the agent may demand that it be made available by bringing an action in court within six months of the demand being submitted to the principal.

§ 4. If the parties fail to reach agreement in choosing the certified auditor referred to in § 2, the agent may demand, by bringing an action in court within six months of the demand being submitted to the principal, that a certified auditor designated by the court be given access to and make an excerpt from the commercial books.

- Article 459 of the Civil Code concerned a creditor's entitlement to receive a so-called "inventory":

Article 459 § 1. Person obliged to hand over a set of things or assets of an estate or to provide information on the set of things or the assets of the estate should provide the creditor with a list of the things comprising the set or a list of the elements comprising the assets of the estate.

§ 2. If there is reasonable cause to believe that the list provided is not reliable or precise, the creditor may demand that the debtor represent before a court that he drew up the list to the best of his knowledge.

Facts

The dispute concerned the commission due to the claimant company (the agent) from the defendant bank (the principal) under an agency relationship for the period from 4 August 1998 to 30 April 2015. Within the framework of this relationship, the claimant acted as an agent when the defendant concluded contracts with its customers. These contracts mainly concerned credit cards, but the claimant also offered other contracts (ie, a loan and a bank account).

In the statement of claim, the claimant pursued three claims against the defendant, concerning:

- submitting a statement by the defendant bank containing data on the commission due to the claimant (pursuant to article 761(5) section 1 of the Civil Code);

- making available the information needed to determine whether the amount of that commission had been correctly calculated by the defendant bank (pursuant to article 761(5) section 2 in conjunction with article 761(5) section 3 of the Civil Code); and
- submitting an assurance by the defendant bank to the court that it has compiled this information to the best of its knowledge (pursuant to article 459 section 2 of the Civil Code).

Decision

The Regional Court in Warsaw, as the first-instance court, dismissed the statement of claim.

As a result of the claimant's appeal, the second-instance court – the Court of Appeal in Warsaw – amended the contested judgement in part and ordered the defendant bank to make an extract from its commercial books for the period from 1 October 2001 to 30 April 2015, containing the information further specified in the ruling, available to the claimant.

As the Court of Appeal found, the cooperation between the parties was governed by the original agency contract and two subsequent successor contracts and annexes to those contracts. In the contractual provisions, the parties detailed the principles of determining the commission due to the claimant. However, none of the agreements provided for the claimant to receive remuneration on subsequent transactions concluded with customers the agent had acquired earlier. During their cooperation, the defendant made statements to the agent about the amount of commission due to it, while the claimant did not demand payment of this commission for "subsequent transactions".

The case raised interesting legal issues, in particular:

- the agent's ability to successfully pursue information claims aimed at determining the commission due to it, even if the limitation period for claims for payment of that commission had already expired;
- the scope of information needed to determine whether the amount of the commission due to the agent was correctly calculated;
- whether it is permissible for the parties to an agency contract to contractually exclude the right to a commission referred to in

article 761 section 1 *in fine* of the Civil Code (the so-called commission for "subsequent transactions"), as well as whether *in casu* the parties have excluded this right in their respective contracts;

- the contestability of the obligation to submit a statement containing data on the commission due to the agent under article 761(5) section 1 of the Civil Code;
- the period for which the claimant is entitled to an information claim pursuant to article 761(5) section 2 of the Civil Code; and
- the applicability of article 459 section 2 of the Civil Code to extracts from the principal's commercial books presented to the agent.

Court of Appeal

With regard to the first claim pursued by the claimant, the Court of Appeal – based on article 761(5) sections 1 and 2 of the Civil Code – found that only the data referred to in article 761(5) section 2 of the Civil Code, (ie, the information needed by the agent to determine whether the amount of the commission due had been correctly calculated, but not the submission by the principal of a statement containing the data on the commission due to the agent) could be effectively demanded by way of court proceedings.

The Court of Appeal, however, differently from the Regional Court, assessed the validity of the claimant's second claim concerning the information claim referred to in article 761(5) sections 2 and 3 of the Civil Code. In particular, the Court of Appeal found that, even though the information claim was ancillary to the claim for payment of a commission, it could also be effectively pursued after the claim for payment had become time barred. Furthermore, the Court of Appeal found that the information claim applies to the extent to which the agent has a claim for payment of remuneration and, based on the interpretation of the contracts in the present case, since it assumed that the claimant was not entitled to a commission for "subsequent transactions", the claimant could also not effectively seek access to data allowing verification, in this case, of the amount of the commission.

At the same time, the Court of Appeal found the claimant's third claim concerning the submission of an assurance, referred to in article 459 section 2 of the Civil Code, to be unfounded. According to the Court of Appeal, an extract from a bank's commercial books cannot be considered either as a set of things or as assets of estate, while making it available is not equivalent to giving knowledge of such a set or assets. Further, as it pointed out, submitting the assurance mentioned above can only be sought if there is a reasonable presumption that the previously submitted inventory was not reliable or accurate.

Both parties filed cassation complaints against the judgment of the Court of Appeal.

Supreme Court

The Supreme Court dismissed both cassation complaints and confirmed the accuracy of the Court of Appeal's position.

In particular, contrary to the defendant bank's position, the Supreme Court pointed out that the expiry of the limitation period for a claim for payment of a commission does not render the agent's information claims, "effectively unenforceable before the court".

The Supreme Court provided a broad substantiation of this position. It explained that the information claim may expire, but in the concretised case regulated in article 761(5) section 3 of the Civil Code (ie, when the agent does not request the release of the information referred to in article 761(5) section 2 of the Civil Code) by means of an action brought within six months from the date of the request to the principal.

The Supreme Court also addressed the issue of the ancillary nature of information claims. It pointed out that an information claim is, obviously, functionally related to a claim for payment. However, this does not deprive the information claim of being a right in and of itself. Guaranteeing the possibility of obtaining relevant data has a substantial protective effect for the agent, as it serves to prevent irregularities in settlements between the parties to the agency contract. Moreover, in certain situations, the exercise of the information claim makes it possible to eliminate the resulting underpayment. On a broader level, however, this claim is a means of verifying the principal's loyalty to the agent.

Moreover, in the judgment, the Supreme Court indicated the possibility of applying the protection set out in article 5 of the Civil Code to the agent, if the principal raises a defence of the statute of limitations during an action for payment. In doing so, the Supreme Court assumed that this seems particularly likely in situations where, due to the disloyal actions of the principal, the agent only became aware of the amount of commission due to them after the expiry of the limitation period for the claim for payment.

The Supreme Court also hinted that an agent may have had an interest in determining the amount of commission that they are entitled to, even if the claim for its payment was already time-barred because such a claim may be set off against the principal's claim.

The Supreme Court also addressed other interesting issues from the point of view of the interpretation of the provisions concerning the agency contract. Sharing the position on the dispositive nature of article 761 section 1 of the Civil Code, it pointed to the possibility of contractual exclusion of the agent's commission for subsequent transactions concluded with customers previously acquired by the agent. In doing so, it referred to the position expressed in the Court of Justice of the European Union (CJEU) judgment in *Rigall Arteria Management*. This judgment was issued in relation to an earlier question submitted under article 267 Treaty on the Functioning of the European Union by the Supreme Court. In that case, the CJEU ruled that it is possible to derogate contractually from the right that this provision confers on an independent commercial agent to receive a commission – specifically, a commission in respect of a transaction entered into (during the term of the agency contract) with a third party whom that agent previously acquired as a customer for transactions of the same kind.

With regard to the other issues arising in the case, the Supreme Court provided, among other things, supplementary clarification that the obligation to provide information is, from the substantive point of view, broadly construed. This is because it covers information "needed" to verify the correctness of the calculation of the commission, and not information "necessary" or "indispensable" for this purpose. Thus, the interpretation of the phrase "necessary information" should take into account the principles of the Council Directive of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents.⁽³⁾ In article 12(2), this directive provides

that a commercial agent has the right to request "all the information . . . which he needs in order to check the amount of the commission due to him".

Comment

This judgment provides essential guidance on interpreting the provisions governing an agency contract. Under Polish law, this contract is a named contract – regulated in articles 758 et seq of the Civil Code. The current regulation of the agency contract in the Civil Code is an implementation of the Council Directive 86/653/EEC into the Polish legal order.

The position of the Supreme Court will undoubtedly be taken into account by entities in business using the agency contract in their activities, including those in the banking or insurance sector. Especially, due to the fact that in the judgment the Supreme Court included the elaborate statement on the subject of an information claim, for which a legal basis has only existed in Polish law since 9 December 2000 and, despite being in force for more than 20 years, still raises doubts.

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Endnotes

(1) Ref II CSKP 2252/22.

(2) Case C-64/21.

(3) 86/653/EEC.