

# Multiple assignments of future receivables

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### Introduction

The Supreme Court recently addressed the effects of an agreed sale of a plot of land on the security assignment of the future receivables under the lease agreement regarding such plot.<sup>(1)</sup> The Supreme Court broadly upheld its previous jurisprudence and confirmed that in cases of security assignments of future receivables, where the agreement on the assignment has already been perfected, the receivable will accrue to the security assignee when the individual receivable accrues without the need for any further action. Therefore, any additional further assignment of this receivable to another assignee is void as the assignor no longer has rights in the receivable.

### Facts

To secure a significant loan, the borrowers granted mortgages on several plots of land that they owned, together with security assignments of the lease payments arising from lease arrangements entered into regarding the real estate on the land to their bank.

To reduce the loan, the borrowers and the bank agreed the sale of the respective plot at a minimum price. Pursuant to the lease arrangement regarding the plot to be sold, each lease payment was to be made for a six-month period in advance. The lessee duly paid the lease for the period from June 2015 to November 2015 on 5 June 2015.

The purchaser was a legal entity and one of the borrowers acted as its managing director. The purchase agreement regarding the plot provided for an effective date (1 June 2015) and explicitly excluded the transfer of the lease agreements. The purchaser (ie, the plaintiff) could – at its discretion – take over the lease agreements. Further, according to the wording of the purchase agreement, as of this effective date, "the receivables for lease payments were to be deemed to have been assigned by the sellers to the purchaser (if and to the extent that the purchaser enters into the lease agreements)". The ownership title to the plot of land would pass to the purchaser on its full payment of the purchase price to the trustee. The purchaser transferred the purchase price on 25 June 2015.

The bank (ie, the defendant) was not involved in the negotiation of the purchase agreement. The trustee informed the bank on 11 June 2015 about the sale. The bank provided the declaration of release regarding the mortgage to the trustee on 1 July 2015.

On the same day, the lessee notified the bank that it had been informed that the purchase had been made with effect as of the effective date (ie, 1 June 2015) and asked the bank for confirmation that the security assignment has been released as of such date. The bank informed the lessee that the purchaser had not been registered in the land register and that, as such, the security assignment remained in force and lease payments were to be made to the bank.

The opening of insolvency proceedings regarding the three borrowers stalled the consummation of the transaction until the end of November 2015. On receipt of the purchase price, the bank released the security assignment.

The purchaser sued the bank for the lease payment received in June 2015 by alleging unjust enrichment of the bank based on its assertion in the claim that:

- the bank had agreed to the sale at a minimum price and the assignment of the lease receivables under the

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- purchase agreement as of the effective date; and
- a common understanding existed that, similar to the declaration of release regarding the mortgage, the security assignment should also be released prior to the purchaser's registration and the bank's receipt of the purchase price.

## Decisions

The first-instance court dismissed the claim. The court of appeals reversed the judgment, turned over the decision and held that:

- the bank had no right of co-determination regarding the purchaser concerning the conditions of the purchase agreement save for the granting or refusal of consent to the release of securities; and
- if the sellers (ie, the bank borrowers) had acted in breach of their contract with the bank, the bank could turn only to them.

With the effective date stated in the contract, the lease agreements and the claim for lease payments were transferred to the buyer.

The Supreme Court reversed the court of appeal's verdict and reinstated that of the first-instance court.

The Supreme Court repeated that a duly perfected security assignment causes the transfer of the future receivable when it comes into existence. As such, the right in the receivable had been transferred to the bank and the sellers could not validly transfer the security assigned receivable to the purchaser. The Supreme Court dismissed the assertions that a three-party agreement on the transfer of the lease agreements prior to the transfer of the ownership had been reached. Summarising, the Supreme Court held that the plaintiff had failed to adequately evidence its assertion that the purchaser had validly taken over the lease agreement prior to its registration as owner of the plot and that the bank had validly agreed to release the security assignment.

Accordingly, the Supreme Court held that due to the security assignment being in place and the lease agreement still being effective, the title to the receivable had already passed to the bank. Therefore, the sellers had had no title in the receivable when entering into the purchase agreement and the purchaser (ie, the plaintiff) had become only an alleged assignee (ie, a 'pseudo-assignee'). As such, the plaintiff did not qualify as a 'damaged party' within the meaning of Section 1041 of the Civil Code. The Supreme Court also dismissed the plaintiff's allegation that it had genuinely acquired the unencumbered lease receivables by referring to the settled case law that the plaintiff had been aware of the security assignment of the receivable, as it had had to assume the factual knowledge of its managing director (ie, one of the borrowers).

Finally, the Supreme Court held that the assignors as sellers could not interfere with the defendant's existing rights by agreeing with the purchaser and setting an economic cut-off date in the purchase agreement, even though it may have been correct that the bank:

*had no right of co-determination vis-à-vis the purchaser regarding the conditions of the purchase agreement beyond the granting or refusal of consent to the release of encumbrances in the land register.*

## Comment

Although the facts of this case are unique, this decision offers some guidance on potential pitfalls in connection with real estate finance transactions, particularly in debt restructuring scenarios, and collateral provided to the financing bank. Obviously, the Supreme Court does not allow for careless negotiating and drafting of purchase agreements by the borrowers and requires due involvement of all parties that may be affected by such sale. The Supreme Court explicitly confirmed that even where a bank agrees to the sale of a plot which serves as security for a loan, the owner of the plot must not agree on terms of sale that interfere with the bank's interests. Further, the Supreme Court confirmed that even in the case of the multiple assignment of a future claim, the second assignee does not acquire any right to the claim but is merely a pseudo-assignee. Although the assignment is subject to the condition precedent that the claim arises, the assignor already loses the title to such claim with the first effective assignment and can no longer effectively assign the claim to another party thereafter.

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## Endnotes

(1) OGH, 21 December 2020, 1 Ob 141/20x

