

SUPREME COURT'S JUDGMENT

Case no.

T 6146-18

delivered in Stockholm on 9 April 2020

PARTIES

Appellant

GG's estate

The Swedish Legal, Financial and Administrative Services Agency

Inheritance Fund Unit

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Counsel 1: SJ, Legal Officer

Counsel 2: VS, Attorney

Respondent

Nordea Bank AB, company registration no. 516406-0120

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Document ID 175754

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THE MATTER

Claim

RULING APPEALED

Judgment of the Svea Court of Appeal of 22 November 2018 in case T 2153-17

OPERATIVE PART OF THE JUDGMENT

The Supreme Court affirms the operative part of the judgment of the Svea Court of Appeal.

The Supreme Court orders GG's estate to pay Nordea Bank AB for its costs of litigation in the Supreme Court in the amount SEK 155,600, of which SEK 145,600 pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

CLAIMS IN THE SUPREME COURT

GG's estate has requested that the Supreme Court order Nordea Bank AB to pay the estate SEK 650,829 plus interest in accordance with Section 6 of the Interest Act from and including 9 March 2015 until payment is made.

The estate has further requested that the Supreme Court relieve the estate from the obligation to compensate Nordea for its costs of litigation incurred in the district court and the court of appeal and order Nordea to compensate the estate for its costs of litigation there.

Nordea has opposed modification of the judgment of the court of appeal.

The parties have requested payment of their costs of litigation incurred in the Supreme Court.

REASONS FOR THE JUDGMENT

Background

1. In July 2011, GG granted HJ a written general power of attorney. GG died a couple of months later. The power of attorney contained the following.

I, GG, hereby authorise HJ, from and including 20 July 2011, to independently and without restriction represent me in my name and on my behalf in respect of all my affairs and to exercise my rights. HJ is accordingly authorised on my behalf, in my name, to take all measures and legal acts which may be lawfully taken by me.

2. In November of the same year, HJ instructed Nordea pursuant to the general power of attorney to pay invoices with funds from the bank account of the deceased. The invoices were issued to GG's estate and pertained, in part, to approximately SEK 125,000 for packing, transporting and removing property from the deceased's apartment, and, in part, to approximately SEK 500,000 for protection and security services pertaining primarily to several very valuable classic cars. Nordea executed the payment orders.

3. The estate brought legal action against Nordea and requested that it pay the estate an amount equal to that paid from GG's account. The basis for the action was that the bank could not pay the relevant invoices in discharge of its obligations in relation to the estate.

4. The district court denied the estate's action. The court of appeal affirmed the operative part of the district court's judgment.

What is at issue in the case

5. At issue in the case is whether Nordea, in discharge of its obligations in relation to the estate, could pay the invoices. In particular, the issue of the validity of a power of attorney following the death of the principal has been raised.

Regulation in Section 21 of the Contracts Act

6. Section 21, first paragraph, first sentence of the Contracts Act states that, in the event of the death of the principal, a power of attorney shall remain in force unless there are special circumstances causing it to lapse.

7. This regulation was introduced just over 100 years ago upon entry into force of the Contracts Act. Prior thereto, the legal situation was deemed to be the opposite, i.e. that a power of attorney, and thereby the authority of the agent, ceased to apply upon the death of the principal. The background of the change was that the previous principle had shown itself to be associated with manifest disadvantages, in particular when the power of attorney had been granted by a businessman in the course of and for his business. Accordingly, in the area of commercial law, there was a departure from the previous principle, e.g. in the legislation regarding procuration. The same occurred in the German Civil Code, BGB, which served largely as a role model. (See *Förslag till lag om avtal och andra rättshandlingar på förmögenhetsrättens område* [Proposal for an act on contracts and other legal acts in the area of property law], 1914, p. 97 f.).

8. It was believed that there were compelling reasons why the death of the principal should not cause the power of attorney to cease to apply. However, the principle was not to be limited to the area of commercial law. The application of differing principles on the basis of whether or not the power of attorney pertained to commercial relationships was namely not regarded as justifiable. However, the reasons for a power of attorney continuing to be valid following the business owner's death – that it is otherwise nearly always detrimental for the person assuming the position of the person issuing the power of attorney – justified the application of the same principle in respect of other powers of attorney. (See the 1914 proposal, p. 98 and the *Förslag till lag angående handelsregister, firma och prokura* [Proposal for an act regarding business registers, company names and procuration] 1884, p. 35 f.).

9. The legislature did not overlook the fact that there could be situations in which the legal acts of the agent were to the disadvantage of the beneficiaries of the estate.

However, it could not be claimed that the nature of most of the legal acts pursued on the basis of a power of attorney were such that the principal's death rendered it desirable that they be voided. On the contrary, it was considered that the beneficiaries' interests were better served by means of a legal rule which made it possible to act on the basis of the power of attorney. (See the 1914 proposal, p. 98.)

Relationship between the rules of the Contracts Act and the Inheritance Code

10. The Inheritance Code contains rules about the administration and liquidation of estates of deceased. One issue is whether there exists a normative conflict between these rules and the principle expressed in Section 21 of the Contracts Act.

11. It is clear that conflicts of interest may arise between an estate or a beneficiary of an estate and an agent. It may even be the case that the agent has pursued or intends to pursue a legal act opposed by a beneficiary of the estate. However, the possibility that such situations could arise had been considered by the legislature and was not deemed to be an impediment to implementing the provision in Section 21 of the Contracts Act. The assessment made was that, in most cases, it is better for beneficiaries of the estate that the agent has the possibility to act under the power of attorney even after the death of the principal (*cf.* para. 9).

12. The provision in Section 21 of the Contracts Act was not amended as a consequence of the Estate Inventory and Distribution Act (1933:314) or when the Inheritance Code was introduced in 1959. Furthermore, as late as 2017, a reference was made to Section 21 of the Contracts Act in the then new Enduring Powers of Attorney Act (2017:310). Section 28 of that Act provides that Section 21 of the Contracts Act is to be applied in the event of the principal's death (*cf.* Government Bill 2016/17:30, p. 131). So, the principle expressed in Section 21 of the Contracts Act was and has long been well-established.

13. It may be noted that an estate always has the possibility to revoke a power of attorney. In the event the estate beneficiaries cannot agree on such a measure, the court may, upon request of beneficiaries of the estate, appoint an administrator, even provisionally. The estate administrator then has the possibility of revoking the power of

attorney (see Chapter 19, Sections 1 and 10-12 of the Inheritance Code).

Special circumstances

14. Accordingly, the main rule is that, if the principal dies, the power of attorney still applies. However, special circumstances may cause it to lapse.

15. The issue of what may constitute special circumstances has been addressed in the preparatory works. The circumstances may be such that the agent should refrain from pursuing a legal act which *per se* falls within the limits of the power of attorney. For example, the principal, for the sole purpose of acquiring a residence suitable for his or her needs, has granted someone a power of attorney to purchase such residence. In the event the principal subsequently dies prior to such a purchase - as in other exceptional cases in which the conditions for the exercise of the power of attorney no longer subsist – the power of attorney should become void by virtue of the death of the principal. (See the 1914 proposal, p. 99.)

16. The dominant view in the legal literature both in Sweden and the Nordic region is that the rule is only to be applied in exceptional cases of the type exemplified in the preparatory works.¹ As an example of cases in which the exception rule could be applied, reference is made to situations in which the power of attorney is intended for the purchase of trousers or party-wear for the principal or the purchase of a charter trip for him or her. However, there are statements in the legal literature according to which the exception rule should instead be applied broadly.²

¹ See, *inter alia*, Axel Adlercreutz, *et al.*, *Avtalsrätt I* [Contracts Law I] 14th ed. 2016, p. 246, Tore Almén and Rudolf Eklund, *Lagen om avtal och andra rättshandlingar på förmögenhetsrättens område* [The Swedish Contracts Act and Other Legal Acts in the Area of Property Law], 9th ed. 1968, p. 78, Kurt Grönfors and Rolf Dotevall, *Avtalslagen — en kommentar* [The Contracts Act – a Commentary], 5th ed. 2016, p. 189, Mads Bryde Andersen, *Grundläggande aftaleret* [Basic Contracts Law], 4th ed., 2013, p. 283 f., Birger Stuevold Lassen, *Kontraktetsrettslig representasjon – en lærebok med et avsnitt om kommisjon* [Contractual Representation – A Textbook with a Section on Commissions], 2nd ed. 1992, p. 74, Lennart Lynge Andersen, *Aftaleloven med kommentarer* [The Contracts Act with Commentary], 6th ed. 2014, p. 155 and Henry Ussing, *Aftaler paa formuerettens omraade* [Agreements in the Area of Obligations and Property], 3rd ed. 1950, p. 318 f.

² See Christina Ramberg, *Fullmakten och döden* [The Power of Attorney and Death], *SvJT* 2017, p. 464 ff.; *cf.* Göran Lind and Gösta Walin, *Ärvdabalken del I* [The Inheritance Code Part I], 21 February 2019, *Juno*, commentary on Chapter 17, section 3.

17. It is clear from the statements in the preparatory works that special circumstances only exist in genuinely exceptional cases. It is further apparent that the exception rule is aimed at situations where the conditions for the exercise of the power of attorney ceased as a consequence of the death of the principal. In this context, there typically arises a difference between powers of attorney in commercial circumstances which often pertain to a certain type of action over time and powers of attorney granted by a private person which often relate to a limited and specified engagement to undertake a certain measure, e.g. the purchase or sale of a certain good. By virtue of the example chosen in the preparatory works, as well as through the examples provided in the literature, it has been made clear that the relevant legal acts are typically such as have a strong connection to the principal's person when he or she was alive and which are deprived of their meaning upon the death of the principal.

The assessment in this case

18. The written power of attorney is a standardised and generally formulated power of attorney, valid until further notice. It cannot be deemed to be evident from the power of attorney that it would lapse upon GG's death. It also grants the agent the right to undertake new commitments.

19. According to the estate, there are special circumstances according to which the power of attorney has lapsed as a consequence of GG's death. The estate has pointed out in particular that the claims pertain to large sums and work of an unusual character, that it involves very broad powers for HJ, that the power of attorney was prepared a short time prior to death and that the payment orders were placed relatively long thereafter. However, these circumstances do not constitute such special circumstances that cause the power of attorney to be deemed lapsed (*cf.* para. 17).

20. The court of appeal has considered that GG cannot be deemed to have disposed of his estate assets within the meaning of Chapter 17, Section 3 of the Inheritance Code. Furthermore, the court of appeal has considered that the general power of attorney was not restricted and that it cannot be deemed to contravene good faith and fair dealing for Nordea to invoke the legal document against the estate. The Supreme Court reaches the same conclusion on these issues.

21. The operative part of the judgment of the court of appeal shall therefore be affirmed.

22. In light of this outcome, the estate shall compensate Nordea for its costs of litigation incurred also in the Supreme Court. The cost claim is reasonable.

Justices of the Supreme Court Gudmund Toijer, Ann-Christine Lindeblad, Johnny Herre, Erik Nymansson (reporting Justice) and Stefan Reimer participated in the ruling.
Judge referee: Mohamed Ali