An act of Commission or Omission? – Protecting a broker's interests

Adam Ramlugon, Partner in the City of London law firm Bargate Murray discusses the recent case of *Moran Yacht & Ship Inc v Pisarev*[1], the latest superyacht broking dispute to fall into the Commercial Court's hands.

The case provides some helpful guidance of what the Court looks for in determining whether a broker is entitled to a commission on a particular deal.

To a casual observer, the job of a superyacht broker must look heavy on the glamour and financial reward, for comparatively little work. The game, you might think, is a simple one; the buyer walks into your office, a few phone calls are made and, a few days later, another +€200m yacht has changed hands. Right?

Wrong (well, mostly). There may be some truth in this presumption, but the reality is a little different.

Having worked with some of the top superyacht brokers over the last few years, I have seen first hand how much work goes on behind the scenes in putting a deal together. Pulling off a successful deal does not come without some hard graft.

Consider the following:

- The brief for a broker is a simple but demanding one - get the client the most yacht possible at the lowest price or, when representing a seller, vice versa. Keep in mind however, that there is a reason why a potential buyer has the means to outlay tens, or even hundreds, of millions on a yacht. Put another way, the client and their advisers are not likely to be short on business sense. They will probably be used to driving a hard bargain (as will those on the other side of the transaction). Meeting the clients' exacting standards is often no mean feat.

- It can, and often does, take several months (sometimes years), to convert a potential buyer into an owner. Taking a deal from start to finish represents a significant investment of time on the broker's part.

- When the time comes to put pen to paper, there is often a great deal of documentation to wade through and agree to ensure a buyer receives good clean title to their new pride and joy. Whilst most of the time the sale and purchase documents will be settled by the parties' lawyers, a top broker will have a good working knowledge of how they fit together, and can be useful in applying their commercial acumen to reach agreement on the snags that can arise during the course of a deal.

In common with most sales industries, where a broker has facilitated the sale of a particular yacht, they will, quite reasonably, expect to be paid a commission on the deal. This will usually be a single figure percentage of the sale price. That means a broker can still expect to net a commission that can run into millions on a large deal.

That said, not every broker that has had some form of involvement in a deal is entitled to a commission. More often than not, a number of brokers will have "courted" the same eventual buyer and those that do not receive a commission may feel that it was the work they put in that made the deal happen. Some may feel strongly enough to take their claim to the courts.

The legal basis

Over the past few years the courts have offered some guidance as to the sort of factors they look for to support a claim for a commission.

First, the broker must be party to a contract, or a "*chain of contracts*"[1], linking them to the party from whom they are seeking commission. Of itself however, this is not enough to make a commission payable in the event a sale is achieved.

The second factor is that the broker must be the "*effective cause*" of the sale. In other words, the broker must show it was their actions that brought the buyer and seller to the table.

The facts in *Moran v Pisarev*

The broker (M) was instructed by the seller to find a buyer for its yacht, and did in fact show the eventual buyer (B) around the yacht. M's claim for commission failed the "*effective cause*" test. In reaching his decision, the judge in *Moran* gave a number of reasons which boiled down to the following:

[1] *Berezovsky v Edmiston [2010] EWHC 1883* paragraph [70].

- Whilst M had shown the yacht to B, the visit was "*perfunctory*"[2] and took place *before* they received instructions to market the yacht and find a buyer.

- There was a considerable amount of time between M's involvement with B and the date of the sale (around 19 months). Whilst not conclusive, this tended to suggest that the deal struck between B and the seller was a "*new transaction*"[3] that was not within B's contemplation when he was shown round the yacht by M, nor at any other material time.

- In the intervening time, there had been "*no relevant contact*"[4] between M and B. The judge mad a point of querying why, if M considered B to be a potential buyer for the yacht, it made no attempts to contact him following his initial visit.

Protecting the broker – 6 key points

By contrasting the result in *Moran* with that in the 2010 case of *Berezovsky v Edmiston*[5], in which the broker's claim for commission was upheld, the following points arise as central to a finding that a broker was the "*effective cause*"[6] of a transaction, and thus entitled to a commission.

1. First and foremost, there must be a contract between broker and the party responsible for the commission (principal). Without it, any groundwork the broker does to drum up interest in the yacht will not count for much. As in the *Edmiston* case, the contract does not have to be reduced to writing, but it is often helpful if it is in order to set the rate of commission payable to the broker. If the rate isn't agreed in writing, it is left open as another point of potential dispute (again see *Edmiston*[7]).

2. Second, ensure the work carried out with potential buyers takes place after the contract is agreed with the principal. Any leads pursued pre-contract should be revived and efforts to market the boat to these contacts renewed.

3. Third, the broker should be alive to the personal circumstances of their potential buyers and any material changes in them. In *Moran*, the judge noted that when B was shown the yacht by M, he did not have readily available funds with which to purchase one. By the time at which the deal was agreed, B had sold some business interests and was in a position to make such a purchase.

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[2] *Moran Yacht & Ship Inc v Pisarev and another [2014] EWHC 1098 para [103].*
[3] Ibid, para [104].
[4] Ibid, para [106].
[5] *[2010] EWHC 1883.*
[6] Or, put another way, that it was the actions of the broker "… that really brought about the relation of buyer and seller…" see *Nahum v Royal Holloway and Bedford New College [1999] EMLR 252.*
[7] The level of commission was set at 3% by the Court of first instance but reduced to 2.5% on appeal.

4. Fourth, the broker should ensure it "registers" its interest in all the potential buyers it is working with the principal. This is common industry practice and for good reason. By doing so, the broker puts the principal on notice of the potential buyers the broker is working with. If the principal sells his yacht to one of those buyers, it will be difficult to claim that the sale had nothing to do with the efforts put in by the broker.[8]

5. Fifth, keep a paper trail that documents each link in the "chain" put together by the broker between the buyer and the principal. This should be sufficient to stem off any dispute as to the broker's entitlement to commission before it reaches the courts. If not, it will be key evidence in any related court proceedings in any case.

6. Sixth, whilst it is not likely to be determinative of itself, make sure the trail between buyer and principal doesn't run cold. The longer the period between the broker's last involvement and the point of sale, the more likely the courts will find that the deal reached was a "*new*" one, unconnected with the broker's previous efforts. If attempts are made to exclude the broker from negotiations once an introduction has been made however, this will not shut down the broker's claim[9].

Ultimately, whether or not a broker is the effective cause of a transaction is a question of fact, and will turn on the facts present in each case. Keeping the above points in mind should, however, assist in weighting a claim for commission in the broker's favour.

Adam Ramlugon
Partner
Bargate Murray
E: Adam@bargatemurray.com
T: +44 (0)2073751393
F: +44 (0)2073929529

[8] Obviously, there must be some factual basis for a broker registering his interest in each of them, or else a broker could simply "hit and hope" by reeling off half a dozen names from the Forbes rich list in an email to their principal.
[9] *Berezovsky v Edmiston* [2010] EWHC 1883 paragraph [53].