

SUPERYACHT: BROKERS'**COMMISSION**

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INTRODUCTION

The superyacht industry has changed dramatically since the financial crises of 2008 and brokers have had to fight tooth and nail for their commissions. The world market is picking up again with global sales of about 221 superyachts in the first half of this year, up by about one-third on the same period in 2013, including second-hand sales. In total over 400 new superyachts will probably be built this year.

Brokers play an active role in the superyacht arena. It is customary in the industry for the parties to be introduced by a yacht broker. In the event the broker makes the deal, he is entitled to a commission. However, a broker will have to show that he has been an “effective cause” of the sale of the yacht. There are two recent cases which illustrate the brokers’ entitlement to a commission.

In order to explain the position in greater detail, this newsletter examines (1) when the broker is entitled to a commission and (2) the court’s interpretation of the “effective cause” test.

**The “4you” [2014] EWHC 1098
(Comm)**

The 4YOU was a superyacht belonging to a company owned by Mr Pisarev, a wealthy Russian businessman. On 18 May 2010 Moran Yacht & Ship Inc brokers (“Moran”) showed the yacht to Mr Miliavsky while the vessel was

in Monaco. Despite having no further contact with Mr Miliavsky, in or about February 2012, one of Mr Miliavsky's companies agreed to buy the yacht from Mr Pisarev's company for €19.8 million.

The dispute arose because Moran argued that they had shown the yacht to Mr Miliavsky pursuant to instructions given by Mr Pisarev at the 11 May 2010 Amels meeting. It was pleaded that the instructions were to market the yacht for sale. Accordingly, the visit in Monaco on 18 May 2010 was an effective cause of the sale to Mr Miliavsky's company, and Moran were therefore entitled to commission. However, Mr Pisarev argued that the meeting on 11 May was a tour of a shipyard with discussion of a newbuild that he was considering buying.

Mr Justice Males, sitting in the High Court, dismissed the claim for the following reasons. First Moran had not succeeded in proving that there had been an instruction to market the yacht on 11 May 2010 and although he had instructed Moran to market the yacht in September 2010, that meeting was not an effective cause of the later sale. Secondly, the visit on board the 4You on 18 May 2010 had been short and Mr Miliavsky was not interested in buying at the time. In any event, the long lapse between the visits to the yard on 11 May 2010 until negotiations to sell the yacht started in December 2011; Males J was

of the opinion that the eventual sale was a new transaction.

The “Darius” [2010] EWHC 1883 (Comm)

In early 2004 Mr Berezovsky entered into discussions with a German shipyard (“FLW”) in respect of a proposed newbuild luxury yacht named *Darius*. The contract price for the construction of the yacht was €148,540,000, payable in instalments.

Mr Berezovsky had difficulty in paying the instalments because he was unable to meet the instalments of the purchase price as they fell due and therefore decided to sell the yacht whilst it was still under construction. Mr Berezovsky instructed Edmiston & Company Limited (“Edmiston”) in May 2008 to find a buyer for the luxury yacht and market the *Darius* on a discreet basis with a view to realising a net price of €300,000,000. There was no written brokerage agreement between the parties, simply an oral agreement and not specific rate of commission was agreed.

In June 2008 Edmiston instructed Merle Wood & Associates Incorporated (“MWA”) as sub-brokers on the transaction to assist in finding a buyer for the *Darius*. One of MWA’s contacts identified an Emirati family, the Al Futtaims, as potential purchasers of the Yacht and as a result of which two members of the Al Futtaim family entered into direct negotiations with Mr Berezovsky. In the event, the Al Futtaim family purchased the *Darius* for €240 million through their company Paragon International Ltd.

Two principal questions arose for decision:

- (a) Was Edmiston & Co entitled to commission on the sale; and
- (b) If it was, what was the appropriate rate of commission?

One of the arguments raised by Mr Berezovsky for not paying the broker’s commission was that the actions of Edmiston (through MWA) were not an effective cause of the sale. He relied on the fact that neither Edmiston nor MWA had obtained a firm offer from the Al Futtaims. The argument was that a broker was expected to do more to earn his commission than merely circularise particulars of the yacht to rich individuals. In fact, a broker had to “bring the potential buyer into the transaction”, in particular by “eliciting” an offer from him. Accordingly, whether or not Edmiston (through the actions of MWA) introduced the Al Futtaims to Mr Berezovsky was not the effective cause of the eventual sale.

Mr Justice Field, sitting in the High Court, held that Mr Berezovsky’s submission would be rejected. Entitlement to a commission was dependent on whether the broker showed that he has been an “effective cause” of the sale of the yacht (*Millar, Son & Co v Radford* (1903) 19 TLR 575). Field J held that MWA’s approach to the Al Futtaims family had caused their interest in the *Darius*; and that no subsequent event had broken the chain of causation between MWA’s approach to the Emirati family and the purchase of the yacht through their company Paragon International Ltd. The fact that Edmiston had not been involved in the negotiations did not affect its

right to commission because they were instructed to find a buyer for the luxury yacht. In *Allan v Leo Lines* [1957] 1 Lloyd's Rep. 127, which turned on very similar facts, Mr Justice Devlin had remarked that: "if a broker effects an introduction and is willing to go on with the usual business negotiation, it hardly lies in the mouth of an owner who takes it out of his hands to say that he has made no further contribution".

There was some dispute between the parties regarding: what was the appropriate rate of commission? The Judge found that when Edmiston was instructed by Mr Berezovsky, it had indicated that a commission rate of 2.5% would be acceptable if the Yacht were to sell for more than €300 million. Field J also found that the reasonable expectation of all concerned was that if the Yacht sold for a lower sum, the commission rate would increase. Therefore, in this case, the appropriate rate of commission on a sale at €240 million was 3% (which amounted to €7.2 million).

CONCLUSION

We need to ask ourselves the following question: what can be done to avoid a costly and lengthy process through which both owners and brokers went in the above two cases? One solution would be for brokers to modify the process of their engagement and put in writing their obligations. The role and the entitlement of brokers will then be clearer.

This is not unusual in business; lawyers, for example, are obliged to set out the terms and scope of their engagement when instructed. In essence, if the brokers have been the effective cause of the sale of the superyacht, then they are entitled to a commission.

In the absence of express written agreements, factors that are taken into account when deciding whether and what amount of commission the broker is entitled to are (i) the relationship between the broker and the seller, (ii) the extent to which other similar yachts are on the market, (iii) the extent to which there are other potential purchasers, (iv) the price achieved, (v) the speed of the transaction, (vi) the involvement of sub brokers and (vii) the extent to which the brokers have participated in the transaction.

This article is intended only to give general guidance and reference in respect of the law. You are recommended to always consult a lawyer with any particular problem or query you may have.

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