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Broking Bad: Some Thoughts On

Pan Oceanic Chartering Inc v Unipec UK Co Ltd [2016] EWHC 2774 (Comm).

Working for nothing

Broking is a risky business. A broker can work for days, months or even years to try conclude a contract, only to see it fail for some wholly extraneous reason: the whim of a counterparty, a movement in the market, or simply bad luck.

It was for this reason that Lord Justice Lawton compared a broker to a groom who takes a horse to a water-trough. The broker may get his principal to the negotiating table, but when he gets him there he cannot make him sign, any more than the groom can make a horse drink.[1]

In good times, broking can be highly lucrative. In bad times, shipbrokers can go for months or years without concluding a deal. Chartering brokers are also feeling very squeezed in the present market.

Every broker has to accept the risk that if there's no deal, there is no commission. What is more difficult to accept is not being paid commission even though a deal has been struck.

Failed transactions

The law relating to payment of brokers' commission on failed deals is complicated, and in some respects unclear.

This is in part because brokers are often reluctant to sue for commission, for fear of losing future business. Indeed, very often the broker wants the chance to negotiate a new contract to replace the failed transaction so that, far from making a claim against the principal, he or she is busy trying to win the new instruction.

In other words, very few claims by brokers for commission or damages equivalent to lost commission have reached the courts, and available case law is very limited.

A few general points may, however, be made.

[1] *Alpha Trading Ltd v Dunnshall-Patten Ltd* [1981] QB 290, 308.

Whose broker?

Surprisingly often, the parties disagree about who appointed the broker. In new build contracts, for example, the broker customarily acts for the buyer, although paid by the seller, which can cause confusion.

In cases involving the sale of a second hand vessel or, more unusually, charterparties, there may only be one broker, who may be regarded as a an "*independent intermediary*" or "*true broker*" (as Staughton J, as he then was, put it[2]): in other words, the broker acts for both parties. This can cause real confusion when things go wrong.

What terms?

Even if it is clear who appointed the broker, the terms of the appointment may not be clear. How much commission the broker is entitled to is often left to the last minute. The broker may be asked to reduce commission in order to get the deal done.

In other cases, a broker may use a sub-broker, without having first made clear whether the sub-broker is entitled to independent commission, or whether he has to share the first broker's commission.

Where the agreement to pay commission is contained in or evidenced by a commission clause, difficult issues may arise as to whether a broker may sue under the *Contracts (Rights of Third Parties) Act 1999*.[3]

Whether to imply a term to protect a broker from a failed transaction

If A has appointed a broker, and a contract has been agreed between the A and B, what protections are available for the broker in the event that A breaches the contract?

It has been said that it is "*well established*" that the contract between an agent and A in such circumstances contains an implied term that A must not breach its contract with B and thereby prevent the commission being paid to the agent.[4]

Although the Supreme Court has recently re-emphasised that terms may be implied only if necessary[5], one can see that without such an implied term, it is possible for the broker to be deprived of his commission in circumstances most people would say were manifestly unfair and, to that extent, it is necessary to imply such a term in order to make the contract work properly.

Say, for example, a broker acts for shipyard A and secures a deal to construct and sell a vessel to buyer B. The broker is paid commission on the first four instalments. Prior to delivery, the market goes up significantly, and A decides to sell the vessel, in breach of its contract with B, to C. Is it fair that the broker should be deprived of his commission on the final instalment because his principal A has breached the contract with B? Wouldn't the officious bystander say "of course not"?

On the other hand, in *L French and Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451 the House of Lords dismissed a claim for commission by brokers who had procured an 18 month time charterparty,

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[2] See *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, 17.
[3] See *Voyage Charters,* chapter 24 and *Nisshin Shipping v Cleaves* [2004] 1 Lloyd's Rep 38.
[4] *Marcan Shipping (London) Ltd v Polish Steamship Co (The "Manifest Lipkowy")* [1989] 2 Lloyd's Rep 138 per May LJ at p. 140. See also *Alpha Trading Ltd v Dunnshall-Patten Ltd* [1981] QB 290 and *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd's Rep 515
[5] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742.

which was cancelled when the owners sold the vessel to the charterers after only 4 months of effective time. The House of Lords held there was no implied term preventing an owner of a ship that had been chartered from agreeing to sell the ship to the charterer and thus avoiding the monthly commission that would otherwise have been payable to the broker.

Further, in one case it was common ground that the understanding of the market for the sale of second hand vessels is that the broker is not entitled to commission if a deal does not complete, whatever the reason.[6] That would prevent any term from being implied which was contrary to market practice.

Present state of English law

On the present state of authorities, a broker may be able to claim commission (by way of damages) from his principal where the principal breaches the underlying contract, but not where the principal agrees to vary or terminate the contract. It is, however, fair to say that the authorities do not all speak with one voice.

To yet further confuse the issue, whether or not some of these issues fall to be considered as aspects of a duty of good faith is another point which has yet to be developed in the case law. In other words, does it make any difference of the principal intends to deprive the broker of commission? That is as yet entirely unclear.

Pan Oceanic Chartering v UNIPEC

On any view, the position of a broker who has been deprived of commission because a contract has been thrown up not by his principal, but by the counterparty, is very difficult indeed.

That was the situation an unfortunate broker found itself in the recent Commercial Court case of *Pan Oceanic Chartering Inc v Unipec UK Co Ltd* [2016] EWHC 2774 (Comm).

The dispute arose out of a contract of affreightment agreed in April 2010 between the defendants (entities within UNIPEC, the chartering arm of SINOPEC) and Tankers International, the VLCC tanker pool.

This was a very significant piece of business: the CoA required UNIPEC to nominate 8 to 11 cargoes a month for three years for carriage from West Africa to Singapore/Japan range.

The CoA contained a commission clause in the following terms:

> *9. COMMISSION:*
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> *2.5% address commission on freight, deadfreight and demurrage to Charterer deductible from the source and Owners have nominated Pan Oceanic as the broker and pay 1.25% brokerage commission on freight, deadfreight and demurrage.*

Commission under the CoA was estimated as being $6.6m per year.

From about April 2012 onwards UNIPEC failed to nominate any cargoes under the CoA. Although in a letter dated 3 July 2012 the pool complained its losses amounted to $14m, apparently the pool did not make a claim against UNIPEC for breach of contract. It appears from the judgment that UNIPEC and the pool carried on doing business with each other in different ways.

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[6] *The Manifest Lipkowy* [1988] 2 Lloyd's Rep 171.

It is unclear whether the broker sought to claim against its client, the pool. The litigation which came before the Commercial Court arose out of its claim against UNIPEC.

Originally the broker claimed bad faith, malice and in conspiracy, but by the close of submissions, its claims were limited to two claims under New Jersey law: first, for breach of an "implied in law" promise to perform the CoA; and secondly, a claim for tortious interference with contractual relations. New Jersey law was said to be the operative law because that was the broker's place of business.

The claim failed for a number of reasons. One of the important aspects of the Judge's decision was her finding that the cessation of nominations under the CoA had not been effected with the predominant motive of retaking control of brokerage. The CoA was thrown up by UNIPEC not primarily to deprive the broker of his commission, but for other commercial reasons.

Had that finding been the other way, it is possible that the broker would have had more success in making allegations of bad faith. In the absence of any finding of bad faith, however, the claim failed.

Pump Court

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