Brokers and Lawyers – There is no 'I' in Team

The phrase "*it's not what you know, it's who you know*" may have been coined at around the turn of the 20th century in a little known journal (at least to us) called "The Electrical Worker"[1]

We wonder whether the author of that now well worn phrase knew just how prescient it was. To us, it has never been more relevant and will only become more so as the 21st century enters its late teens.

The ways in which we work and communicate with colleagues and clients are becoming more and more diffuse. Where once a professional person's business was all done by hard copy letter, a great deal of business communication is now conducted by email and messaging applications such as WhatsApp - the lines between traditional and so called "social" media are becoming increasingly blurred. The trend, it seems, is for more and more formal business to be conducted through increasingly informal channels.

The one constant through all of this is that the relationships you have with your customers, clients and wider network are the lifeblood of your business. It is why we say that we live in a "relationship economy" where, broadly speaking, the individual with the best relationship with the customer or client (perhaps one that started on Twitter or Facebook) tends to be the cat that gets the proverbial cream.

There is, of course, nothing particularly surprising about this. We are all social animals that prefer to do business with people that we know and trust – to the exclusion of all others in some cases. In an industry as (comparatively) small as luxury yachting however, this can sometimes cause a variety of legal headaches.

Example

Let's consider the example of a potential yacht buyer who has a strong relationship with a particular yacht broker. The broker, in turn, has a good relationship with a particular yacht lawyer[2] and is told by his client to instruct the lawyer on his behalf to negotiate the acquisition of a particular yacht.

There is, of course, nothing wrong with any of that and this sort of scenario is quite common in the superyacht industry. However, where things become more complicated and risky from both the broker's and lawyer's perspective is where the broker (whether at the request of the buyer or as a matter of course) is the sole conduit through which 100% of the information flows between the lawyer and the buyer. In other words, the lawyer has no direct contact with the ultimate client and

[1] 1914 May 233/1
[2] Let's make him an English lawyer if only because our example depends on them being so!

Tel. +44 (0)20 7375 1393
Fax. +44 (0)20 7392 9529
info@bargatemurray.com
Facebook.com/bargatemurray
Twitter.com/bargatemurray
Bargatemurray.com

possibly no way of contacting that person. Again, we hasten to add, if managed carefully there may not be a problem with this, but there may very well be if the parties are not careful.

Issues for the Broker to consider

The relationship between a broker and their client is a classic example of the relationship that exists at law between an agent and their principal. The hypothetical broker in our example above, should be mindful of the following:

1. **Warranty of Authority** – As a matter of law, any broker that purports to act on behalf of their buyer is effectively giving a promise to third parties that they have the authority to do so. In practice, therefore, if a broker puts forward an offer of, say, $25m to purchase a yacht, they need to be absolutely sure that they have a clear mandate to do so – it is not enough for the broker to have an honest (but incorrect) belief that they did.

   If it turns out that they are wrong about this (i.e. the buyer's budget was capped at $23m) the broker can find themselves personally liable for any loss suffered by the third party (here the seller of the yacht, who thought they had struck a deal at $25m). If the seller only manages to sell the yacht for $22m a month later, they could feasibly pursue to the broker to the tune of the $3m shortfall. This is a situation that will almost certainly be avoided by clear communication between all three of the buyer, broker and lawyer.

2. **Duty to act with reasonable skill and care** – Subject to the terms of any contractual arrangements between a broker and his client, a broker will ordinarily be under a duty to act with reasonable care and skill. This is not a particularly high threshold to meet and a broker can protect himself by keeping in mind that his conduct will be measured, if a dispute were to arise, against expert evidence given by another broker as to whether or not they met the standards of conduct generally held to be acceptable in the market. Thus, adhering to the highest standards of brokerage practice will go a long way to discharging this duty.

   In our opinion, this is not an issue that will ordinarily cause a broker too much trouble. The brokers that we have had dealings with, for example, are professional people that insist on meeting the highest standards of conduct.

3. **Fiduciary duties** – As part of the agent/principal relationship, the broker in our example also owes a set of obligations known as fiduciary duties to their buyer. The word "fiduciary" has its roots in the Latin fidere which means to trust. Under English law today, the term essentially refers to an obligation of loyalty which requires the broker to put the interests of their principal above their own.

   The danger here is one of financial incentive. Many brokers are remunerated on the usual commission based model which most brokers are very happy with. However, naturally this

means that they have a financial interest in the buyer purchasing the yacht with perhaps less of an emphasis on the terms on which the deal is done.

The buyer, on the other hand, may be very keen to buy the yacht, but will have more of a direct financial interest in the terms on which the deal is done (for example, the terms of any guarantees that may be offered, the outcome of any condition survey, the items that are included on the inventory list and so on). So, brokers need to be careful to ensure that their clients are well informed and 100% happy with the final terms of the deal – clear open and honest communication between the broker, lawyer and the client is critical here.

Issues for the lawyer to consider

4. **Professional obligations** - Fear not, the lawyer in our example does not get away scot-free! Our example is problematic for him too. This is because an English lawyer is obliged to ensure that they protect their clients' interests to the best of their abilities.

   This obligation can take many forms but, in our example, there is a risk that reporting only to the broker and taking instructions given by them and not the buyer, might mean that the lawyer is not acting in a way which reflects the true wishes of the buyer. Additionally, if they only provide their advice to the broker, they have no way of knowing that their advice is being passed on to the buyer in full. If the buyer (the lawyer's client of course) is not being provided with the full picture, they may do the deal on a false footing. This would potentially constitute a breach of the lawyer's professional obligations and give the buyer a cause for complaint too.

Conclusions

Happily, we know some excellent brokers who place a premium on ensuring that their business is done in a manner that will not give rise to these issues. It is perhaps not a surprise that these brokers often find themselves with repeat business from yacht buying clients who have had the benefit of entering into transactions with their eyes wide open and thoroughly enjoyed the thrill and excitement that comes with purchasing a superyacht.

In sum, it is only right that we acknowledge the value of the business relationships we all have, but there comes a time when two (or more) heads are better than one and working as part of a team on an equal footing works best for everyone.