Neutral Citation Number: [2011] EWCA Civ 431

Case No: A3/2010/2020

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE FIELD
[2010] EWHC 1883 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2011

Before :

LORD JUSTICE LAWS
LORD JUSTICE JACKSON
and
LORD JUSTICE TOMLINSON

- -

Between :

(1) BORIS BEREZOVSKY **(2) PETERSHAM HOLDINGS LIMITED**	**Appellants**
- and -	
EDMISTON & COMPANY LIMITED	**Respondent**

- -
- -

Mr Stephen Hofmeyr QC and Mr N.G. Casey (instructed by **Hill Dickinson LLP**) for the **Respondent**
Mr Luke Parsons QC and Mr Craig Ulyatt (instructed by **Enyo Law LLP**) for the **Appellant**

Hearing dates : Thursday 31st March 2011

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Approved Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1. Introduction,

Part 2. The Facts,

Part 3. The Present Proceedings,

Part 4. The Appeal to the Court of Appeal,

Part 5. What Commission are the Brokers Entitled to Receive?

Part 6. The Appeal in Relation to Interest,

Part 7. Conclusion.

Part 1. Introduction

2. This is an appeal concerning the amount of commission payable by the appellants to the respondent brokers for securing the sale of a yacht. The first appellant is Mr Boris Berezovsky, a wealthy Russian businessman who was granted asylum by the UK Government in 2003. The second appellant is Petersham Holdings Limited, a Cayman Islands special purpose vehicle which is ultimately owned by Mr Boris Berezovsky. I shall refer to the first appellant as "Mr Berezovsky" and the second appellant as "Petersham".

3. The respondents to this appeal are Edmiston & Company Limited, a firm of yacht brokers who have acted for Mr Berezovsky on a number of occasions since the late 1990s. I shall refer to those yacht brokers as "Edmiston". The principal director of Edmiston is Mr Nicholas Edmiston, to whom I shall refer as "Mr Edmiston". Mr Edmiston's son, Jamie Edmiston, features from time to time in the story, but only in a subordinate role.

4. The purchasers of the yacht were Mr Abdullah Al Futtaim of the United Arab Emirates and his son Mr Omar Al Futtaim. The judge referred to Mr Abdullah Al Futtaim as "Mr Abdullah" and to his son as "Mr Omar". I shall adopt the same abbreviations. The judge referred to Mr Abdullah and Mr Omar together as "the Al Futtaim family". I shall adopt the same terminology.

5. The ship builders who constructed the yacht the subject of this litigation were Fr. Luerssen Werft GmbH & Co, to whom I shall refer as "FLW". FLW are a shipyard in Bremen, Germany. The managing director of FLW is Mr Peter Luerssen, to whom I shall refer as "Mr Luerssen".

6. Another firm of yacht brokers who feature in this litigation are Merle Wood and Associates Inc ("MWA"). MWA are based in Florida, USA. The principal director of MWA is Mr Merle Wood.

7. One other individual who plays a major part in the story is Mr Michael Cotlick. Mr Cotlick was at all material times Mr Berezovsky's personal assistant.

8. Yachts of very high value are sometimes referred to as "super yachts". This term was used frequently during the trial and I shall sometimes use it in this judgment.

9. After these introductory remarks I must now turn to the facts.

Part 2. The Facts

10. In early 2004 Mr Berezovsky entered into discussions with FLW for the construction of a 110 metre yacht, to be called *Darius*. These discussions were fruitful. On 7th October 2004 Petersham, Mr Berezovsky's company, entered into a contract (the "shipbuilding contract") for the construction of the yacht. The contract price was €148,540,000, payable in instalments. FLW were entitled to cancel the contract if any instalment remained unpaid for 90 days.

11. In the last quarter of 2007 Petersham failed to pay the fifth instalment. This led to some renegotiation between the parties. On 6th November 2007 the parties agreed amendments to the shipbuilding contract, as set out in a document entitled "Master Addendum". Under the Master Addendum, Petersham were entitled to postpone delivery by up to six months and FLW were entitled to terminate if any instalment was outstanding for 45 days.

12. On 10th January 2008 Petersham exercised their right to postpone the delivery date by six months. One consequence of this postponement was that the sixth instalment under the shipbuilding contract did not fall due until 28th May 2008.

13. Mr Berezovsky was in difficulty funding the sixth instalment and, in the event, he never did pay it. Likewise Mr Berezovsky never paid the seventh instalment (€23, 890,421), which was invoiced on 14th May 2008.

14. In those circumstances Mr Berezovsky decided to try to sell the yacht as a vessel in the course of construction. On 14th May 2008 he had a meeting with Mr Edmiston, attended by Mr Michael Cotlick. Mr Berezovsky's difficulties over the sixth and seventh instalments were discussed and Mr Edmiston was made aware that if the dispute with FLW were not resolved by mid July 2008, Mr Berezovsky could lose control of the yacht to FLW. Mr Edmiston told Mr Berezovsky that he thought a net price of €300 million (i.e. net of commission and other expenses) could be achieved. Mr Berezovsky asked Mr Edmiston to begin marketing the *Darius* on a discreet basis with a view to realising a net price of €300 million, but with no approaches to be made to Russian nationals. Mr Edmiston understood that Edmiston were being appointed as a selling broker on a non-exclusive basis. Nothing was said about the applicable rate of commission, but it is common ground that an oral brokerage contract was concluded between Edmiston and Mr Berezovsky and Petersham, if not at this meeting then in the course of the following days, so that if Edmiston could establish that they were the effective cause of the sale of the *Darius*, they were entitled to a reasonable commission. Following those discussions, Edmiston set about discreetly marketing the *Darius*. In early June 2008, during a telephone conference with Mr Wood, Mr Edmiston requested that MWA should assist in finding a buyer.

15. Mr Wood was aware that the Al Futtaim family were keen to buy a super yacht. Mr Wood was in fairly regular contact with Captain Sean Wrigley, who was employed by the Al Futtaim family as Captain of one of their yachts. On 11th July 2008 Mr Wood

sent details of the *Darius* to Captain Wrigley, suggesting that this might be of interest to Mr Abdullah. Captain Wrigley replied:

> "Will do my best! If he bites can we agree on €3million commission for me? Will be in front of him as soon as I can get him alone."

It seems that for those who work in the world of super yachts, life has its compensations.

16. On 13th July 2008 Captain Wrigley spoke to Mr Abdullah about the *Darius* and showed him some details. Mr Abdullah discussed the matter with his son Omar and they decided to pursue this purchase.

17. On 14th July Mr Wood emailed to Captain Wrigley a large number of photographs and plans of the *Darius*. Captain Wrigley showed this to the Al Futtaim family.

18. On 15th July Mr Wood told Edmiston that Mr Abdullah was a new prospect who seemed to be developing quickly and that Mr Berezovsky should be advised that this was through Edmiston's efforts.

19. On the same day, 15th July, there was a meeting between Mr Edmiston, Mr Berezovsky and Mr Cotlick. In the course of that meeting Mr Edmiston said that he would be willing to accept a commission of 2.5% if a net sale price of €300 million was achieved. Mr Berezovsky and Mr Cotlick did not demur from that.

20. On 16th July FLW had agreed to allow Mr Berezovsky more time in which to sell the yacht, in return for certain additional payments. On 17th July, Mr Edmiston emailed to Mr Berezovsky the names of "clients" whom his firm had introduced, with a view to selling the *Darius* at a net price of €300 million. That list included Mr Abdullah.

21. On 18th July Mr Abdullah and Mr Omar visited the FLW yard in Bremen, where the *Darius* was under construction. On 30th July Mr Abdullah and Mr Omar met Mr Luerssen in Monaco. They expressed a serious interest in purchasing the *Darius*, but said that they did not want to deal through brokers.

22. On 28th August 2008 Mr Luerssen reported to Mr Berezovsky and Mr Cotlick that the Al Futtaim family were interested in purchasing the *Darius.*

23. On 29th August Mr Omar sent an email to Mr Cotlick, making an initial offer of €210 million for the purchase of the *Darius*. Negotiations followed, in which the brokers were not involved. On 16th September 2008 Mr Cotlick and Mr Omar reached agreement in principle for sale of the yacht at a price of €240 million. On 18th September heads of agreement were signed. In October 2008 the Al Futtaim family completed the purchase of the *Darius* from Petersham for €240 million.

24. Edmiston played no part in the negotiations which occurred between the Al Futtaim family and Mr Berezovsky during August, September and October 2008. Indeed they were not told about those negotiations until a late stage. Nevertheless, the fact remained that the Al Futtaim family had been introduced through the efforts of Edmiston and their sub-brokers, MWA. Accordingly Edmiston insisted that they should be paid a commission. Mr Berezovsky and Petersham did not accept

Edmiston's claim for commission. In order to achieve a resolution of this matter, they issued the present proceedings.

Part 3. The Present Proceedings

25. By a claim form issued in the Commercial Court on 5th March 2009 Mr Berezovsky and Petersham claimed against Edmiston and MWA declarations that neither Edmiston nor MWA were entitled to brokerage or commission in respect of the sale of the *Darius*. Both defendants resisted this claim and Edmiston made a counter claim for whatever commission was due.

26. The action came on for trial before Field J in June 2010. The judge heard extensive factual evidence concerning the course of negotiations, as well as expert evidence concerning levels of commission charged by yacht brokers.

27. In his reserved judgment handed down on 26th July 2010 the judge held that Edmiston were the effective cause of the purchase of the *Darius* by the Al Futtaim family. Accordingly, Edmiston were entitled to receive a commission. The judge assessed the commission at €7.2 million, which constituted 3% of the sale price.

28. Mr Berezovsky and Petersham accept that the judge was right on the issue of liability. They are, however, aggrieved by the amount of commission and interest awarded. Accordingly, in relation to quantum issues, they have appealed to the Court of Appeal.

Part 4. The Appeal to the Court of Appeal

29. The appeal to this court principally concerns the rate of commission awarded. I shall focus on this issue initially. There is also a subsidiary issue concerning interest. Finally, arguments have been raised about costs, but that aspect can be dealt with by written submissions after this court has decided the substantive issues.

30. In relation to the principal issue, Mr Luke Parsons QC, who appears for the appellants, argues that there was an agreement between the parties that, in the event of a sale at €300 million net, the commission would be 2.5%. Since the actual sale price was materially lower than €300 million, the commission rate should be either less than 2.5% or 2.5%. The judge's reasons for moving up from 2.5% are flawed. Although Mr Parsons did not formally abandon the contention that the commission should be less than 2.5%, this contention was not at the forefront of his submissions. Realistically, Mr Parsons concentrated on his best point, namely that there was no proper basis for the judge to move up or down from the contractual rate of 2.5%. Therefore the commission should be reduced from €7.2 million to €6 million.

31. Mr Stephen Hofmeyr QC, for the respondent, argues that the judge did not find any agreement for commission at 2.5%, but rather a concession by Mr Edmiston that, if the yacht were sold for €300 million net, then Edmiston would be prepared to accept a commission as low as 2.5%. That target price was not met, so the concessionary rate of 2.5% did not apply. Accordingly the judge had to determine a reasonable commission rate by evaluating numerous factors. The Court of Appeal should not interfere with that evaluation, unless the judge made some error of principle. Absent any error of principle, it is not for an appellate court to substitute its own assessment

for that made by the trial judge. If Mr Hofmeyr is wrong in his primary submission, then he argues that any adjustment to the 3% rate should be upwards rather than downwards. This is because all relevant factors point towards a rate higher than 3%.

32. Before this court can consider the merits of the appeal, our first task is to interpret the judgment below. Did the judge find or did he not find that an oral agreement about commission rate was reached on 15th July 2008?

33. The judge found Mr Cotlick to be "an impressive and truthful witness who had a very good recall of matters of detail". On the basis of Mr Cotlick's evidence, the judge found that at the meeting on 15th July 2008 Mr Edmiston said that he would be agreeable to a fee of 2.5% in respect of a sale at or above €300 million net. Mr Edmiston said that this would be a good deal for him, given the agreed asking price (€350 million). It is apparent from the judgment that no one at the meeting demurred from what Mr Edmiston said. The judge does not expressly state in his main judgment that this gave rise to an oral agreement, although paragraphs 57, 58 and 61 of the judgment, when read together, strongly suggest such a finding. The matter is put beyond doubt, however, by the judge's ruling delivered on 30th July 2010, which was some four days after the main judgment. In paragraph 2 of this ruling the judge held:

> "The finding that Mr Edmiston agreed to accept a 2.5% commission if a net sale price of 300 million were achieved is a finding of fact made on the court's assessment of the credibility of Mr Cotlick and Mr Edmiston. In my opinion Edmiston & Co have no real prospect of success in appealing this finding."

34. On this threshold issue, therefore, I accept the submission of Mr Parsons and reject that of Mr Hofmeyr. The judge has held that there was an oral agreement for a 2.5% commission in the event that the *Darius* was sold for €300 million net.

35. Having resolved this preliminary matter, I must now turn to the central issue in the appeal, namely what commission are the brokers entitled to receive?

Part 5. What Commission are the Brokers Entitled to Receive?

36. The oral agreement of 15th July 2008 did not apply to the sale which was actually made. This is because the Al Futtaim family purchased the yacht for €240 million, which was some €60 million less than the price anticipated. In those circumstances, the appellants' obligation was that arising under the oral agreement of 14th May 2008, namely to pay a reasonable commission.

37. The court therefore has the familiar task of determining what is a "reasonable" sum to be paid by way of remuneration. The court must pay close attention to any statements which the parties made at the material time indicating what they regarded as reasonable remuneration for the services in question: see the reasoning of the House of Lords in *Way v Latilla* [1937] 3 All ER 759 at 764 and the reasoning of Devlin J in *Allan v Leo Lines Ltd* [1957] 1 Lloyd's Rep 127.

38. In *Allan* one of the issues before the court was the proper rate of commission payable to a shipbroker following the sale of a motor vessel for £63,750. At page 134 Devlin J said:

> "I think, therefore, that if there was no definite agreement in this case it comes so near to it that when considering what would be a reasonable sum I cannot really do otherwise than take the figure the parties themselves were talking about, and the only figure they were talking about, which is the figure of five per cent."

Accordingly Devlin J assessed the commission at 5%. It can be seen from the report that the only authority cited was *Way v Latilla*, in which Devlin J (when at the Bar) had appeared as junior counsel for the respondents.

39. Applying those principles to the present case, the starting point for determining what constitutes a "reasonable" commission must be 2.5%. The question then arises as to whether any, and if so what, adjustment should be made to that figure to reflect the fact that the *Darius* was sold for €60 million less than the parties had anticipated on 15th July.

40. The judge's reasoning process which led him to move up from 2.5% to 3% was as follows. In paragraph 61 he noted seven factors relevant to the rate of commission. These were:

i) YachtZoo and Royal Oceanic were engaged by Mr Berezovsky to market *Darius* at agreed commission rates of 3% and 2.5%.

ii) MWA were paid a commission of 2.5% in respect of the sale in June 2009 of *Ecstasea*, an 86 m Feadship yacht at a price of approximately €100 million.

iii) A commission of 4% was paid in respect of the sale of *Pelorus*, the sister ship of *Darius*, sold in October 2003 for US $150 million.

iv) The commission agreed by Edmiston in respect of the *Princess Mariana and Moon Goddess* was 4% of the gross price.

v) In his email of 17th September 2008 to Mr Cotlick, Jamie Edmiston (Mr Edmiston's son) claimed a commission of 5% on top of the 2.5% he assumed was being claimed by Mr Luerssen.

vi) Mr Edmiston claimed commission on the *Darius* sale at the rate of 5% in a letter dated 16th October 2008 to Mr Berezovsky.

vii) In US proceedings brought by MWA against Petersham and Mr Berezovsky, the claim was for a commission of 70% of 5% of the gross sale price of *Darius*, "as is industry standard".

41. In the following two paragraphs the judge reasoned as follows:

> "62. It is common ground that Mr Edmiston said nothing at the meeting on 15 July 2008 about accepting a commission lower than 2.5% if the net price were below €300 million. In my opinion, it was not implicit that Mr Edmiston was agreeing to accept a lower commission in these circumstances. On the contrary, I think the reasonable expectation of those present

> would be that the rate of commission would go up if the net price were appreciably lower than €300 million, since at the end of the day a broker is interested in his actual return on a transaction.
>
> 63. The significance of Mr Edmiston's expressed readiness to accept 2.5% if a net price of €300 million were achieved is that this is a strong indicator that a reasonable commission on a gross price of €240 million will be around 2.5%. With this in mind, and having regard to: (a) the fact that the ultimate sale price was €240 million rather than €350 million; and (b) the matters noted in (i) to (vii) in paragraph 61 above, I conclude that the appropriate rate of commission to award in this case is 3% of €240 million, namely €7.2 million."

42. Much of the argument in the Court of Appeal has focused upon the judge's reasoning in those two paragraphs.

43. Mr Hofmeyr initially sought to argue that the second and third sentences of paragraph 62 were findings of primary fact. But in the face of some opposition from the court I think he accepted (or, if he did not accept, I would hold) that these two sentences are inferences which the judge drew from the primary facts as found. The crucial findings of primary fact were that a 2.5% commission rate was agreed in the event of a sale at €300 million net, but no commission rate was agreed, or even discussed, in the event of a sale for some lesser amount.

44. I have carefully studied the passages relied upon in the evidence. It is clear that there was no basis upon which the judge could find that there was in fact any shared expectation of the parties that the commission rate would go up in the event of the sale price falling below €300 million. The judge's finding that such a shared expectation would have been reasonable is simply another way of formulating the judge's conclusion that a reasonable commission rate for a sale at less than €300 million would be more than 2.5%.

45. The judge's reasoning which leads to his conclusion in paragraph 62 is to be found in the last part of the final sentence of that paragraph:

> "…since at the end of the day a broker is interested in his actual return on a transaction."

46. As Mr Parsons rightly observes, that reasoning is deficient. It focuses solely on the position of the broker. It is undoubtedly the case, as is clear from the evidence, that yacht brokers like to make as large a commission as possible on every sale. So, if the sale price is lower than expected, no doubt the broker would relish receiving a higher commission rate. That, however, is only part of the picture. If the sale price drops below the figure predicted by the broker, then the seller (that is the client) is disappointed. The gross proceeds of sale are less than the seller expected and he will no doubt wish to pay proportionately less commission to the broker, in order to preserve as much money as possible as net proceeds of sale.

47. In the present case Edmiston gave clear advice that a net sale price of at least €300 million would be achievable: see paragraph 61 of Mr Cotlick's witness statement and the judge's finding that Mr Cotlick was an honest and accurate witness. See also the judge's finding in paragraph 27 of the judgment that at the meeting on 15th July "Mr Edmiston repeated his view that a net price of €300,000,000 was definitely achievable for the *Darius* and confirmed that the gross asking price should be €350,000,000".

48. In the event, when a sale price of only €240 million was achieved, both Mr Berezovsky and Edmiston were disappointed. Mr Berezovsky received a lower sale price and Edmiston received commission on a lower sale price. On the facts as found by the judge, I see no reason in logic or otherwise why the rate of commission should be higher than the stipulated rate of 2.5%. Any consolation given to the broker would increase yet further the disappointment of the seller. If either party was responsible for the disappointment which fell to be shared out, it must be the broker who had created the original optimistic expectation.

49. I turn now to the seven factors which the judge identified in paragraph 61 of his judgment. The first five of those factors were known and, in so far as relevant, taken into account on 15th July 2008 when the parties agreed a commission rate of 2.5% on the anticipated sale price. None of these five factors would be a reason for increasing the commission rate in the event of a sale at €240 million. Factors (vi) and (vii) comprise assertions made by parties after the sale had been agreed. They shed no light upon what constituted a reasonable commission on a sale for €240 million or what the parties would have agreed if they had turned their minds to that matter in July 2008.

50. In the course of submissions Mr Hofmeyr referred to a number of other factors which he submitted that the judge ought, but failed, to have taken into account as making it appropriate to increase the commission. In particular, the fact that Mr Berezovsky had need of a rapid sale and the fact that the pool of potential buyers (with €300 million to spend on a yacht) was small. However, these factors were known to both parties when the rate of 2.5% was agreed. I do not see how they assist the respondent in relation to the present appeal.

51. Mr Hofmeyr also advanced the ingenious argument that if an officious bystander at the meeting on the 15th July had asked "what will happen to the commission rate at a sale below €300 million?", the parties would have replied that the commission rate would go up. In relation to this submission, it is worth recalling the words of McKinnon LJ, who formulated the officious bystander test in *Shirlaw v Southern Foundries* (*1926) Limited* [1939] 2 KB 206 at 227 as follows:

> "..if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'oh, of course!' "

Imagine that such a bystander had crept into the meeting on 15th July and said: "Suppose the yacht is sold for less than the €300 million predicted by Mr Edmiston. Will the rate of commission rise above 2.5%?" It is inconceivable, in my view, that the parties would have testily suppressed him with the words "oh, of course!" The unfortunate bystander may possibly have stirred up a hornets' nest, with Mr Edmiston arguing for more commission and Mr Berezovsky and Mr Cotlick arguing for less.

Whether the parties would have arrived at any answer to the bystander's audacious question, I do not know. If they had eventually reached agreement, there is no basis for saying that this would have been either above or below 2.5%.

52. Mr Hofmeyr also argued that the stated rate of 2.5% was a "concession". This concession only applied if the price (at one point Mr Hofmeyr called it "the fabulous price") of €300 million were achieved. I am afraid that this argument will not do. €300 million net was regarded, on Mr Edmiston's advice, as being the minimum sale price likely to be achieved. On that basis the parties agreed that a commission rate of 2.5% should apply. This was not a concession made by either party, it was a sensible agreement focused on the anticipated outcome.

53. Let me now draw the threads together. The judge gave two reasons in paragraph 63 of the judgment for moving up from 2.5% to 3%. They were: (a) the fact that the ultimate sale price was €240 million rather than €350 million and (b) factors (i) to (vii) set out in paragraph 61 of the judgment. In my view, neither of those reasons stands up to scrutiny. The judge ought, following the principles established in *Way v Latilla* and *Allan v Leo Lines*, to have adopted the rate of 2.5% which had been regarded as reasonable by both parties. In the circumstances which occurred, namely a sale at less than the anticipated price, no good reason has been established for moving either up or down from that figure.

54. I would therefore allow the appellants' appeal on the main issue and reduce the commission awarded to €6 million. The only other issue in this appeal, to which I must now turn, is the question of interest.

Part 6. The Appeal in Relation to Interest

55. The judge awarded interest to Edmiston on the commission at European Central Bank rate plus 1%. The appellants do not dispute the rate of interest awarded. They do, however, contend that they should only pay interest on 30% of the commission.

56. The basis of the appellants' argument is that under the agreement between Edmiston and MWA, Edmiston must pay 70% of any commission received to MWA. Accordingly, Edmiston have only been out of pocket as to 30% of the commission. Therefore Edmiston should only receive interest on that lesser sum as compensation for delay in receiving payment.

57. This novel argument of Mr Parsons did not feature during the trial. Consequently there was no explanation at trial of the terms of the sub-brokerage agreement between Edmiston and MWA. The appellants' present argument concerning interest first made its appearance in the third round of post-judgment written submissions.

58. In these circumstances Mr Parsons pins his entire argument concerning interest on paragraph 32 of Edmiston's re-amended defence and counter claim. This paragraph reads as follows:

> "Paragraph 29 is noted. The terms of the Sub-Brokerage Agreement are of no relevance to Edmiston's position in the present proceedings and, in particular, to Edmiston's entitlement to commission in respect of the sale of Project

> Darius. Without prejudice to the foregoing, the Sub-Brokerage Agreement was entered into on or about 6th June 2008, when Edmiston provided information to Merle Wood in relation to Project Darius and requested assistance in seeking a purchaser. It was an implied term of the Sub-Brokerage Agreement that, if Merle Wood introduced the ultimate purchaser to Project Darius and was the or an effective cause of the sale, Merle Wood would, in accordance with standard market practice, receive a proportion of such commission as was due to and received by Edmiston."

The 70/30 split is not expressly mentioned in this paragraph, but it is clear from Mr Edmiston's evidence that 70/30 was the normal split when Edmiston and MWA collaborated, with one of them acting as sub-broker.

59. Mr Parsons submits that the agreement pleaded in paragraph 32 contains no express term for payment of interest. MWA have no current action against Edmiston in the context of which MWA could recover statutory interest. Therefore, if Edmiston receives interest on the whole of the commission, they would receive a windfall.

60. On this issue, I accept the submissions of Mr Hofmeyr and reject those of Mr Parsons. If Edmiston recover interest as awarded by the judge, there is no basis for saying that Edmiston will not account to MWA for 70% of the interest, as well as 70% of the commission.

61. The 70% element of the commission is money due from Edmiston to MWA. It must be implicit in the terms of the sub-brokerage agreement, as well as from the long standing relationship between Edmiston and MWA, that Edmiston will account for the appropriate proportion of interest received from the appellants for late payment. This really is a case where the officious bystander previously invoked by Mr Hofmeyr would receive the same answer from both parties.

62. In the result, therefore, I would reject the appellants' arguments in respect of interest. That disposes of the final issue in the appeal.

Part 7. Conclusion

63. For the reasons set out in Parts 4 and 5 above, I would allow the appellants' appeal on the main issue and reduce the commission awarded to Edmiston from €7.2 million to €6 million. I would dismiss Edmiston's cross-appeal.

64. For the reasons set out in Part 6 above, I would dismiss the appellants' appeal in relation to interest and uphold the judge's award in that regard.

65. All that remains is the question of costs, upon which the parties are invited to make written submissions. Given the history of this case, I hope the parties will forgive me for mentioning that those submissions should be concise.

Lord Justice Tomlinson:

66. I agree that the appeal should be allowed to the extent suggested by Jackson LJ. I add only a very few words of my own because we are differing from the commercial

judge and out of deference to the excellent argument deployed on both sides in this appeal.

67. As Jackson LJ has pointed out, the judge does not expressly state in his main judgment that there was an agreement reached on Mr Berezovsky's yacht "Kiring" on 15 July 2008 to the effect that commission of 2.5% would be payable on a sale at or about €300M. Furthermore, Mr Hofmeyr was I think right to submit that the language used by the judge at paragraphs 61 and 63 of his judgment, where he twice uses the expression "readiness to accept", is the language of concession or is at least consistent with a finding to the effect that 2.5% was a concessionary rate contingent upon achievement of a sale at €300M or above.

68. The difficulty which Mr Hofmeyr faced in pursuing this argument to its logical conclusion was that it was not Mr Edmiston's evidence at trial that he had made any such concession. He had no recollection of any discussion of commission rates at all. Furthermore, he was adamant that had there been such a discussion, he would not have agreed to a rate of 2.5%, which evidently he regarded as derisory.

69. The judge found that there had been a discussion of commission rates and that Mr Edmiston had expressed a readiness to accept 2.5% on a sale at €300M. Whether the discussion was couched in terms of a concluded agreement at that stage may be open to question, particularly in the light of Mr Cotlick's evidence in cross-examination to the following effect:-

> "He [Mr Edmiston] mentioned he would expect 2.5% and mentioned that it was reasonable. I think that means an agreement."

However, as Mr Parsons pointed out, it is not difficult to infer an agreement to market the vessel on this basis from the indication found to have been given by Mr Edmiston to the effect that he was agreeable to do so, followed by his proceeding to market the vessel without further discussion or ado. That is entirely consistent with what the judge said in his consequential ruling on 30 July 2010 as set out by Jackson LJ at paragraph 33 above. Since the judge described his finding as a finding of fact made on the court's assessment of the credibility of Mr Cotlick and Mr Edmiston, the judge had evidently rejected Mr Edmiston's evidence to the effect that it was inconceivable that he could have expressed a readiness to accept a commission of as low as 2.5%. However that still leaves open to debate whether the 2.5% rate should be regarded as concessionary.

70. Mr Parsons for his part was able to mount a powerful argument, based upon and supported by the evidence, to the effect that it was in the highest degree improbable that Mr Edmiston would have been prepared to agree a rate which was concessionary in nature. I was persuaded by this argument, but since 2.5% is on any view of the evidence at the very bottom end of the range of commissions likely to have been under discussion, the irony is that the argument also and necessarily tended, to my mind at any rate, to undermine the judge's finding that there had been a discussion at which Mr Edmiston had indicated a readiness to proceed on the basis of 2.5% commission on a sale at €300M. However permission to appeal against the judge's finding to that effect was refused both by Sir Mark Potter on the papers and by Etherton LJ on a renewed oral application on notice to the Appellants. Once it is

accepted, as Mr Hofmeyr had to accept, that Mr Edmiston did give the indication found by the judge, the case for regarding it as concessionary in nature simply falls away. There is no basis in the evidence upon which one can sensibly so regard it. It can only be regarded as simply a compromise.

71. Like any compromise, it must be treated as having been reached in the light of all the factors then known to the parties as tending to militate in favour of a higher or a lower rate of commission. Seen in that light, there was, as Jackson LJ has explained, no principled basis upon which the judge could conclude that the reasonable commission payable in the event of a sale at a price less than €300M was greater than 2.5%.

72. I agree with Jackson LJ that the appeal in relation to interest must be dismissed for the reasons which he gives.

Lord Justice Laws:

73. I also agree.