

to pay or not to pay...?

That was the question which exercised the Court of Appeal in *Makram Barsoum Estafnous -v- London & Leeds Business Centres Ltd* [2011] EWCA Civ 1157. Although straightforward on the face of it, in the event, the Court declined to find that an estate agent was entitled to commission under an agreement which provided for the payment of commission on the sale of a property, despite a transaction having taken place. But why?

The facts

The case concerned one Mr Estafnous, an estate agent who had his offices within a building, Regent House, which the owner, LLBC, wanted to sell. It was agreed that LLBC would pay Mr Estafnous a not inconsiderable commission of £2 million in return for the agent introducing a buyer.

The short contract which was subsequently drafted stated:

'LLBC ... agrees ... that on completion of the sale of the property to the Intending Buyer [a Mr Kapoor] or any party related to or associated with that party LLBC will pay Mr Estafnous the sum of 2 million pounds sterling notwithstanding any variations in the stated purchase price.'

During the negotiations that followed, it was agreed that Kapoor would purchase the shares of the company which owned the property, rather than the property itself. The transaction ultimately completed on the basis of a share sale agreement and therefore ownership of the property remained where it had always been – with LLBC.

It was acknowledged that on a literal construction of the agreement, the share sale did not trigger the obligation on LLBC to pay the commission to Mr Estafnous. However, he argued that a 'looser interpretation' should be adopted. He had, he said, introduced a buyer who had obtained effective control and ownership of Regent House.

There was no doubt that Mr Estafnous had, indeed, kept his part of the bargain. However, the Court held that there was no ambiguity in the agreement which clearly envisaged a transfer of ownership of the property. In the

absence of ambiguity, there was no room for the Court to imply terms to result in the outcome Mr Estafnous sought. 'This is,' the Court stated, 'one of those cases where those involved did not think about what was to happen in certain circumstances, namely if the property sale were restructured as a share sale'.

The Court accordingly concluded that on the true construction of the agreement and in the circumstances of the transaction, Mr Estafnous was not entitled to the £2m commission.

A contract which meant what it said

The agent's solicitors had envisaged in their drafting that the purchase might be made through an associated entity and also for the possibility of a price change. However, they did not provide for the eventuality which in fact occurred. The Court acknowledged that this was unsurprising in the circumstances, as the agreement was reached against a background of a deal already struck – a land transaction - subject to contract.

The decision clearly highlights the importance of considering all possible outcomes when documenting a transaction and wherever possible, providing how each may be dealt with. Where the stakes are high, a little forethought can go a long way.

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