



Estafnous-v-LLBC Limited (14/10/2011)

The Message: Careful drafting of contractual documents is still vital.

The Case: The Court of Appeal has made clear there is a limit on how liberal the Courts will be when interpreting documents.

As long ago as March 2001, Mr Estafnous entered into a commission agreement with LLBC whereby he was to receive commission of £2 million if he introduced a purchaser of LLBC's long lease of an office building known as Regent House Business Centre, 24-25 Nutford Place, London W1.

At the time of the agreement, the sale price of the property was to be £19 million and, in return for LLBC agreeing to pay him £2 million on completion of a sale of the property, Mr Estafnous introduced LLBC to a Mr Kapoor as the prospective purchaser. The agreement provided for commission to be payable on a purchase by Mr Kapoor or any associated party of his but it was silent as to any sale of the property by any associated party of LLBC or by way of the sale of the shares in LLBC.

The property was, in fact, owned by a subsidiary of LLBC called Drillray Properties Limited. It held the property in trust for LLBC and LLBC, by the time of the eventual sale in 2002, was a subsidiary of a company called IMCO. By a Share Sale Agreement dated 14 November 2002, Mr Kapoor's company acquired the shares in IMCO for £16 million and thereby acquired LLBC and Drillray Properties, and accordingly, controlled the property. The acquisition of the property in this manner was for good commercial reason and was not designed so as to avoid liability for the commission.

When Mr Estafnous claimed his commission, LLBC raised various arguments but, ultimately, the question to be decided by the Court of Appeal was whether the commission agreement only applied to a sale of the property or also covered the sale of the parent company? The trial Judge adopted a strict construction and, on the basis that a share sale was a quite different transaction to a property sale, he held that no commission was payable.

Before the Court of Appeal, it was argued upon behalf of Mr Estafnous that a much more liberal interpretation should be applied. Although it was accepted that the agreement only expressly provided for commission on a sale of the property, it was contended that it should also cover a share sale as the end result was that Mr Kapoor acquired control of the property and it should make no difference as to the manner in which he did so.

Although recent cases have made it clear that the Courts can be more flexible and purposive in construing documents so as to give effect to the true intentions of the parties,

the Court of Appeal held there was no room in this case to imply any term to assist Mr Estafnous. The parties had simply never given any consideration to a share sale taking place and, whilst the Courts can imply terms into agreements to spell out what was intended by the wording used, it cannot imply a term to add to what the parties intended to provide for.

In cases where a contract does not provide for a certain event, the Courts will not re-write the document unless it is clear the event was intended to be covered. In fact, the normal inference is that, if a document is silent as to what is to happen on a certain event, this is to be taken as intended as, otherwise, the parties would have made express provision for it. Accordingly, if the event causes loss to one or other of the parties, they have no redress.

The Court stressed that previous case law, which permitted consideration to be given to the background context when construing a document, was not a licence for the Courts to rewrite contracts. The primary source for understanding what the parties meant is the documentation itself and, in this case, the Court was in no doubt that the parties only intended to cover a property sale.

So this case is a good reminder as to how strict the Courts can be and that parties need to seek to provide for every foreseeable event in order to fully protect themselves.