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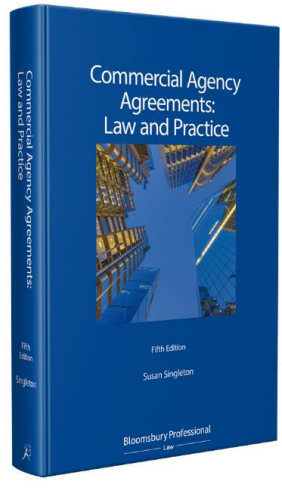

Extracts of Chapter 6:

Compensation, indemnities and litigation
Post-termination commission and notice period damages
Money claims on termination (inc case examples)
Statistics and settlements

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Chapter 6

Compensation, indemnities and litigation

> 'The question in this appeal is how the compensation should be determined. But for this purpose it is necessary first to decide exactly what the agent should be compensated for. Only then can one proceed to consider how the compensation should be calculated. On this first question the directive is explicit. The agent is entitled to be compensated for "the damage he suffers as a result of the termination of his relations with the principal." In other words, the agent is treated as having lost something of value as a result of the termination and is entitled to compensation for this loss.'
> (Lord Hoffmann *in Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32)

6.1

An agency relationship can work well and to the benefit of principal and agent. Chapter 5 examined the circumstances, however, in which it may break down. One party may simply give notice of termination. The agent may die or fall ill, resign or assign his agency. It was seen in that chapter that in any of the following circumstances the agent may claim compensation (or an indemnity if the agreement provides for an indemnity) from the principal where the Regulations apply:

1. the agent dies;
2. the agent has his fixed or indefinite contract terminated by notice (other than for substantial breach which justifies immediate termination – see *Spectrum Agencies v Crocs Europe BV* [2012] EWCA Civ 1400 (CA) described in Chapter 5) or his fixed-term contract expires;
3. the agent resigns because of circumstances attributable to the principal; or
4. the agent is too ill or old reasonably to be required to continue.

Reference should also be made to Chapter 7 in which Charles Lazarevic looks at compensation value issues.

6.2

The first question therefore is whether the Regulations apply to that particular agency and this topic was addressed in Chapter 1. As to the circumstances of termination of an agency and in which compensation is payable on termination, reference should be made to Chapter 5 where these matters are examined in detail.

6.3

This chapter seeks to explain the compensation or indemnity payment which may be payable under the Regulations. One of the most helpful cases on this is *Lonsdale* (a copy of which is in Appendix 3). It is unfortunate in terms of lack of precedent that there have been so few cases on compensation. The vast majority of the writer's cases settle and usually after a confidential mediation which from the clients'

point of view, however, is very sensible. This chapter does not provide guidance on all the different compensation schemes for agents throughout the world. Local law advice should be taken before notice of termination is given in such cases.

Post-termination commission and notice period damages

6.4

It is extremely important also to note that in most agency cases the agent claims regulation 17 compensation (or an indemnity payment) in addition to commission under regulation 8 for orders received after termination for a reasonable period. This is discussed in Chapter 4 which deals with commission. In the *Tigana v Decoro* case (a copy of which is in Appendix 3) considered there and below, the agent received commission, unusually for a nine-month period after termination for such regulation 8 orders in addition to the lump sum under regulation 17.

6.5

In *Monk v Largo Foods Ltd* [2016] EWHC 1837 whether payment of regulation 8 commission would affect the amount of regulation 17 compensation was held to depend on if that affected the sum a notional buyer would pay for the agency when assessing regulation 17 compensation.

6.6

Finally, many agents are not given a proper notice of termination – as seen in Chapter 5 this is often a three-month period so their third head of claim is for what they would have earned in the notice period. Some are also owed commission from before the agency ended which is again a separate claim. Most will claim costs and interest when they litigate as well.

Money claims on termination

6.7

1. The agent is entitled to commission due up to the date of termination and for a reasonable period thereafter on orders generated through his efforts. This was examined in Chapter 4. This is separate from compensation/indemnity.
2. The agent is entitled to damages along the lines of a wrongful dismissal claim in employment law if proper notice was not given under his contract. Again, this is separate from a compensation/indemnity claim. For example, an agent marketing services is not within the Regulations but if he is not given his contractual notice period he is entitled to claim for common law damages for breach of contract for the profit he would have earned in that notice period, subject to the normal deductions such as for expenses, accelerated receipt and subject to his obligation to mitigate his loss. Indeed regulation 17(5) provides that:

6.8

The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.

This sentence from the Regulations does not mean the agent can claim both the indemnity and compensation alternatives under the Regulations. It means the agent can claim the indemnity plus common law damages for breach of contract if there is a breach of contract. In many cases there is an obligation to make a payment to the agent where the principal is not in breach of contract. This is what companies find so hard to accept, as it was not previously the position under English law. The principal has followed the contract to the letter, paid all commission due and given the notice period required but still has to pay a large lump sum.

6.9

The rest of this chapter looks at the compensation and indemnity provisions. Regulation 17(1) provides that commercial agents shall, after termination of the agency contract, be indemnified in accordance with regulations 17(3)–(5) or compensated for damages in accordance with regulations 17(6) and (7) below. There are therefore two different bases for payment to an agent which might apply. All other EU states have chosen one or the other – in fact all except France have payments of an indemnity. In France compensation is payable.

Case example – *Charles Shearman v Hunter Boot Ltd* [2014] EWHC 47 (QB)

6.10

This decision held that a clause providing that, whichever of indemnity or compensation resulted in the lower payment, was unenforceable. It went against the purpose of the Directive.

In this case the indemnity yielded £204k whereas the compensation figure on a valuation report was estimated at £1,454,400. However, all the judge was deciding was the preliminary issue on the clause concerned and the parties thereafter settled on confidential terms, so it is not known how much the agent obtained.

The judge stated:

> ‘The structure of Clause 14 is not consistent with the Regulations and, following what appears to be a concession by Hunter, the entire clause falls away so that, if the Claimant is entitled to anything, it is to compensation not indemnity.’

It would be wise to avoid such clauses following this decision.

Case example – Brand Studio Ltd v St John Knits, Inc [2015] EWHC 3143

6.11

In *Brand Studio Ltd. v St John Knits, Inc* the parties agreed the agency agreement contained a clause similar to that in the *Hunter Boot* case above, but one party argued part of the clause could be severed and the rest stand. The principal was a Californian fashion company designing women’s clothing and the agent operated in the EU.

The material parts of the agency agreement said:

> ‘6.3(a) Upon expiry or termination of this Agreement for any reason:
>
> (a) If and to the extent that the … Regulations apply, [the claimant] shall (if and to the extent so entitled in accordance with the provisions of the Regulations) have the right to be indemnified as provided for in regulation 17 of those Regulations. For the avoidance of doubt, [the claimant] shall have no right to any compensation under those Regulations upon termination or expiry of this Agreement *provided that* if the amount payable by way of indemnity under this Clause would be greater than the amount payable by way of compensation, [the claimant] shall … have the right to receive compensation instead of an indemnity under the regulations …
>
> 7.5 In the event that any provision of this Agreement is held to be invalid or unenforceable, such provision will be deemed to have been severed from the Agreement, while the remained of the Agreement will remain in full force and effect.’

6.12

The court heard a preliminary issue only:

> ‘Whether the Claimant is entitled to compensation (as opposed to an indemnity) pursuant to clause 6.3(a) of the EU Agency Agreement executed by the Claimant and the Defendant on or about 9-14 December 2009, referred to in the statement of case as the “EU Agreement”, (as defined in the Amended Particulars of Claim dated 6 March 2015) and pursuant to Regulation 17 of the Commercial Agents (Council Directive) Regulations 1993 (as amended).’

The court answered no to that question. The judge said:

> ‘Once the proviso is severed from clause 6.3(a), as I consider it should be, the clause contains only the valid concession by the agent that in the event of termination of the agency agreement the agent will be entitled to an indemnity rather than compensation. For the purposes Regulation 17 the agency contract therefore “otherwise provides.”’

That conclusion is sensible. If the proviso ‘provided that and words that follow it’ are removed from the clause, the indemnity should stand rather that the entire clause including the option of an indemnity. Notwithstanding the decision that the indemnity choice still stood, in practice it remains wise to put separate provisions in different clauses and not to try complex clauses opting for the lower of indemnity or compensation as this case and *Hunter Boot* show they often do not work given the purposive nature of EU law.

Statistics and settlements

6.13

Since 1994 when the Regulations came into force, there have been many settlements but not a vast number of court judgments on the Regulation, although the number of judgments is increasing as the years go by. So, some issues under the Regulations such as how to assess compensation payments currently remain unclear even after the *Lonsdale* case and other subsequent relevant cases. Generally, where the Regulations appear if there is no indemnity ‘cap’ then agents will often claim two to three years’ commission and many will settle for one to eighteen months. Some agents use their trade union, e.g. Unite (previously the Professional

Sales Agents Association (PSA) which is now part of Unite). In 2007 the PSA obtained settlements totalling about £4m without solicitors and £1.5m after solicitor intervention.

Also, the Manufacturers' Agents' Association represents many agents – http://www.themaa.co.uk/.

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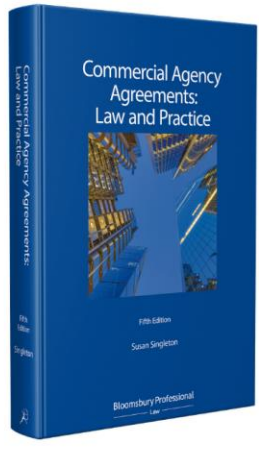

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