



NEWS

Commercial Agents Update - is an agent always entitled to compensation on termination?

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In this article, [Michael Axe](#) examines two cases where the High Court has found that commercial agents were not entitled to compensation upon the termination of their agencies.

Under the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") commercial agents are normally entitled to receive compensation from their principal if the principal terminates their agency. Ever since the case of *Lonsdale v Howard & Hallam Ltd* was heard in the Court of Appeal, principals have been concerned that the level of compensation due to the agent could be significant, as it must fully compensate the agent for the loss of the value and goodwill of their agency business.

An agent will not, however, normally be entitled to compensation under the Regulations if the principal terminates the agency because the agent breaches the agency agreement. However, the breach must be sufficiently serious to justify the termination (i.e. it must not simply be a trivial breach), and it must have been the genuine reason for the termination. Two recent cases have provided some further clarification on when such a termination may be justified.

Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd

In this case the High Court was asked to consider not only whether the agent was a "commercial agent" within the meaning of the Regulations, but also whether his alleged breaches of his agency agreement justified the termination of the agency by the principal.

The question of who is a commercial agent for the purposes of the Regulations can be a difficult one to answer. In this case, the principal provided the agent with price lists for a number of products, and although the agent could quote indicative prices to customer he had no authority to conclude a sale without approval from the principal. When the principal came to terminate the agency (for the reasons summarised below), it argued that the agent was not a "commercial agent" within the definition of the Regulations as he did not have authority to "negotiate" a sale, as required by the Regulations.

The High Court, however, was not persuaded by this argument, finding instead that the agent's role had been to generate interest in the principal's products, to suggest possible prices, and to encourage customers to place orders. The High Court ruled that these activities were sufficient for the agent to qualify as a commercial agent under the Regulations, notwithstanding the fact that potential sales needed to be referred to the principal for approval before they could be concluded.

The High Court then had to consider whether the termination by the principal had been justified. The agency agreement required the agent to work exclusively for the principal, and to provide weekly written reports to the principal. The principal had given the agent numerous formal warnings regarding his failure to provide the required reports, and it had also discovered that the agent was working for other companies. When the principal sought to terminate the agency on the grounds that the agent had breached the agency agreement, the agent sought to argue that the breaches were not sufficiently serious to justify the termination and/or that the breaches were not the genuine reason for the termination.

After examining the exact wording of the agency agreement, the High Court decided that under the terms of the agreement the agent had been allowed to work for other companies, provided that he notified the principal and ensured there was no conflict of interest. As there was not, therefore, an absolute prohibition on the agent working for other companies, the High Court ruled that although the agent had been in breach of the agreement by not providing notice to the principal, this breach on its own did not justify terminating the agency.

Thankfully for the principal, the High Court agreed that the agent's persistent and continued failure to provide the required weekly reports, despite numerous requests and warnings from the principal, was a breach of the agreement sufficiently serious to justify the termination of the agency. The High Court was also convinced that the breach of contract had been the genuine reason behind the termination. Accordingly, the agent was not entitled to any compensation from the principal.

As an interesting aside, the Judge also commented that compensation may not have been payable in any event, as the income stream from the agency was insufficient to be attractive to any hypothetical purchaser of the agency, therefore there was no real loss of value/goodwill for which the agent would have been entitled to compensation.

Crane v Sky In-Home Service Ltd

To complicate matters even further, the Regulations do not apply to agents whose activities as a commercial agent are considered "secondary" to some other arrangement with the principal. Although such agents do strictly speaking satisfy the definition of a "commercial agent" as set out in the Regulations, they are specifically excluded from the provisions of the Regulations on the basis that their role as a commercial agent is not the primary purpose of their arrangement with the principal.

Allegations of both breach of contract and of "secondary" activities were raised in the case of Crane v Sky In-Home Service Ltd. In this case the agent sold satellite equipment packages ("the Equipment") on behalf of the principal, at the same time as selling subscriptions to satellite television services ("the Subscriptions") on behalf of the principal's sister Sky company. Only the agency relating to the sale of the Equipment was covered by the Regulations, however, as the Regulations only apply to agencies dealing in the sale of "goods", not the sale of "services" such as the Subscriptions.

The principal sought to terminate the agency after it became aware that the agent was passing off his own extended warranty service on the Equipment as being a service provided by the principal (in breach of the principal's trademarks). The agent then claimed compensation under the Regulations, but the principal argued that (i) the agent was not its commercial agent, (ii) if he was its commercial agent, his activities were "secondary", and (iii) in any event it was entitled to terminate the agency for breach of contract in relation to the trademark infringements.

The High Court did not agree with the principal's first argument, and found that the agent satisfied the Regulation's definition of a commercial agent. The High Court then clarified that under the Regulations, the key to whether or not the agent's activities were "secondary" in this case was whether or not the sales by the agent were likely to generate goodwill which would lead to repeat custom.

The High Court ruled that in this case, the goodwill which led to repeat custom was generated by the sale of the Subscriptions, not by the sale of the Equipment itself. As the Regulations only applied to the agency selling the Equipment, which did not generate the goodwill/repeat custom, these activities were "secondary" under the provisions of the Regulations, and accordingly the agent was not entitled to any compensation.

The High Court also confirmed that the breaches of the principal's trademarks would have justified the termination of the agency even if the agent's activities had not been "secondary", and so no compensation would have been due in any event.

Comfort for Principals?

With the value of compensation payments likely to increase after the Lonsdale decision, and recent cases seeming to expand the definition of a "commercial agent" even further than before, many principals were feeling that the balance had tipped too far in favour of the agents' rights. These recent High Court decisions should at least provide some comfort to principals that even in circumstances where an agent does fall within the definition set out in the Regulations, they may not necessarily always be entitled to compensation upon termination.

For further information on this or any other issue relating to litigation, please contact [Michael Axe](#) by emailing [Michael](#) or by calling him on 08450 990045, or speak to your usual contact in the [Commercial Disputes](#) Team.

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