



NEWS

Commercial agents update – when does an agent cease to be an agent?

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[Michael Axe](#) analyses a number of recent High Court and Court of Appeal decisions that have further clarified when a commercial agent will be entitled to compensation upon the termination of their agency.

Under the Commercial Agents (Council Directive) Regulations 1993 (“the Regulations”), commercial agents can potentially be entitled to compensation in the event that their principal terminates their agency. The leading 2007 House of Lords case of *Lonsdale v Howard & Hallam Limited* confirmed that where compensation was due, it should represent the value of the lost agency (by reference to what a hypothetical purchaser would have been willing to pay for the agency at the date of termination). Therefore, if an agency is flourishing at the date of termination, the compensation payable can be very significant, and so agents and principals alike will be keen to establish when compensation is and is not payable.

Three recent cases have each tackled key questions to consider when assessing whether compensation is payable:

1. is the agent actually a “commercial agent”?
2. when was the agency actually terminated?
3. can the parties agree their own contractual basis for calculating compensation in the agency agreement itself?

1 – Is the Agent actually a “Commercial Agent”?

In the case of *Sagal (t/a Bunz UK) v Atelier Bunz GmbH*, the agent (Mr Sagal) contracted directly with the end customers using the name “Bunz UK”, and not the name of the German principal (Bunz GmbH). All order confirmations and invoices sent to the end customers were printed on Bunz UK headed paper, and the terms and conditions referred to Bunz UK and not Bunz GmbH. The agent (after receiving orders from the end customers) placed his orders with the principal, and the principal then invoiced the agent directly, rather than the end customer. The agent set his prices for UK customers by adding a 25% margin to the list prices set by Bunz GmbH.

After the initial High Court trial, the Court of Appeal was asked to consider whether the agent actually fell within the definition of a “commercial agent” under the Regulations. The two key issues were:

- (a) whether the agent had continuing authority to negotiate the sale of goods on behalf of the principal, and,
- (b) whether the agent’s prices were fixed by the principal so that he had no discretion in relation to what he charged the end customers.

In relation to the first question, under the Regulations a “commercial agent” must either have authority to negotiate sales “on behalf of” the principal, or authority to negotiate and conclude sales “in the name of” the principal. In this case, it was accepted by all that the second definition was not satisfied, as Mr Sagal had never had authority to conclude sales “in the name of” Bunz GmbH.

The Court of Appeal then ruled that Mr Sagal had not had authority to negotiate sales “on behalf of” Bunz GmbH either, as this would have involved Mr Sagal negotiating with end customers who would then contract directly with Bunz GmbH. In this case, Mr Sagal/Bunz UK had only ever negotiated and contracted in his own name, and so he was at best only an “undisclosed agent” (i.e. one who contracts in his own name but on behalf of a principal), which does not fall within the definition of a “commercial agent” under the Regulations.

In relation to the second question, the Court of Appeal agreed that Mr Sagal had not been obligated to adhere to Bunz GmbH’s list prices, and that he had been free to choose his own mark-up. However, the Court of Appeal confirmed that although the ability of an agent to decide his own mark-up on sales suggested that he was not a “commercial agent” under the Regulations, it was not conclusive evidence of such.

One further point that was stressed by the Court of Appeal was the importance of having contractual documentation confirming the nature of relationship between the alleged agent and principal. In this case, it was arguably the contracts between the agent and the end customers which were key to establishing which type of agency had been created.

2 – When was the Agency actually Terminated?

An agent loses its right to compensation under the Regulations if it does not notify the principal of its claim for compensation within one year of the date of the termination of the agency. In the case of *Claramoda Limited v Zoomphase Limited (t/a Jenny Packham)*, the High Court had to determine when the agency had actually been terminated in circumstances where there was not a clear and obvious termination date.

It was accepted by the agent and the principal (who both worked in the fashion industry) that they had first discussed the termination of the agency in December 2005, but they disagreed on this question of when the termination had actually taken effect. The principal argued that the agency had been terminated by 31 October 2006 at the latest, which would mean that the claim (which had been initiated on 27 November 2007) had missed the one year deadline. The principal’s argument was based on the assertion that the agent’s authority to negotiate sales on behalf of the principal had ended when the main batch of orders for their current collection was finalised on 31 October 2006.

However, the agent argued that the agency had not been terminated until mid-January 2007. The agent’s logic was that although its “primary” agency duties had concluded in October 2006 when it had concluded negotiating sales for the collection, it had continued to perform “secondary” agency duties until the start of the next season in around mid-January 2007.

Although the High Court agreed with the principal’s assertion that the “main” selling of its current collection had been concluded by the agent by 31 October 2006, the Court accepted that there had been continued “commercial activity” on the part of the agent after this date, including:

- dealing with order confirmations
- dealing with repeat or amended orders
- dealing with requests for promotional materials and
- dealing with enquiries about product availability.

The High Court ruled that this continued commercial activity, although reduced from the amount that the agent had engaged in previously, was still sufficient to show that the agent had continuing authority to negotiate sales after 31 October 2006. It was shown to the High Court that the agent had dealt with enquiries regarding amendments to orders until at least January 2007, and therefore the claim (notified on 27 November 2007) had been initiated within the required one year period.

It is important to bear in mind, however, that this was another case where there was little to no contractual paperwork relating to either the commencement of the agency or its termination. In these circumstances, the

High Court had to look more closely at the nature of the activities carried out by the agent to determine when the agency had actually been terminated. Had the parties had any contractual or other documentary evidence in relation to the agency relationship and its termination, the confusion could have easily been avoided.

3 – Can parties agree their own contractual basis for calculating compensation?

The Regulations prohibit the parties from deviating from the Regulations' compensation and indemnity provisions, unless the deviation is not to the agent's detriment. In practice, this means that if the parties use the Agency Agreement to specify their own method for calculating the compensation payable upon termination of the agency, they must ensure that the compensation payable under the Agency Agreement is not less than the agent would be entitled to under the Regulations.

This issue was raised in the recent case of *Berry v Laytons*. In this case, the Agency Agreement stated that the compensation was fixed at three times the average monthly commission calculated over the entirety of the agency. When the agency was terminated, the agent (Mr Berry) instructed specialist solicitors (Laytons) to advise him on his entitlement to compensation under the Regulations. The solicitors advised that the agent was only entitled to compensation in accordance with the provisions set out in the Agency Agreement, and so the agent accepted a compensation payment from the principal calculated in accordance with the Agency Agreement.

The High Court was subsequently asked to consider whether the solicitors had provided negligent advice to the agent. Although the solicitors' advice pre-dated the *Lonsdale v Howard & Hallam Limited* case (which has now clarified how compensation under the Regulations should be calculated), the High Court still ruled that a reasonably well informed and competent solicitor would have advised the agent that the provisions in the Agency Agreement were not a genuine and reasonable pre-estimate of the agent's loss, and so would be void for attempting to deviate from the Regulations' compensation provisions to the detriment of the agent. The solicitors were therefore ordered to pay the agent damages representing the shortfall in compensation which, due to the solicitors' negligent advice, he had been unable to obtain from the principal through further negotiation.

This case has reinforced that although the parties can attempt to agree how compensation is to be calculated in the terms of the Agency Agreement, the provisions will only be valid if they reflect the amount of compensation which the agent would nevertheless be entitled to under the Regulations. In light of the House of Lords' decision in the *Lonsdale v Howard & Hallam Limited* case, in practical terms this means that the parties may attempt to agree on an acceptable method for determining what a hypothetical purchaser would have been willing to pay for the agency at the date of termination, in order to assess the true value of the lost agency. However, when negotiating Agency Agreements, principals may well consider that they will be better off expressly incorporating the indemnity provisions under the Regulations, in order to try to altogether avoid the expense and uncertainty involved in having to deal with any "weighing up" exercise that would be otherwise necessary as a result of a compensation claim.

For further information on this or any other issue relating to commercial agents, 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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