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LEGAL SURGERY

agentbase

Commercial Agency
28 Years later (Part 3)

The 1st and 2nd parts of this Legal Article were published in March and May 2021.

Termination of a Commercial Agency

In broad terms a commercial agency for an indefinite period may be terminated by the minimum notice period prescribed by the Regulations, namely one month in the first year, two months in the second year and three months in the third and later years. The parties may not agree a shorter period of notice (but may agree a longer notice period) and the notice period must expire at the end of a calendar month. A commercial agency for a fixed period, which both parties continue to perform after the expiry of that fixed period, converts into a contract for an indefinite period and requires the same notice period as described above. Further, a commercial agency agreement for a fixed period which finishes at the end of the period gives rise to a claim for compensation.

On a recent case, with which I brought, involving a chocolate manufacturer, a two-year fixed term commercial agency ran from 1st January 2018 to 31st December 2019, but the parties continued to perform with the principal accepting orders placed by the agent. On 10th January 2020, the principal tried to terminate the agency with effect at the end of January 2020, arguing that the agency had come to an end at the end of December 2019, that only reasonable notice was required to the end of January with no compensation payable. I claimed notice to the end of April 2020 with compensation. Had the principal allowed the fixed term agency to terminate 10 days earlier, the claim would have been limited to compensation. Principals often try to settle compensation claims with the agent, after giving notice of termination before the agency contract ends. However, such a strategy can be risky, because the Regulations prevent the parties from doing anything detrimental to the agents right to compensation before the end of the agency contract.

On another recent case in which I was involved, in September 2020 a national supplier principal of garden furniture gave 3 months-notice to terminate, an agency that commenced in January 2010, with effect at the end of December 2020. The agency had always been successful. On any reasonable analysis the agent's compensation claim was conservatively valued at in excess of £300,000. On 25 November 2020, the agent and principal agreed that the principal would pay £25,000 in full and final settlement of all claims inclusive of the remaining notice – valued at about £15,000 and compensation to be valued. This was paid on 31 December 2020. The agent then sought my advice. I challenged the validity of the agreement reached prior to termination and recovered substantial compensation. The principal was very unhappy, but in my mind had sought to pull the wool over the agent's eyes to circumvent the Regulations.

Another strategy my firm sees adopted by principals, is to give notice of termination then reduce the scope of the agent's product range, customer list or territory so as to reduce the amount of commission the agent may earn and the amount of compensation payable upon termination. This however does not in my experience work. Frist because any variation must be with bilateral agreement and if the principal seeks to impose the change unilaterally it may permit the agent to terminate and preserve his compensation claim. Second because the Court will calculate compensation payable for the loss of commission that the agent would have earned if the agency agreement had continued in its normal manner not based upon what the agent did earn as a result of the principal reducing scope. Thus, on a recent case I conducted, involving a long-established cutlery supplier principal, the principal unilaterally removed half the agent's territorial customer base and product range, the agent terminated with immediate effect and claimed compensation by reference to the contract pre-variation. The principal paid notice and compensation assessed by reference to the contract pre-variation.

The agent's right to compensation does not exist if: (1) the principal terminates because the agent has done something seriously wrong. The conduct is said to have to go to the root of the contract. Thus, a commercial agent has a duty to look after the interests of his principal and act dutifully and in good faith. This is arguably the only basis upon which an agency may be justifiably terminated by principal without payment of compensation. An example is an agent acting for multiple principals who compete with one another. Unless each principal was fully informed of the agent's activities for the other principals and all principals had consented to the agent acting in this manner, any of the principals may terminate the agent's agreement summarily and avoid the payment of compensation. By contrast an agent failing to hit agreed key performance indicator in a contract, may entitle a principal to terminate summarily but would not entitle a principal to avoid the payment of compensation.

This is a complex field which has given rise to a significant amount of litigation. For example, a claim in which my firm was instructed involving the sale of furniture, the issues of competing principals and informed consent, which ran for several years to the High Court and Court of Appeal. (2) the agent has terminated himself and the termination is not justified by the principal's serious default or the agent's age or infirmity, or (3) the agent has with the principal's consent assigned his rights and duties to another person.

Practical Steps that Might be Taken

Like them or loathe them, the Regulations are, in my view, likely to be here to stay.

Where they apply, the Regulations restrict the freedom allowed to a principal and an agent under English law to contract as they wish. Certain provisions, as indicated, can't be avoided; all dealings between agent and principal are subject to an overriding duty of good faith.

The parties, particularly principals, should therefore ensure that written agreements mirror the Regulations where they must; provisions overriding the Regulations, where that is allowed, should do so taking into account the need for good faith.

At a basic level the parties to an agency relationship should ensure that the agreement clearly sets out the following:

a. what rate of commission is payable, when, and subject to what conditions?

b. on what basis commission on sales will be split between former and current agents and over what period?

c. events of termination, particularly what will justify the principal in terminating immediately?

d. agents will want a statement that they are commercial agents; principals will prefer a statement either (if such is obviously true) that they are not,

e. Principals will normally prefer, if the Regulations are applicable, any entitlement on termination is to indemnity and not to compensation (the difference between the two entitlements is not covered in this article but an indemnity is generally more favourable):

Principals should understand before entering a commercial agency agreement that in most cases an agent on termination will be likely to compensation and in broad terms how much.

If faced with a compensation claim, principals are encouraged to ask themselves the following questions: Did the agent sell things for me ? Have I and will I continue to benefit from those sale? If the answer is yes, then the principal should think hard about disputing the existence of the commercial agency and instead look to engage in early settlement negotiations during which costs are better spent seeking to reduce the amount of compensation payable.

Giles Bright is a Head of Dispute Resolution at Bankside Commercial Solicitors

BANKSIDE COMMERCIAL solicitors

Hamilton House
1 Temple Avenue
London EC4Y 0HA
Tel: 020 7654 0200
www.banksidecommercial.com