Commercial law briefing

Professional negligence and commercial agency

Strange bedfellows?

Commercial agency disputes appear to be on the increase, judging by the rise in reported cases, together with the growing number of enquiries from clients. In part, this is in response to the current economic climate, which has forced principals to rationalise or restructure their agency relationships in both domestic and European markets.

As the tide turns and economies begin to recover, this trend is likely to continue as businesses grow and seek out new agency partners in new markets. Where a principal is buying a company which is already party to an agency agreement, the principal may need to consolidate, rescale, and perhaps terminate, agency agreements (*see also Focus "Commercial agents: ending the relationship", www.practicallaw.com/9-386-1799*). A flurry of recent cases has brought into focus several important issues concerning commercial agency arrangements (*see box "Practical implications"*).

Meaning of commercial agent

Commercial agency agreements are regulated by the Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*) (1993 Regulations) which implement the Commercial Agents Directive (*86/653/EEC*). A commercial agent is a self-employed intermediary who has continuing authority to do either of the following:

- Negotiate the sale or purchase of goods on behalf of another person (the principal).
- Negotiate and conclude the sale or purchase of goods on behalf of, and in the name of, that principal (*regulation 2(1)*).

The Court of Appeal has clarified the definition of commercial agent under the 1993 Regulations in *Raoul Sagal (t/a Bunz UK) v Atelier Bunz GmbH ([2009] EWCA Civ 700; www.practicallaw.com/8-422-4257*).

Sagal claimed that he was a commercial agent under the 1993 Regulations. At first instance, the court held that he was not as he had no authority to negotiate or contract on Bunz GmbH's behalf.

On appeal, Sagal argued that he had authority to negotiate the sale of goods on behalf of Bunz GmbH. The fact that he contracted personally as "Bunz UK" with the customer, rather than contracting in the name of Bunz GmbH, was irrelevant. Sagal also argued that Bunz UK's prices were fixed by Bunz GmbH; he had no discretion in relation to the charge to be made to UK customers.

In dismissing Sagal's appeal, the court held that the definition in the 1993 Regulations encompasses two types of commercial agent; namely, those that have continuing authority to:

- Negotiate only on behalf of the principal.
- Negotiate and contract on behalf of, and in the name of, the principal.

Sagal did not satisfy either test as he negotiated and contracted in his own name, not Bunz GmbH's name. The decision reaffirms the principle that undisclosed agencies, in which an agent contracts with customers in his own name but on behalf of his principal, do not fall within the 1993 Regulations.

The fact that an intermediary sets its own mark-up on sales will not automatically prevent it from being a commercial agent. It is indicative, but will not by itself displace the documentary evidence.

Practical implications

If dealing with a dispute involving commercial agency, bear in mind that recent case law has:

- Clarified the definition of a commercial agent (*Raoul Sagal (t/a Bunz UK) v Atelier Bunz GmbH [2009] EWCA Civ 700*).
- Highlighted the risk of professional negligence when advising on the termination of agency agreements (*Alex Berry v (1) Laytons and (2) BG Jones [2009] EWHC 1591 (QB)*).
- Held that an arbitration award was unenforceable because an arbitration and choice of law clause did not give effect to the Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*) (*Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB)*).
- Shown the difficulty of establishing when an agency agreement has been terminated and the implications this has for bringing compensation claims (*Claramoda Limited v Zoomphase Limited (t/a Jenny Packham) [2009] EWHC 2857 (Comm)*).

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The decision emphasises the critical role that documents (particularly contracts between the intermediary and customers) will play in indicating the nature of the intermediary's relationship with the alleged principal.

Termination compensation

A recent High Court decision has brought into sharp focus the risks associated with advising on the termination of agency agreements to which the 1993 Regulations apply (*Alex Berry v (1) Laytons and (2) BG Jones [2009] EWHC 1591 (QB)*). In *Berry*, a firm of solicitors, Laytons, was advising a commercial agent, Berry, on his company's entitlement to compensation under the 1993 Regulations for termination of its agency agreement with Polamco Limited. Laytons had held itself out as having particular expertise in this area of law.

A provision in the agency agreement purported to fix the agent's statutory entitlement to compensation on termination to three times the average monthly commission over the lifetime of the agreement. Notwithstanding the operation of regulation 17 of the 1993 Regulations (regulation 17), Laytons advised Berry that his company was entitled to compensation on termination in accordance with this provision. Berry therefore accepted payment from Polamco on those terms.

Regulation 17 entitles a commercial agent to a compensation or indemnity payment on the termination of its agency. That entitlement will not arise where the principal has terminated the agency because of default attributable to the commercial agent which would have justified immediate termination under the 1993 Regulations, or where the agent has terminated the agreement itself.

The entitlement to a compensation payment is designed, among other things, to compensate an agent for the damage suffered as a result of a termination that deprives the agent of commission which proper performance of the agency agreement would have procured.

The parties cannot derogate from the payment entitlement to the detriment of the agent before the agency agreement expires (*regulation 19, 1993 Regulations*) (regulation 19). Consequently, if the amount of compensation for termination provided for in the agency agreement is less than an agent's entitlement under regulation 17, the relevant clause will amount to a derogation and will not be enforceable.

The question for the court in this case, therefore, was whether a reasonably informed and competent solicitor with Laytons' expert knowledge would have advised that the provision for three months' commission on termination in the agency agreement derogated from Berry's statutory entitlement.

The House of Lords has since ruled definitively that a compensation payment should be quantified by reference to the value of the agency on termination (*Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Limited [2007] UKHL 32; www.practicallaw.com/2-374-0980*). However, Laytons' advice preceded this decision. At that time, the method of quantification adopted by the English courts was based on various ill-defined factors.

Despite the judicial uncertainty in this area at that time, the court held that a reasonably competent lawyer with the requisite expertise would have advised that three months' commission was not a genuine and reasonable pre-estimate of Berry's loss and was therefore void as a derogation from Berry's rights under the 1993 Regulations.

The court noted that Berry had transformed Polamco into the market leader in its field and so on that basis, and relying on pre-*Lonsdale* factors, the court held that Berry's loss, and hence the quantum of the compensation to which he was entitled under the 1993 Regulations, would probably have been assessed at around two years' commission.

Laytons had therefore given negligent advice as to the operation of regulations 17 and 19. It was held that had Berry been advised that he had a reasonable chance of success in a claim for compensation under regulation 17, he would have pursued such a claim. Instead, as a result of Laytons' negligent advice, Berry had lost the chance to bring proceedings or negotiate a more favourable settlement in the compensation claim with Polamco.

Berry was therefore entitled to damages from Laytons representing the compensation he would have been likely to have received from Polamco under regulation 17, less the amount already received from Polamco under the terms of the agency agreement. Laytons is appealing the decision.

Other developments

Two other recent cases demonstrate the pitfalls and inherent uncertainties of the 1993 Regulations.

In *Accentuate Ltd v Asigra Inc*, a Canadian arbitration and choice of law clause relating to a commercial agency arrangement was unenforceable because it did not give effect to mandatory provisions of the 1993 Regulations (*[2009] EWHC 2655 (QB)*). As a result, the arbitration award could not be enforced.

In *Claramoda Limited v Zoomphase Limited (t/a Jenny Packham)*, it was not clear when an agency agreement had been terminated as there was no written termination notice or contractual provision (*[2009] EWHC 2857 (Comm)*). The limitation period for bringing compensation claims under regulation 17 is one year from termination of the agency contact. The court found that the agency contract does not necessarily end when the agent ceases to negotiate sales if they are still carrying out some commercial activity for the principal, for example, dealing with customer queries. As a result, the agent was not time-barred from bringing a compensation claim.

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