



Commercial Agents Update 2010 (Part 1)

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The Commercial Agents Regulations have been in force for over 15 years yet the Courts are still being asked to clarify parts of the Regulations which remain unclear. Few will have missed the House of Lords decision in *Lonsdale v Howard Hallam* where the Court explained how compensation under the Regulations should be calculated. The purpose of this note is to provide an update on those areas of the Regulations which have been clarified by the Courts over the last three years.

(For a fuller explanation of commercial agency law please refer to our Complete Guide to Commercial Agents, accessible via our website, www.clarkslegal.com).

The following questions have been considered by the Courts over the last three years:

1. How do you calculate compensation due on termination of a commercial agency agreement?

This was the question put to the House of Lords in *Lonsdale v Howard Hallam* (2007). Previously the Court's approach was inconsistent and had varied between either applying the French rule of awarding two years' gross commission or using the value of the agency business to calculate the award. The Court decided that the latter basis was correct and explained the method of calculating compensation as follows:

- The test is what a hypothetical purchaser would reasonably have paid for the agency business at the date of termination, on the assumption that it was assignable and would have continued.

- Where appropriate, the valuation will take account the following:
 - The condition of the underlying business of the principal. If the business is in decline or being closed, this will be reflected in a reduced valuation. If the agent is likely to take customers away with him on termination, again this should be reflected in a reduced valuation.
- The agency should be valued on a net basis, so any expenses that the agent has to incur to earn the commission need to be discounted.
- Where claims go to Court, generally the parties will need to provide expert accounting evidence to prove the value of the business.
- After *Lonsdale*, the Court was given a further opportunity to clarify these rules in *Nigel Joinery Services v Ian Firth Hardware* (2008). The Court held that generally the costs of employing someone to undertake the duties of the agent was an expense which should be deducted when preparing the valuation. In many cases, this will substantially reduce the amount of compensation awarded.

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2. When is an agent a "commercial agent" for the purpose of the Regulations?

One qualification is that the agent must have "continuing authority to negotiate the sale or purchase of goods". Lawyers have tried to exclude the Regulations by drafting agency agreements which avoid giving the agent the necessary "authority to negotiate".

Two recent decisions have helped clarify this issue.

- In *Nigel Joinery Services v Ian Firth Hardware* (see above), the Court decided that an agent whose role it was to get the customer interested in the product, suggest possible prices for the product (subject to principle's approval) and encourage the customer to order those products was a "commercial agent" even though the actual sale was negotiated by the principal.

- In *Raoul Sagal (T/A Bunz UK) v. Atelier Bunz GMBH* (2008), an individual bought jewellery from principal at 20% discount and sold onto customers. Court held that where a business buys and sells the goods as principal rather than agent, this will not be a commercial agency. In this case, the individual did not have authority to negotiate on behalf of the principal, and was, in reality, a distributor.

A further requirement is that the agent's activities as "commercial agent" must not be "secondary" to their main duties as an agent.

- In *John Harold Crane v Sky-In Home* (2007), a sales agent was retained to supply and install satellite equipment packages and also to sell subscriptions to Sky's satellite television. The Court held that the key issue was whether the sale of the "goods" (in this case the satellite equipment) generated any goodwill (in this context, repeat business) for the principal. The Court decided that it was the sale of the satellite subscriptions (which is a "service" and therefore not covered by the Regulations) which generated the repeat custom and that the sale of the goods (i.e. the satellite equipment) was therefore secondary, meaning the agent was not a commercial agent.

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