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LEGAL SURGERY

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THE UK SALES AGENT REGISTER

Roadmap to a compensatory pay-off

Making the assumption of an agent being a 'commercial agent' for the purposes of the Commercial Agents Regulations, the following is a short checklist of some of the points an agent needs to be aware of if intending to pursue a claim for appropriate compensation (i.e.:- actual 'compensation' or an indemnity), following termination of any agency.

The Agent Should

• Ensure that he is at no point in breach of any of his obligations to his principal (be those obligations as set out in a written agency agreement, and/or otherwise as set out in the Commercial Agents Regulations). If an agent is ever in breach of any of the obligations which are owed to his principal, he may as a result (but depending on what/how serious the breach is) then be disentitled to any form of compensatory payment.

This ensuring of not being in breach of obligations also applies in respect to the period between the service of the termination notice and the actual end of the agency.

• Never agree to sign an agency contract presented part way into an agency relationship unless the relevant proposed document accurately reflects the already existing terms or (after taking specialist legal advice) is otherwise deemed acceptable - I keep saying to agents that they should always take proper legal advice in respect to any new agency contracts which they are asked to sign, and this is not only from the point of view of ensuring that they understand what they would be agreeing to, but also so as to ensure that, in respect to 'bad' agreements, they effectively (and promptly) reject in writing either the proposed new terms in their entirety, or otherwise effectively reject (again promptly, and in writing) those specific terms which are unacceptable.

The point is that certain terms might be incorporated into a new agency agreement which (perhaps because those additional terms might create further obligations for the agent, or are otherwise similarly disadvantageous) may make a claim for appropriate compensation following termination, more difficult or less valuable.

• Never resign his or her own agency (unless the relevant circumstances of the termination would qualify as one of the exceptional circumstances as set out in Regulation 18(b), and which would entitle the agent to still bring a claim for compensation or (as appropriate :) an indemnity).

Resignation by the agent (save in those exceptional circumstances I have alluded to) ordinarily then disentitles that agent from making a claim for compensation/an indemnity in the relevant instance.

• Be very careful to ensure that he doesn't inadvertently compromise his prospective entitlement to compensation/an indemnity once the agency has actually terminated, in that the agent needs to be aware of the risk that the principal may at that point seek to compromise the claim entitlement by offering (say, and as an example) a final commission payment due after the agency ended with an additional goodwill amount on the basis that the aggregate payment is then 'in full and final settlement of all and any claims'.

• Make sure Regulation 17(9) is fully complied with within 12 months of the termination date of the agency.

Regulation 17(9) is that Regulation which requires that, once the agency has terminated, the agent notifies the principal (and notifying in writing is obviously very best practice, and what should be done) to the effect that it is the agent's intention to pursue a claim for (as appropriate :-) compensation or an indemnity.

If the agent fails however to effectively notify within 12 months of the termination date in accordance with Regulation 17(9), the claim would then be lost (i.e.:- non pursuable) no matter however good the compensation/ indemnity claim might otherwise have been.

Of interest is the observation that the valuation methodology used in commercial agency claims is often the capitalised earnings method. In the case of low earning agencies where this methodology provides an unfavourable outcome for the agent on a Regulatio 17 claim, a different methodology might be more appropriate.

• Value the claim properly - If the claim is for compensation (as opposed to an indemnity), the value of that claim would be based on an assessment as to the hypothetical sales value of the agency, as at the point of termination. Whereas this evaluation process is complicated, it suffices at this stage to say that the more profitable an agency is (i.e.:- the higher the net profit after taking into account an appropriate deemed salary level, reflecting the amount of time taken to earn the commissions) the likely more valuable will be the compensation claim.

If (on the other hand) the claim is for an indemnity, the claim would instead be capped at the equivalent of one year's earnings calculated as an average of the previous five years' income from the agency (or as an average of a lesser period where the agency hasn't been ongoing for at least five years), and would otherwise (very broadly speaking) reflect the extent to which the agent has generated goodwill for the principal, which goodwill the principal still derives a benefit from and is likely to continue to do, going forward.

Finally, the agent may also have other rights on termination, such as for commissions owing, and/or commissions in the pipeline. All of those should be assessed at the same time as the value of the compensation/indemnity is calculated, as they may be very valuable.

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The ONLY law which we practice is the law as it relates to commercial agents.

Please note that, as far as we can, we take cases on on a "success related fee".

Please ensure that you obtain legal advice before acting in reliance upon anything in this article, particularly since each individual's circumstances may necessitate a unique approach, and also on account of the fact that the law may of course at any time change. Furthermore, please be very clear that the answers given in this column may not cover or otherwise refer to all possible angles, aspects, relevant information and/or points of law and so that all or any information which is given above needs in every instance to be referred for legal advice for clarification and amplification, before being relied upon.