

## Post-termination payments for agents, indemnity, compensation and the worst of all worlds

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### Commercial Agents can benefit from substantial payments when their agency contracts come to an end.

In England and Wales, principals and agents can choose when they enter into the agency contract whether an indemnity or compensation will be payable on termination. If there is no election, then compensation is payable by default. Compensation is usually more than an indemnity.

From a principal's perspective the key advantage of an indemnity is that the amount payable to an agent has an easily calculated top limit. In contrast, compensation has no cap, which can be favourable to the agent, though principals can adopt strategies to manage their potential liability if they act promptly and strategically before termination.

The sharp contrast between an indemnity and compensation was again considered recently in the case of *Brand Studio Ltd v St John Knits Inc* [2015] EWHC 3143 (QB), in which the Court found that the agent was entitled to an indemnity and not compensation.

In *Brand Studio Ltd v St John Knits Inc*, the parties' contract provided that upon termination, the agent would be paid by way of indemnity, unless compensation would be less than the indemnity, in which case the agent would be entitled to compensation. In a previous case, (*Shearman v Hunter Boot* [2014] EWHC 47) such a clause was held to be invalid and the Court held that the agent was entitled to compensation.

The agent in the *Brand Studio* case argued that the clause was invalid as a whole and so it was entitled to compensation. The principal argued that the selection of an indemnity was valid and should be upheld regardless of the further provision selecting compensation if it was lower, on the basis that if that further compensation provision was invalid, it could be deleted from the contract without altering the nature of the parties' bargain.

The court agreed with the principal and severed the clause, leaving the selection of the indemnity in place. This did not happen in *Shearman*, as the principal had not argued that the offending part of the clause could be severed, which meant that the entire clause was deleted and the agent was entitled to compensation.

On the face of it, this latest decision flies in the face of the rationale underpinning the Commercial Agents Regulations (which is to protect agents from their principals), as the decision is to the principal's benefit and the principal is likely to have had the bargaining power when the contract was entered into. However, the parties clearly agreed an indemnity in the contract and the principal was debarred from being able to rely on the part of the clause by which the agent would get the worst possible outcome.

DWF has extensive expertise in advising principals and agents on compensation and indemnity claims as well as other issues arising from the agency relationship. Specific examples of our recent cases involving indemnities include acting for a very well-known European food manufacturer, advising a major sportswear manufacturer on its relationship with a European agency business and dealing with a potential multi-million pound claim against a major food producer. We take a solution focussed, client centric commercial approach.

For both principals and agents, careful consideration is required of the best way to protect your position. Steps can be taken at the outset of, during and after the end of the relationship to ensure that your legal, evidential and tactical position is protected and aligns to your commercial objectives. We have extensive experience in acting for principals and agents in relation to issues arising before, during and upon the termination of the agency contract, including dealing with contested claims, liability and valuation issues.



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