

**BREACH OF
CONTRACT**

LEGAL SURGERY

agentbase
THE UK SALES AGENT REGISTER

Breaking up is hard to do



How do you know if a breach of contract is serious enough to allow you to immediately terminate and end the relationship?

It is a common misconception that any breach, even small breaches, can allow the innocent party to terminate the contract – which isn't the case.

In order to justify ending the contract completely the breach must be 'repudiatory' (i.e. "serious"). A breach is 'serious' when it is so fundamental that goes to the very heart of the contract, permitting the innocent party to terminate the contract immediately and claim damages.

Why is it important?

It's important because if you are an innocent party that ends a contract early because of a 'serious' breach but you misjudged the seriousness of it, then you are the one in 'serious' breach for ending the contract early. The other party would be able to claim damages from you.

In addition, if an agent commits a 'serious' breach and the principal ends the contract with immediate effect then the agent will lose its right to claim compensation or an indemnity under the Commercial Agents (Council Directive) Regulations 1993 (the "Regulations"). These payments can be substantial and can run into six-figure sums. Given the considerable financial implications for both parties, allegations of 'serious' breach must be taken extremely seriously by both parties to an agency contract.

How do you know if a 'serious' breach has been committed?

First, look at the contract to find out what each party has agreed to do or if a specific action will allow the innocent party to end the contract. If a 'condition' of the contract is breached, that may be a 'serious' breach. For example, if an agent takes on a competing line of identical products to its principal's products and there is a clause in the contract which expressly prohibits this, then this may amount to a 'serious' breach, although it is strongly advised to take specific legal advice.

If there is no clear breach of a condition, a 'serious' breach can also occur when the innocent party has been deprived of most of the benefit of the contract. For example, if a party abandoned the contract or refused all further performance that would potentially amount to a 'serious' breach. Repeated late production of sales reports by an agent would not usually amount to 'serious' breach because the principal has not lost the whole benefit of the contract.

The Courts have provided the following (very limited) guidance on what will amount to a 'serious' breach that can have the effect of denying an agent its right to compensation or an indemnity payment:

- Failure to meet a sales target alone is unlikely to be enough to justify immediate termination. The principal would need to demonstrate that any decrease in sales is a direct result of the agent's failure to perform its obligations and is not related to any external factors such as market downturn. Even if the contract sets a minimum level of sales, falling below this still may not be enough;
- Serious, calculated and abusive language by an agent to its principal was sufficiently serious to permit ending a contract. In that case a faxed apology

was found to be insincere and insufficient to remedy the breach. The Court did qualify this by stating that words spoken hastily in the heat of the moment and swiftly neutralised by an apology would not be a 'serious' breach.

- The Court has previously held that negative comments about a principal which were published online by an agent did not amount to a 'serious' breach if a reasonable person would think that the comments were intended to be humorous.

Deciding whether to end a contract immediately for a 'serious' breach is a difficult decision to make, often in heated circumstances. It is critical to take legal advice before reacting and to keep a paper trail of attempts to resolve disputes. All correspondence could end up being produced in Court and acting reasonably throughout can have an effect on the outcome of any claim.

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