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Watch what you say about your principal!

Regular readers will recall that we featured this story back in july 2010. it was submitted by Thom Vaughan of EAD solicitors. Thom's article was about the original (High Court) decision, however, a Court of Appeal decision was made in October, so please read the following update to the case;

It may be an obvious point of common sense, but if you make disparaging remarks about your principal the likelihood is that they will be entitled to terminate your agency contract and you will lose your right to compensation or indemnity under Regulation 17 of the Commercial Agents (Council Directive) Regulations 1993 (the Regulations).

However, it is clear from the recent Court of Appeal decision in Anderson & Albrecht v Crocs Europe BV that the principal will not automatically have a right to terminate in these circumstances and avoid compensation/indemnity payments. Each case will be decided on its own facts and the Court will look at how serious the breach of contract is before determining whether the principal is entitled to terminate.

Regulation 3 implies into the contract between a commercial agent and his principal (the agency contract) obligations on the commercial agent to"...look after the interests of his principal and act dutifully and in good faith". The commercial agent and his principal cannot 'opt out' of these obligations, which means they apply to all commercial agency contracts, whether those contracts are written or verbal and irrespective of whether the contract itself actually says something different.

WHAT HAPPENED IN THE CROCS CASE?

The Claimant commercial agents had built a very successful agency in the UK for Crocs' products over a relatively short period of time (about 3 years) and Crocs became unhappy with the levels of commission it was paying to them. By its own admission Crocs was looking to end the agency contract, but it had not taken that step because it would have faced a sizeable claim for compensation under Regulation 17. The parties had tried to negotiate a way out of the situation, but could not reach agreement and a tense stand off ensued for several months before Crocs terminated the agency contract citing breaches by the Claimants of their obligations under Regulation 3.

The breaches relied upon by Crocs related to the creation by a member of the Claimants' customer services team of a spoof "Star Wars crawl" (the text at the beginning of each Star Wars film which rolls up the screen and disappears into space). A member of Crocs' customer services team in Holland had found a website which enabled an individual to create their own "crawl" using whatever text they wished.

He used this to create a "crawl" about a typical working day for the Crocs' customer services team and sent a link to the website page he had created to staff in the Claimants' office. In turn, one of them created the following "crawl" which poked fun at the difficulties Crocs had had over a number of years in making deliveries to customers in the UK;

That's a Croc!! Of Shite!!

SPECTRUMS WAR OF LIGHT VS DARK

SOS to the stoned nether regions of the Netherlands, evil dark lords create partys to numb the brains of the workers but couldn't do the galactic job of putting shoes in boxes. Leaving the UK to fend off retailers fighting like storm troopers with phone & email abuse, they fought for a year with the promise of reinforcements. This was an evil plan to draw the UK into the dark abyss filled with Croshite.. In the intense battle that followed, we had offered the crown jewels of Uk retail to the dark lords who then shat all over the retail landscape, leaving behind the strewn waste of the spectrum crew. WE WILL SURVIVE battered, bruised but laughing.

As well as claiming that the Claimants' contract was with Crocs Europe BV's parent company rather than Crocs Europe BV and that the Regulations did not apply to Claimants' contract, Crocs also argued that the Claimants had breached their obligations under Regulation 3 by (i) creating the "crawl" and (ii) circulating a link to the "crawl" to a group of friends of the Claimants which included a number of Crocs' customers. Crocs argued that it was therefore entitled to terminate the contract (and thereby avoid having to pay compensation to the Claimants).

HIGH COURT DECISION

The High Court Judge had no hesitation in finding that the Claimants' contract was with Crocs Europe BV and that the Regulations did apply to it. He also found that the Claimants had breached their obligations under Regulation 3. Crucially, however, he also decided that the seriousness of that breach fell "a long way short" of the level of seriousness required to entitle Crocs to terminate the agency contract. In reaching that conclusion, he relied on a number of factual matters including that:

1. the "crawl" was obviously intended to be humorous (and sounded worse in a Court than in the world of the web);
2. the circulation of the "crawl" was very limited and to persons who would see the joke;
3. it was very unlikely that Crocs' customers would see the "crawl" unless they had the specific link (there had been a dispute between the parties as to whether the "crawl" was available "to the world at large" as claimed by Crocs or had very limited accessibility because it could not be located via search engines such as Google but could only be accessed via a specific link to the web page on which it had been created);
4. the situation at Crocs which was the subject of the crawl's humour was well known to Crocs' customers.

COURT OF APPEAL DECISION

Undaunted, Crocs appealed the decision that the breach had not been serious enough to entitle Crocs to terminate the agency contract. Crocs raised a number of grounds of appeal, including (i) that any breach of Regulation 3 should automatically entitle the principal to terminate the agency contract and (ii) that the High Court Judge got it wrong and the Claimants' breach was, in fact, serious enough to entitle Crocs to terminate the agency contract. The case came before the Court of Appeal.

Despite one of the Court of Appeal Judges indicating that he might have found in favour of Crocs if he had been the Judge in the High Court, the Court of Appeal upheld the decision of the High Court Judge.

The Court of Appeal agreed that the Claimants had breached their obligations under Regulation 3 but the breach was not serious enough to entitle Crocs to terminate the agency contract. The Court agreed with the reasons given by the High Court Judge and concluded that the crawl was "obviously jokey" and that there was no evidence of harm suffered by Crocs.

WHAT DO AGENTS NEED TO KNOW FROM THIS?

Clearly, to be on the safe side and to avoid the risk of termination of the agency contract and the loss of your right to compensation or indemnity, a commercial agent should avoid making any disparaging or derogatory remarks about his principal.

If such remarks cannot be avoided in the heat of the moment or as tempers flare, all may not be lost. It is clear from other cases dealing with similar issues that, if a genuine and full apology is made by the commercial agent before the principal tries to terminate the agency contract, that might diffuse the situation and prevent the principal from being able to terminate. However, depending on the particular circumstances even a genuine apology might not be sufficient.

Each case will be decided on its particular facts, but a Court will very likely find disparaging or derogatory remarks to be a breach of the commercial agent's obligations to his principal under Regulation 3. The Court will then have to decide whether that breach is serious enough to entitle the principal to terminate the agency contract without having to pay compensation or indemnity. Much will depend on the views formed by the Judge and it can be seen from the comments made in the Court of Appeal that this could be something of a lottery as different Judges may form different views based on the same evidence.

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