ISSUE 267 March 2018

LEGAL SURGERY

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THE UK SALES AGENT REGISTER

Commercial Agency Law Insight:

To What Extent is a Principal Entitled to Turn Customer Accounts Into House Accounts?

When the Commercial Agents (Council Directive) Regulations 1993 came into force on the 1st of January 1994 they represented an entirely new concept in the United Kingdom. Unlike other jurisdictions, notably France and Germany, that had established legislation specifically tailored to the class of persons known as "commercial agents", the United Kingdom was, give or take, starting fresh.

Since that time the nuances of the Regulations have been explored, prodded and poked in innumerable court rulings to the extent that it is fair to say that it is now a fairly well established area of law. An agent can telephone an agency lawyer with a set of facts relating to a legal issue and the lawyer is able to draw on a rich jurisprudence, rather than speculating and hypothesising.

A good example of this is the Court of Appeal (Light v Ty Europe Ltd [2003] EWCA Civ 1238) finding that on expiry of a fixed term, the agent will have the right to payment of an indemnity or compensation. Therefore a principal could not, for instance, hand out a two year contract and then allow it to expire and avoid paying compensation.

However, there still remain certain issues upon which the light of the judiciary's intellect has not yet shone. A good example of this is where an agent has a written contract that, on its face, extends an unfettered right for the principal to remove customer accounts and designate them as House Accounts. This is a pernicious clause that finds its way into many contracts. Pernicious in the sense that the agent is, on the face of it, working to develop clients whilst always knowing that his principal can swoop in at any time and remove them. That creates a climate of fear that is unfair to the agent and not conducive to a healthy vital relationship.

On the one hand there is a generally prevailing judicial reverence for the parties to arrive at whatever bargain they see fit when entering into a business deal, such as a commercial agency agreement. However, that latitude is not unchecked.

Regulation 4(1) requires that a principal in his relations with the agent must act "dutifully and in good faith." The notion of good faith was, until recent times, generally an alien one in the United Kingdom; it is a continental concept that has been imported to these shores by the introduction of the Regulations.

Specific features of this duty are spelled out in the Regulations, though they are not exhaustive. For instance, a principal must "provide [the] agent with the necessary documentation relating to the goods concerned" and "obtain for his commercial agent the information necessary for the performance of the agency contract…'

Returning to the example above, if the principal removes 20% of the agent's accounts and re – designates them as house accounts has he offended the requirement that he should act dutifully and in good faith? What about if he removes 80% and leaves the agent without enough income to cover his fuel costs etc such that he needs to cease his activities? Is it possible to look at the question as one of degree or is it, rather, an absolute question as to whether the principal can or cannot remove accounts?

There is a potential further check on such activity, which comes in the guise of Regulation 7 (dealing with an agent's right to commission). This provides that a commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract where the transaction has been concluded as a result of his action; or where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

There is academic disagreement as to whether the agent's rights to commission per Regulation 7 can be excluded by agreement of the parties and the matter has not been settled by the courts. The thrust of the main argument for those who say the rights can be excluded is that because certain other Regulations specifically state that they cannot be derogated from then the absence of such wording in Regulation 7 means that it can. Not the most sophisticated line of argument but still.

If the Regulation 7 rights cannot be excluded then arguably the agent will remain entitled to payment of commission on sales made to the customer even if the customer is removed from his sphere. This would be a fine outcome for the agent – he is paid in full for a customer that he does not need to spend time, money or effort nurturing.

Of course there will be those who argue that an agent who knowingly contracts on the above basis (i.e. permitting his principal to cherry pick prime accounts) should honour such an agreement in any event. However, that is to ignore that the clause may have been left in the contract precisely because of the parties' unequal bargaining power and the agent's desperation to secure his own appointment. The statutory support of the Regulations was introduced precisely to protect this "downtrodden race" and to rebalance power between the parties. Not my description but that of Staughton LJ!

Both the question of whether Regulation 7 commission rights can be excluded and the extent of the Regulation 4 obligation of good faith are issues that are ripe for judicial consideration. Whilst they remain matters of credible debate then lawyers will delight and agents / principals are liable to clash.

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