Issue 296,September 2020

LEGAL SURGERY

agentbase®
THE UK SALES AGENT REGISTER

Information can be key to determining the commission payable to an agent

Last month saw a hearing in the English courts where the agent was seeking a summary judgment to enforce a clause in the agency agreement permitting each of the principal and agent to inspect accounts and records kept by the other party.

The agency agreement

In 2011, the parties had entered into an agency agreement. The agreement provided that the agent was entitled to commission of sales by the principal to customers which involved an introduction or the assistance of the agent. The commission was stated to be 40% of the gross profit payable monthly in respect of all sales by the principal to the customer for the duration that the customer remained a customer of the principal.

To enable the agent to know the commission to which it was entitled the principal was required by the agency agreement to provide monthly statements of sales to customers and the commission payable. If the agent agreed with the statement, the agency agreement provided that the agent would then issue an invoice. This right of the agent was underpinned by the right of inspection.

The arguments

The agent claimed that it had not been paid the commission to which it was entitled. It therefore applied for summary judgment for an order for specific performance that it be allowed to inspect the principal's records and so verify its entitlement to commission. As part of its argument, the agent claimed that the records and accounts included those relating to the base costs of the sales as well as the invoices to customers as both categories of records were needed to check the calculations of gross profit and so of commission.

The principal opposed the application for summary judgment. The basis of its defence was that the effect of the definition of "custom" in the agreement was such that the principal's liability to pay commission and provide information and documents was limited to sales concluded by the agent or concluded by the agent with the assistance of the principal and – most importantly – given the competing constructions of the provisions in the agreement, it would be inappropriate of the agent to be given summary judgment.

Judgment

The court ruled against the agent. It was the view of the judge that the provisions in the agency agreement requiring each of the principal and agent to keep separate records and accounts of all sales of products was not suitable for determination on an application for summary judgment.

The judge further ruled that the right of commercial agent under Regulation 12 of the Commercial Agents Regulation to information from the principal which an agent needed in order to check the amount of commission due was not determinative of how the contractual provision was to be interpreted.

Take home points

1. It is likely that in this case, the agent was seeking a quick win in terms of the disclosure of information as to the commission as this might have resulted in:

1.1 a without prejudice offer of settlement from the principal; or

1.2 an order by the court to pay outstanding commission and so help the agent fund the litigation against the principal..

As such, the agent's tactic was understandable.

1.It would seem that the agent did not seek to rebut the principal's arguments. If so, there was always a risk that the judge would prefer the principal's arguments over the agent's arguments.

2.It is not clear from the judgment why the agent did not focus more on its entitlement under Regulation 12 of the Commercial Agents Regulations.

3.Equally why the agent did not seek to argue that failure to provide the information constituted a breach of statutory duty by the principal.

4. If it is possible to do so, from the agent's perspective an agency agreement should provide a clear contractual right to information as to sales and commission in order to avoid the issues of interpretation which bedevilled this particular application for summary judgment. Further, a contractual right along these lines would go to bolster the statutory entitlement of an agent to the same information under the Commercial Agents Regulations.
But from the principal's perspective, the way forward is clear – avoid including rights of inspection and provision of information in agency agreements so forcing the agent to rely on Regulation 12

5.If it is possible to do so, from the agent's perspective an agency agreement should provide a clear contractual right to information as to sales and commission in order to avoid the issues of interpretation which bedevilled this particular application for summary judgment. Further, a contractual right along these lines would go to bolster the statutory entitlement of an agent to the same information under the Commercial Agents Regulations.

6.But from the principal's perspective, the way forward is clear – avoid including rights of inspection and provision of information in agency agreements so forcing the agent to rely on Regulation 12.

fox williams
Good sense in the City

Steve Sidkin
Head of Commerce and Technology

for and on behalf of Fox Williams LLP, Solicitors
d: +44 (0) 20 7614 2505
m: +44 (0) 7788 148 537

10 Finsbury Square London EC2A 1AF
t: +44 (0) 20 7628 2000
f: +44 (0) 20 7628 2100