



An Agent's Windfall for the Sale of Goods – The Measure of Recovery

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To date there has been no decided case upon the amount of damages properly allowable to a commercial agent engaged in the sale of goods under the European Communities (Commercial Agents) Regulations, 1994 and 1997.¹ The Regulations which introduce civilian concepts of damage into Irish law are novel and have attracted widespread comment. The purpose of this article is to set out the parameters of damages recoverable and the amounts allowable upon termination of an agency agreement in the area of the sale of goods.

Background

The Irish European Communities (Commercial Agents) Regulations, 1994 and 1997 made in accordance with Council Directive 86/653/EEC on the Co-ordination of the Laws of Member States relating to Self Employed Commercial Agents² are best seen as an aspect of both the law of agency and the law relating to the sale of goods. This arises from the relatively narrow categorisation of "agent" in the Regulations. The regime is applicable to agents whose primary activity involves negotiating and concluding contracts for the sale of goods on the part of another.

At the heart of the Directive is the commercial recognition that the agent may have lastingly contributed to the goodwill of the principal's business and that it is equitable that the agent should be compensated for this.³ The Directive recognises this by redistributing to the agent some of the benefit which he has created in the form of compensation for the client base built up by him which the principal will continue to enjoy after termination. The effect is to create an extra entitlement to compensation on termination of the agency agreement, taking into account both actual losses incurred and, in addition, the benefit element. This accrues where the agency agreement with the principal is terminated through no default on the part of the agent. It thus provides an additional level of protection to the agent.

The novel features of the Directive include a range of duties imposed on the principal which the common law does not impose⁴ and an optional requirement which Ireland has implemented that any such agency contract should be evidenced in writing for it to be valid.⁵ Those within the

scope of the definition of commercial agents are further protected upon termination by a series of notice periods. There are protective provisions where termination comes about due to the age and infirmity of the agent.

Defective Implementation – Choice of Damage Basis

By the implementation of the European Communities (Commercial Agents) Regulations, 1997, Ireland finally complied with its obligations arising out of Council Directive 86/653/EEC on the Co-ordination of the Laws of Member States relating to Self Employed Commercial Agents.⁶ The aim of the Directive was to harmonise the national provisions which deal with the legal position of commercial agents. Ireland had failed in its original implementing legislation⁷ to make a choice between two proposed methods of computing damage to commercial agents where the commercial agency agreement is terminated. It is now provided by regulation 2 of the European Communities (Commercial Agents) Regulations, 1997, as follows:

"2. It is hereby confirmed that, pursuant to Regulation 3 of the European Communities (Commercial Agents) Regulations, 1994, a commercial agent, shall after termination of the agency agreement, be entitled to be compensated for damage in accordance with Article 17(3) of the Directive subject, insofar as they are relevant to such compensation, to the provisions of that Article and of Articles 18, 19 and 20 of the Directive."

The compensation measure, which is modelled on French law, is now the applicable measure. It will apply to all agency agreements terminated since the introduction of the 1994

1 S.I. No. 33 of 1994 and S.I. No. 31 of 1997 respectively. The two regulations are to be construed as one piece of delegated legislation – Art. 1(2) of the 1997 Regulations.

2 [1986] O.J. L 382/17 of December 31, 1986.

3 Staughton L.J. in *Page v. Combined Shipping and Trading Company Limited* (1996) 15 Tr. L.R. 357. At p.5 of the transcript sums up the rationale of the directive as being "that commercial agents are a down-trodden race and need ...

protection against their principals".

4 Art. 4 of the Directive.

5 Art. 13(2) of the Directive and regulation 5 of the 1994 Regulations.

6 [1986] O.J. L382/17 of December 31, 1986.

7 The Commission commenced infringement proceedings against Ireland for non-implementation of this part of the Directive.

Regulations. This follows from the principle that domestic legislation will in so far as it is possible be interpreted in the light of a Community Directive.⁸

Requirement of Writing

Regulation 5 of the 1994 Regulations provides that the agency contract shall not be valid unless it is evidenced in writing.⁹ The requirement is merely that the agency agreement should merely be *evidenced* in writing, not that the whole agreement itself should be written down between the parties. Therefore, a brief note between the parties continuing business dealing upon agreed terms is sufficient. So too would a subsequent invoicing system recording the method of payment be sufficient. There is no requirement of contemporaneity of the note in writing which evidences the agency agreement.

Where a previously oral agency agreement has been renewed, it has been held in *Moore v. Piretta Pta Ltd*,¹⁰ that an agent's entitlement to compensation should be based on the agent's contribution to the principal's business during the entire term of the agency and not merely during the last written contract period.¹¹ Accordingly, if a previously oral agency agreement is subsequently renewed and the renewal evidenced in writing, then compensation is to be assessed on the whole of the agency period, not merely the written period.¹²

Considerable doubts have been expressed as to the retroactivity of the requirement that a commercial agency agreement, as defined, be evidenced in writing.¹³ As with all legislation, the requirement for writing cannot be applied retroactively prior to February 28, 1994, the date upon which the 1994 Regulations came into force. It is submitted that this requirement cannot be applied to the window period between January 1, 1994, when the Regulations purport to come into force and February 28, 1994, when the Minister signed the measure into law. The alternative scenario that such agency agreements concluded between January 1, 1994 and February 28, 1994 were not valid, would interfere with the vested rights of the parties.¹⁴

Where there is no evidence in writing of the commercial agency agreement, then it is not valid. In such a circumstance,

the agreement would be terminable without notice and no entitlement to damages by way of the compensation measure would arise. In order to contract into the Commercial Agents Regulations, then it is necessary that there be some evidence in writing of the agreement.

Commission

Where a commercial agent is wholly or partly remunerated by commission, there are further provisions which deal with entitlements to commission both during and after the termination of the agreement.¹⁵ An agent will be entitled to any unpaid commission arising out of the performance of the agency agreement. Any part of the agents remuneration which varies with the number or value of business transactions is deemed to be commission.¹⁶ The commercial agent's entitlement to commission, once it arises, cannot be extinguished unless the contract between the principal and the third party is not executed in circumstances where the principal is not to blame.¹⁷ This is a mandatory provision and cannot be derogated from to the detriment of the commercial agent.

A commercial agent is entitled to commission on commercial transactions concluded during the period of the agency contract where either¹⁸:

- (1) the transaction has been concluded as a result of his action; or
- (2) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind; or
- (3) where the agent has an exclusive right to a specific geographical area or group of customers and the transaction is with a customer belonging to that area or group. This includes any contracts concluded without any action on the part of the commercial agent.¹⁹

If a commercial agent is appointed to his position following the termination of another commercial agent's contract, the commercial agent loses his entitlement to commission on transactions concluded during the period of the contract where these are either, mainly attributable to the prior

8 *Clare Watson v. Monsanto & EPA*, unreported, High Court, O'Sullivan J., October 6, 1998.

9 Member States may not impose any condition other than requiring that a written document be drawn up for the agreement to be valid. The Community legislature have dealt exhaustively with the matter in Art. 13(2). In *Barbara Bellone v. Yokohama SpA* C-215/97 (April 30, 1998) it was held that a national rule which made the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register was precluded by the Directive.

10 *The Times*, May 11, 1998.

11 In the U.K. by Regulation 17(2) of the Commercial Agents (Council Directive) Regulations, 1993, S.I. No. 3053 (as amended by S.I. No. 3173 of 1993) the compensation principle is the chosen entitlement

of the commercial agent rather than the indemnity method. A limited right to indemnity is given by Regulations 17(3) - (5).

12 See *Segal* (1998) 142 S.J. 376.

13 O'Mara (1994) C. L. P. 162.

14 See *Algera v. Common Assembly* [1957] E.C.R. 39 in which the ECJ recognises the principle of preservation of vested rights.

15 Art. 6(3) provides that Arts 7 to 12 shall not apply if the commercial agent is not remunerated wholly or in part by commission.

16 Art. 6(2).

17 Art. 11(1). Where this occurs, any commission received by the commercial agent must be refunded.

18 Art. 7

19 *Kontogeorgas v. Kartonpak* C-104/95 [1996] I E.C.R. 6643.

commercial agent's efforts or, the order reached the principal or prior commercial agent before the conclusion of the contract,²⁰ unless it is equitable because of the circumstances for the commission to be shared between both agents.²¹

Where the agency contract has been terminated, a commercial agent is entitled to commission on commercial transactions concluded after termination²²:

- (1) if the transaction is entered into within a reasonable period after the contract is terminated and is mainly attributable to the commercial agent's efforts during the period covered by the agency contract; or
- (2) the order for the goods reaches the principal or commercial agent before the agency contract terminates.

The commission becomes due as soon as the principal executes or should have executed the transaction or else where the third party has executed the transaction. The commission becomes payable not later than on the last day of the month following the quarter in which it became due. These provisions relating to the accrual and payment of commission are mandatory and cannot be derogated from to the detriment of the commercial agent.²³

Further non-derogable²⁴ provisions relating to the supply of information by the principal to the agent for the purposes of the calculation of commission due to the commercial agent are included in the Directive.²⁵ These include a free-standing entitlement on the agent's part to demand that he be provided with all information necessary, including an extract from the books, to check the amount of commission due to him.

Performance of the Agreement

The Directive is not intended to alter national laws which deal with issues such as frustration and termination for breach. These issues are left for resolution to national legal systems.²⁶

The End of the Commercial Agency Contract

In the normal course, upon the conclusion of a contract it comes to an end. The Directive is unusual in that it contains provisions for the continuance of agency agreements and provides for both notice periods and reimbursement of the commercial agent upon the ending of a commercial agency contract. Where an agency contract for a fixed period continues to be performed by both parties after that period has expired it is deemed under the Directive to be converted

into an agency contract for an indefinite period.²⁷ Where this occurs, either party may terminate it by notice. The period of notice to be given where an agency contract for a fixed period is converted into a contract for an indefinite period, must be calculated by reference to the total period of the agency contract, including the initial fixed period of the contract.²⁸

Notice Periods

Very often damages will be recoverable for non-observance of the minimum periods of notice of termination laid down in the Directive. The minimum periods of notice laid down depend on the length the contract of agency has been operative. The notice period is one month for the first year of the contract, two months for the second year commenced and three months for any agency agreement which commences its third or subsequent year.²⁹ In *King v. Tunno*,³⁰ an agent who received commission on the sale by him of bakery products was held entitled to three months notice of termination of the contract under the equivalent U.K. provision where the agency agreement had extended beyond three years. The end of the period of notice given must coincide with the end of a calendar month. These minimum periods of notice cannot be excluded by the agreement of the parties, which may sometimes cause problems. Where the parties agree for longer periods of notice to be given upon the ending of the agency contract, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.

As a corollary of these provisions, if the proper notice periods are not observed, then an agent is entitled to compensation in lieu of the notice period in addition to the compensation measure upon termination.

The Compensation Measure

In determining the damages payable to a commercial agent upon termination, Ireland has chosen the compensation measure. Under Article 17(3) of the Directive, the commercial agent is entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal. Such damage is deemed to occur particularly when the termination takes place in circumstances:

- depriving the agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the agent's activities;

20 These are the circumstances listed in Art. 8.

21 Art. 9.

22 Art. 8.

23 Art. 10(4)

24 To the detriment of the commercial agent.

25 Art. 12.

26 Art. 16.

27 Art. 14.

28 Art. 15(6).

29 Art. 15(2). Ireland did not take up the option provided by Art. 15(3) to provide for further periods of notice to be given to the contracting parties for the fourth and subsequent years.

30 (1996) S.C.L.R. 742.

— and/or which have not enabled the agent to amortise the costs and expenses he had incurred for the performance of the agency contract on the principal's advice.

An important point is that there is no maximum level of compensation provided for in the Directive.³¹

The compensation system was based on French law, which dated from 1958 and whose aim was to compensate the agent for the loss he suffered as a result of the termination of the agency contract.³² In France, under the body of case-law which has developed concerning the right to and level of compensation, judicial custom has fixed the level of compensation at the global sum of the last two years commission or the sum of two years' commission calculated over the average of the last three years of the agency contract which conforms with commercial practice. The courts in France retain a discretion to award a different level of compensation where the principal brings evidence that the agent's loss was in fact less. This would occur where the contract was of short duration. Similarly, the level may be increased, such as where the agent's loss is greater because of the agent's age or his length of service.

It is important to note that the compensation is calculated on all remuneration, not just commission. It is based on the gross figure and includes special commission. Outstanding commissions must be included in the calculation. No distinction is made between old and new customers. There is no practice to reduce for professional costs. The compensation amount represents that part of the market lost to the agent when the agency contract is ended. The agent's loss is fixed at that moment and so future occurrences are not taken into account and there is no duty to mitigate the loss.

Constructive Termination

In *Page v. Combined Shipping & Trading Company Limited*,³³ the issue arose as to whether the circumstances were such as to deprive the commercial agent of commission which proper performance of the agency contract would have procured him. One of the novel features of the Directive is that it introduces into Irish law for the first time the notion that the principal in a sale of goods agency agreement may owe something in the nature of a fiduciary duty to his agent. It is provided in Article 4(1) of the Directive that in his relations with his commercial agent, the principal must act dutifully and in good faith.

The plaintiff had entered into an agency agreement with the defendant to buy and sell commodities. The agreement was to last 4 years. After 5 months the defendant company indicated that its South African parent had decided to deinvest in its British activities. The plaintiff commenced proceedings claiming damages for compensation for repudiation of the agency agreement. The issue which arose on an application for a *mareva* injunction was whether the right to compensation under the Directive could be evaded by the defendant reducing trading to nil so that the plaintiff made no money from the commercial agency agreement. This would in turn mean that the termination payment due to the plaintiff, as agent, would be minimal.

Staughton L.J. in the Court of Appeal looked at the different language versions of the Directive in seeking to interpret the meaning to be given to the Directive in the circumstances. The equivalent of the word "normal" performance of the contract, rather than the "proper" performance of the contract was used. He held that this could be construed as providing for an indemnity to be payable to the agent as compensation, for the lawful termination of an agency contract, to be assessed on the basis to which the plaintiff would have earned and to which he would have been entitled had the contract run its course. In a separate judgment Millett L.J. agreed with this conclusion. This decision has widespread implications, for it indicates the difficulty for a principal to cease operations without incurring liability to each commercial agent.

Loss of the Right to Compensation

In certain circumstances damages, in the compensation measure are not payable.³⁴ Where the commercial agent terminates the agency contract, *prima facie*, the commercial agent has no right to compensation. This is so, unless circumstances exist, attributable to the principal, which justify termination by the agent. No guidance is given on what circumstances attributable to the principal constitute sufficient cause for termination by the agent. However, it may be safely opined, that if the agent found he were selling stolen goods, then this would justify termination of the agency agreement by him. Other reasons which justify termination by the agent and which do not remove his right to compensation include where the agent terminates on the grounds of age, infirmity or illness in consequence of which he cannot reasonably be required to continue his activities.

31 The provisions of Arts. 17 and 18 of the Directive which contain the provisions dealing with termination are mandatory rules of the forum and will be applied regardless of any choice of law made by the parties to the agreement.

32 See Report on the Application of Art. 17 of Council Directive on

the Co-ordination of the laws of the Member States relating to Self Employed Commercial Agents - COM (96) 364 Final, July 23, 1996.

33 (1996) 15 Tr. LR 357 CA.

34 Art. 18.

Where the principal terminates on grounds which would justify immediate termination of the agency contract under national law, because of default attributable to the commercial agent, compensation is not payable to the agent. An example would be where the agent was involved in criminal conduct in the course of the operation of the agency contract. There is no compensation payable where the agent, with the agreement of the principal, assigns his rights and duties under the agency contract to another person. This is an important loophole for the benefits of the agency agreement are retained for another person.

Time Limit

No particular provision is made in the Regulations for limitation periods. Therefore, it has to be assumed that the usual six-year period applies. However, the Directive imposes a notice requirement on the agent to notify the principal of his intention to pursue his entitlement to the compensation measure. The commercial agent loses his entitlement to either if within one year following termination of the contract he has not notified the principal that he intends to pursue his

entitlement.³⁵ Arguably, where a commercial agent brings an action within the six year statutory limitation period, without having previously notified his principal of his intention to pursue his entitlements with the one year period, he is forced to rely on his common law rights and remedies.

Conclusion

Substantial help can be obtained to achieve a proper construction of the Commercial Agents Regulations, which apply in sale of goods law, from looking at the manner and method of calculation of the compensation measure in French law, from which the provisions are derived. The provisions are mandatory and cannot be derogated from during the currency of the agency agreement. The recoveries to which a commercial agent in the field of the sale of goods are much greater than those to which he was entitled at common law.

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35 Art. 17(5).