The worst of both worlds

Sophie Belgrove & Alison Padfield examine commercial agents

IN BRIEF

▶ *Brand Studio Ltd v St John Knits, Inc* shows that an invalid termination provision in a commercial agency contract can be severed under the Commercial Agents (Council Directive) Regulations 1993, even if that results in disadvantage to the agent.

There is a category of self-employed commercial agents for whom the law provides protection on termination of their agency agreements, loosely analogous to unfair dismissal rights for employees. These are "commercial agents", and the protection is provided by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) (the Regulations), which implement EC Directive 86/653 (the Directive). The purpose of the Directive and the Regulations is to provide protection for commercial agents, but there is an obvious tension between that purpose and freedom of contract in an otherwise commercial setting. This is explored in two recent Mercantile Court decisions concerning the agent's rights on termination: *Shearman v Hunter Boot Ltd* [2014] EWHC 47 (QB), [2014] All ER (D) 144 (Jan) and *Brand Studio Ltd v St John Knits, Inc* [2015] EWHC 3143 (QB), [2015] All ER (D) 23 (Nov).

Agents

"Commercial agents" for the purposes of the Regulations are self-employed agents who negotiate the sale or purchase of goods on behalf of a principal. Save in certain circumstances, after termination of the contract the agent is entitled to an "indemnity" or to "compensation". These are calculated in different ways which are specified in the Regulations, and the parties are permitted to stipulate in the contract whether, on termination, the agent will be entitled to compensation or to an indemnity. The default position is that the agent is entitled to compensation unless otherwise provided in the agreement. It is not possible to predict at the outset whether the right to an indemnity or to compensation will result in a higher payment to the agent.

In *Shearman*, HHJ Mackie QC considered a clause which provided that the agent would be entitled to an indemnity unless compensation would be a lower amount, in which case the agent would be entitled to compensation. The clause was, plainly, inserted for the benefit of the principal; as the judge remarked, the agent would always have the "worst of both worlds", and it was improbable that this was the intention of the framers of the Directive. He said that the purpose of the Regulations was partly "freedom of contract" and partly "protection of commercial agents in their vulnerable position". Similarly, "contractual choice is permitted if not encouraged provided that the agent receives the protection afforded by the Regulations as a whole. The Directive exists primarily to protect agents not principals". The judge said that the contract provided for different systems to apply in an eventuality not capable of being specified at the time of the agreement—namely whichever system turned out, at termination, to be cheaper for the principal. This did not give effect to the choice which the Regulations permitted and was not compatible with their primary purpose, which was to protect the agent rather than the principal. The judge noted that it was "apparently not argued… that the offending provision…can be simply severed".

Severance

Unsurprisingly, given the broad hint dropped in *Shearman*, the question of severance was soon before the courts. In *Brand Studio*, Mr Justice Teare considered a similar "worst of both worlds" clause. The key part of the clause stated: "For the avoidance of doubt, [the Agent] shall have no right to any compensation under [the] Regulations upon termination or expiry of this Agreement provided that if the amount payable by way of indemnity under this Clause would be greater than the amount payable by way of compensation, [the Agent] shall… have the right to receive compensation instead of an indemnity."

It was common ground, following *Shearman*, that the clause was invalid as drafted. The issue was whether the "offending proviso" could be severed, leaving the rest of the clause in place. Teare J applied normal contractual principles in deciding that, after severing the offending proviso, the contract remained "the sort of contract that the parties had entered into". As a result, the part of the clause which entitled the agent to an indemnity survived. This meant that the contract "otherwise provide[d]", thereby excluding the operation of the default regime of compensation under the Regulations. As this was to the principal's advantage, the principal lost nothing as a result of its breach of the Regulations.

Current standing

As the law now stands, a *Brand Studios*-style provision represents a one-way bet for the principal: the agent may not realise that it is not enforceable unless severed, and may accept payment of an indemnity; and even if the agent does realise that the clause is unenforceable, the principal is entitled to sever the clause and insist on an indemnity if that is more favourable to the principal than compensation. The balance between freedom of contract and the protection of commercial agents seems on this occasion to have come down firmly in favour of freedom of contract. To echo the words of HHJ Mackie QC in *Shearman*, it seems improbable that this was the intention of the framers of the Directive. **NLJ**

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