Chapter 6

Compensation, indemnities and litigation

> 'The question in this appeal is how the compensation should be determined. But for this purpose it is necessary first to decide exactly what the agent should be compensated for. Only then can one proceed to consider how the compensation should be calculated. On this first question the directive is explicit. The agent is entitled to be compensated for "the damage he suffers as a result of the termination of his relations with the principal." In other words, the agent is treated as having lost something of value as a result of the termination and is entitled to compensation for this loss.'
>
> (Lord Hoffmann in *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32)

An agency relationship can work well and to the benefit of principal and agent. Chapter 5 examined the circumstances, however, in which it may break down. One party may simply give notice of termination. The agent may die or fall ill, resign or assign his agency. It was seen in that chapter that in any of the following circumstances the agent may claim compensation (or an indemnity if the agreement provides for an indemnity) from the principal where the Regulations apply:

1. the agent dies;
2. the agent has his fixed or indefinite contract terminated by notice (other than for substantial breach which justifies immediate termination) or his fixed term contract expires;
3. the agent resigns because of circumstances attributable to the principal; or
4. the agent is too ill or old reasonably to be required to continue.

Reference should also be made to Chapter 7 in which Charles Lazarevic looks at compensation value issues.

The first question therefore is whether the Regulations apply to that particular agency and this topic was addressed in Chapter 1. As to the circumstances of termination of an agency and in which compensation is payable on termination, reference should be made to Chapter 5 where these matters are examined in detail.

This chapter seeks to explain the compensation or indemnity payment which may be payable under the Regulations. One of the most helpful cases on this is *Lonsdale* (a copy of which is in Appendix 3). This chapter does not provide guidance on all the different compensation schemes for agents throughout the world. Local law advice should be taken before notice of termination is given in such cases.

Post termination commission and notice period damages

It is extremely important also to note that in most agency cases the agent claims regulation 17 compensation (or an indemnity payment) in addition to commission under regulation 8 for orders received after termination for a reasonable period. This is discussed in Chapter 4 which deals with commission. In the *Tigana v Decoro* case (a copy of which is in Appendix 3) considered there and below, the agent received commission, unusually for a nine-month period after termination for such regulation 8 orders in addition to the lump sum under regulation 17. Finally many agents are not given a proper notice of termination — as seen in Chapter 5 this is often a three-month period so their third head of claim is for what they would have earned in the notice period. Some are also owed commission from before the agency ended which is again a separate claim. Most will claim costs and interest when they litigate as well.

Money claims on termination

1. The agent is entitled to commission due up to the date of termination and for a reasonable period thereafter on orders generated through his efforts. This was examined in Chapter 4. This is separate from compensation/indemnity.
2. The agent is entitled to damages along the lines of a wrongful dismissal claim in employment law if proper notice was not given under his contract. Again this is separate from a compensation/indemnity claim. For example, an agent marketing services is not within the Regulations but if he is not given his contractual notice period he is entitled to claim for common law damages for breach of contract for the profit he would have earned in that notice period, subject to the normal deductions such as for expenses, accelerated receipt and subject to his obligation to mitigate his loss. Indeed regulation 17(5) provides that:

The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.

1. This sentence does not mean the agent can claim both the indemnity and compensation alternatives under the Regulations. It means the agent can claim the indemnity plus common law damages for breach of contract if there is a breach of contract. In many cases there is an obligation to make a payment to the agent where the principal is not in breach of contract. This is what companies find so hard to accept, as it was not previously the

position under English law. The principal has followed the contract to the letter, paid all commission due and given the notice period required but still has to pay a large lump sum.

2. Compensation or indemnity.

The rest of this chapter looks at the compensation and indemnity provisions. Regulation 17(1) provides that commercial agents shall, after termination of the agency contract, be indemnified in accordance with regulations 17(3)–(5) or compensated for damages in accordance with regulations 17(6) and (7) below. There are therefore two different bases for payment to an agent which might apply. All other EU states have chosen one or the other — in fact all except France have payments of an indemnity. In France compensation is payable.

Statistics and settlements

Since 1994 when the Regulations came into force there have been many settlements but not a huge number of court judgments on the Regulations. So some issues under the Regulations such as how to assess compensation payments currently remain unclear even after the *Lonsdale* case. Generally where the Regulations appear if there is no indemnity cap then agents will often claim two to three years' commission and many will settle for one to eighteen months. The Professional Sales Agents Association (PSA) is behind many claims as it is effectively many agents' trade union and will fund the claim. In 2007 the PSA obtained settlements totaling about £4m without solicitors and £1.5m after solicitor intervention. It is now part of Unite. See http://www.unitetheunion.org/sectors/administration_professional/psa.aspx.

Also the Manufacturers' Agents' Association represents many agents — http://www.themaa.co.uk/.

PSA 2004 settlements included:

- £193,978 for six ex-Morris furniture agents.
- £52,351 for two more agents in the furniture industry, both of whom had the agency for just over two years each. In this case the principal tried to argue that he was dissatisfied with the performance of the agents despite an increase in the sales volume.
- £40,000 for two members who traded as a limited company for 21 years, and started working for a chemical company. Again the principal attempted to avoid payment by arguing poor performance, which was apparently unsubstantiated.
- £35,000 for Mr E who introduced well over 100 new customers and became his publishing house principal's top-performing agent during his contract of only two years and two months. Several unfounded and unsubstantiated allegations were made toward the latter part of 2002 and as a result his agency was terminated.

- £52,000 for Mr G who during his ten-year textile agency was responsible for opening over 75% of all the customers in the area.
- £50,000 for a different Mr G who works in the food industry and who was paid partly by retainer during his brief two-year seven-month agency, which was lost due to the principal reorganising.

Compensation or indemnity — which applies?

In the UK companies have a choice at the contract drafting stage but not later, regulation 17(2) sets out that choice in saying that 'except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified'.

Therefore, if the parties have not addressed the issue, compensation will be payable but not an indemnity. If a written contract is silent on the point, then compensation is payable. Every one of the 50 or 60 cases the author has handled under the Regulations have not included an indemnity. In the vast majority of cases it is the compensation provisions of the Regulations which are relevant. It has been known for lawyers and even judges to muddle the two concepts or suggested the basis for one might be the same as the basis for the other but this may not necessarily be the case.

BIS/The DTI say in their guidance notes on the Regulations that 'there is nothing to stop the parties from agreeing to use the compensation provisions in some cases and indemnity ones in others when terminating a particular contract'. They also point out that the giving of proper notice or the expiration of a fixed term contract does not remove the right to claim compensation or indemnity. They say it might 'potentially reduce the level of the indemnity/compensation', and is a matter for the courts to decide.

The section below on the indemnity is only relevant where in the UK the contract provides for an indemnity. Most do not, though the question should be addressed by lawyers drafting agency agreements.

No other country in the EU implemented the Directive with both the indemnity and compensation option. Does that render the UK Regulations void? That has sometimes been argued. In *Hicks v Morris* (2005, not reported but see the PSA journal summary of the case at http://www.salespeople.org.uk/st20051.pdf) the court looked at this point. The principal attempted to argue this issue. The judge in the Mercantile Court in Leeds did not agree, stating that if this was the case all proceedings that have gone as far as the Court of Appeal in England and to the Inner House, Court of Session in Scotland would be wrong. Clearly, the Law Lords hearing these matters would have indicated this error had it existed and could not have passed judgment in the way in which they did. Of course those courts might have been wrong or the point perhaps was simply not put to them, however it was given short shrift in this decision.

The indemnity

The Regulations first provide for the indemnity. It will not be payable where it is excluded by regulation 18, as seen in Chapter 5 — eg where the agent is in default which justifies immediate termination or the agent has resigned or assigned the agency.

Claims within one year

The indemnity (and compensation) is payable provided the agent makes a claim within one year following termination of his agency contract (regulation 17(9)). Litigation does not need to be started in that period, but the agent must notify his principal that he is pursuing a claim within that period. The period runs from termination of the agency contract, which is presumably later than the date of notice of termination unless the notice is for immediate termination. Subsequently, the normal UK limitation periods for bringing claims would apply under the Limitation Act 1980.

Substantial benefits and equity

Under regulation 17(3) an agent is only entitled to an indemnity where:

(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

Thus even if the contract provides that an indemnity is to be payable on termination the agent may not receive anything. This would be the case, for example, where he has not significantly increased business. An agent might have been given a ready-made customer base when he started, and when he finished the job there may be fewer customers or fewer orders, in which case his indemnity entitlement would be zero. There are no subjective factors in regulation 17(3). It does not matter if the business has failed to grow because of a recession or because of incompetence on the part of the principal. If the simple fact is that the agent has not made the significant increase then he gets nothing. Notice also that the principal must continue to benefit from this increase. If the agent is responsible for an increase, as most are over time, but the agent takes the customers with him when he leaves then again no indemnity is payable.

In *Duncan Moore v Piretta* [1999] 1 All ER 174 the judge examined what is meant by the agent bringing new customers to the principal. The defendants submitted that if, for example, a customer's name appears on a list or if a customer attends a trade fair in response to a circular or advertisement issued by the principal, that customer is not brought to the principal by the agent. The judge did not agree. He said:

'A new customer may in practice be induced to place business with a principal by a variety of means — for example, the quality and price of the goods offered for sale by the principal, the reputation of the principal, the general marketing efforts of the principal, the salesmanship of the individual agent, or the introduction, by an agent on whom the customer is accustomed to rely, of the principal to that customer.'

Business may result from a combination of these factors. The judge thought the phrase 'means simply that he [the agent] was instrumental in obtaining the business of new customers for the principal'. The defendants in the case sold fashion clothing to independent retail outlets in the UK. The agent started work in 1988 for them and they already had a customer base. He was given a customer list. Customers also came through contact with the principal at exhibitions and in other ways. However the agent did most of the work once he had the customer list, and drove 20,000 miles a year in his territory drumming up business. There were 40 customers when the agency ended and all but six or seven were brought in (on the definition used by the judge) by the agent.

This decision also examined the phrase 'or has significantly increased the volume of business with existing customers'. The judge said this just required that the agent should be instrumental in so doing.

The judge quoted from the European Commission report on compensation/indemnity of July 1996 (reproduced in Appendix 2, pages [181–199]) where the Commission refers to German law and says:

'The agent must have acquired the new client and in this respect the instrumentality of the agent is crucial. A small level of involvement is sufficient and it is enough that the agent has merely contributed to bringing the new customer. However, the agent must have played an active role and therefore the existence of a new customer who falls within the territorial scope of an exclusive agency agreement will not automatically suffice.'

Even where these factors are satisfied regulation 17(3)(b) requires that the indemnity must be equitable in all the circumstances.

The one-year indemnity cap

Regulation 17(4) provides that:

'The amount of the indemnity shall not exceed the figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.'

Some agents believe that under the Regulations when an agent is sacked he is entitled to a year's commission. They get this from a misconstruction of regulation 17(4). In fact, in most cases the agent's contract does not provide for an indemnity and regulation 17(4) is therefore irrelevant. Even where it is relevant, the sum is a maximum of a year's commission averaged over the last five years or a shorter period where the agency has operated over a shorter period.

There has to the author's knowledge in the UK only been one court decision relating to the indemnity provisions. This was the *Duncan Moore v Piretta* case. The relevant agency contract was made on 18 February 1994 (just after the Regulations came into force) and the clause provided:

> 'The agent shall be entitled to indemnity on the termination of this agreement for reasons other than a breach of the terms of this agreement by the agent or termination of this agreement by the agent. The parties agree that the indemnity payable to the agent, if any, shall be assessed equitably by applying regulations 17 and 18 of the Regulations to allow the agent the minimum indemnity as permitted by the Regulations.'

The judge looked at the preamble to the Agency Directive and its stated purpose of harmonising EU law on agency. This must be the correct approach. The judge said he therefore was entitled to look to the law of Germany on which the indemnity is based. He also examined the cap of a year's commission and indeed applied it to his calculations.

In this case the judge said there were three stages in assessing the amount of the indemnity.

1. Ask what is the value of the business to the principal of new customers brought in by the agent and increases in sales from other customers. Relevant factors are loss of the business of those customers after the agency is over, whether or not due to the agent's or principal's fault, eg the insolvency of a customer or a decision of a customer to buy goods elsewhere or the agent taking the customer with him. If the benefits to the principal may last more than a year after termination then those benefits can be taken into account.

2. The payment must be equitable. In particular, the commission the agent would have earned had the contract continued is examined. Also relevant the court said were the expenses the agent would have had to pay in earning the commission in future and an allowance should be made for accelerated payment. 'The indemnity is accrued as at the date of termination in respect of commission which would have occurred after it,' the judge said. In the DTI guidance notes on the Regulations they say that 'equitable . . . probably means "just" or "fair" rather than necessarily based on the doctrines or principles of equity — the latter, if they exist at all in the law of every Member State, being bound to vary from State to State'.

   In *Duncan Moore v Piretta* [1999] 1 All ER 174 the defendants claimed that account should be taken of other earnings the agent may have made in a new job or agency — in other words a kind of mitigation of loss. The court did not agree. The judge said:

   The purpose of the indemnity seems to me to be to award a share in the goodwill built up by the efforts of the agent to him on the termination of his agency. Otherwise the whole benefit of that goodwill will remain with his former principal. A concept of mitigation of loss or of anything akin to it seems to me to play no part in this exercise.

   In *Tigana v Decoro* both parties' counsel agreed that 'common law principles of mitigation and avoidable loss have no part to play in the assessment'. The judge thought the defendant's counsel's concession in this respect was 'obviously right: having regard, for example, to the availability of compensation on the death or retirement of the agent (regulations 17(8); 18(b)). . . . As Mr Hollander put it, the focus is on the position at the time of termination: one looks back, not forward'.

In *Duncan Moore v Piretta PTA Ltd*, the judge pointed out that an agent who immediately replaced the lost money should not be in a different position from one who decided to go on holiday for a substantial period. The task is to assess the indemnity, not assess the loss to the agent.

The judge also commented that one does not look into the respective contributions of agent and principal in achieving business because the agent is compensated by the percentage commission they have agreed between themselves for this. If the percentage was grossly disproportionate he thought that this issue might then be examinable.

3. The third step is to apply the cap in regulation 17(4). The judge said the 'contract' included earlier contracts, in addition to the current one which the agent in this case had signed in place of the earlier ones, but with the same principal.

There have been no other cases in the UK to date on the indemnity to the author's knowledge. The *Duncan Moore v Piretta PTA Ltd* decision has been described as a 'step back'. Stephen Sidkin in the *Financial Times* (7 July 1998) pointed out that the court considered German law relevant but 'then calculated the indemnity in a way that bore no relation to the approach under German law. Nor was the calculation consistent with English law'.

The BIS/DTI Guidance notes on the Regulations say:

'The term "indemnity" has a rather more limited meaning than that which it normally bears in English law in that it:

(i) appears to fall short of a complete making good of the loss suffered by the principal; and
(ii) does not necessarily arise in relation to loss caused by the principal.'

BIS/The DTI go on to say they cannot provide any guidance on the amounts of the indemnity.

Lonsdale and Indemnity

The *Lonsdale* decision (2007) briefly looked at the indemnity provisions although they were not applicable in that case and said:

'It is a condition of the indemnity that the agent should have "brought the principal new customers or . . . significantly increased the volume of business with existing customers" and that the principal "continues to derive substantial benefits from the business with such customers": article 17(2)(a). It follows that in a case such as the present, in which the principal went out of business and therefore derived no benefit from the customers introduced by the agent, no indemnity will be payable: see *Saintier and Scholes*, op.cit, at p. 204 [a book on commercial agency]. In addition, article 17(2)(b) limits the indemnity to one year's commission. In the face of these provisions which will satisfy the policy of the directive, it is impossible to argue that it requires a payment of twice gross commission whether the principal has derived any benefit from the termination or not.'

The indemnity and the Commission's 1996 Report

The European Commission issued a report in 1996 on indemnity and compensation under the EU Agency Directive: *Report on the Application of article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents* (see Appendix 2). The report will not be repeated in detail here but it does provide some useful guidance on the indemnity (and compensation which is dealt with later in this chapter). It seems that the indemnity was modelled on article 89b of the German Commercial Code which has operated since 1953.

The Commission say that clearly the indemnity is payable at the end of a fixed term contract and on the bankruptcy of the principal. It is presumed that the principal is deriving substantial benefits from the agency 'even if the principal sells his business or client list if it can be shown that the purchaser will use the client base. If the agent takes the customers with him he will not get an indemnity'.

The calculation

The Commission describe various stages under German law in relation to calculation of the indemnity.

Stage 1

1. First the number of new customers is ascertained and increases in volume of business from existing customers. Then the commission on those customers is calculated 'for the last 12 months of the agency contract'.
2. An estimate is made of the likely future duration of these benefits to the principal. The aim is 'to predict the likely length of time the business with the new and intensified customers will last'. If sales have dropped because of competition or quality of the goods then the indemnity is *not* reduced. Usually a period of two to three years is examined but sometimes a period of up to five years.
3. Next the rate of migration of customers who move away is examined. This varies. In one case it was 38% per year.
4. The figure is then reduced to take account of accelerated receipt.

Stage 2

Then equity is considered. Factors examined are whether the agent works for other principals; whether the agent was at fault; rate of remuneration; decrease in principal's turnover; advantage to principal; payment of pension contributions by principal (almost unheard of in the UK); existence of restraint of trade clause (because if the agent cannot work he will earn less — this has led some UK principals to remove restraint of trade clauses as they are hard to enforce anyway).

Stage 3

The sum calculated under stages 1 and 2 is then compared with the cap under regulation 17(4).

Commission's example — indemnity

Commission on new customers and/or over last 12 months of agency	50,000 ECUs (euros from intensified customers 1 January 1999)
Anticipated duration of benefits is three years with 20% migration rate	
Year 1 50,000 – 10,000 =	40,000 ECUs
Year 2 40,000 – 8,000 =	32,000 ECUs
Year 3 32,000 – 6,400 =	25,600 ECU
Total lost commission	97,600 ECUs
Correction to present value say 10% This figure being equal to the equal indemnity.	87,840 ECUs
This figure might be adjusted for reasons of equity (stage 2 above)	

The Commission says that the method of predicting the indemnity is extremely precise and leads to a predictable outcome and principals can ascertain their risks in advance. It is also better for the agent, as he knows what he can expect.

The Commission state that in some states the maximum figure of a year's commission is taken rather than lesser awards. The cap is just that — a cap or ceiling. It does not mean that the indemnity will always be that sum; in many cases it may be less. Where the agent has not increased business it could be zero. Indeed if the agent has breached his contract, he may owe the principal damages at common law for the loss the principal has suffered through the breach.

Compensation

As seen above, unless otherwise agreed, an agent is entitled under the Regulations to compensation rather than an indemnity and this is described below. Where the contract provides for an indemnity the section above on indemnity is relevant instead. The circumstances under which the Regulations apply were addressed in Chapter 1 and those in which an indemnity or compensation is payable were discussed in Chapter 5.

Regulation 17(6) says that an agent shall be 'entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal'. Regulation 17(7) tries to provide further assistance on this. It says:

'For the purposes of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which:

(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or
(b) have not enabled the commercial agent to amortise the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.'

The *Lonsdale* case and compensation — Compensation for what?

In this judgment the House of Lords (now the Supreme Court) provided useful guidance on assessing copensation. The first issue was what is the compensation for and the court said:

Hoffmann J, said:

'This elegant theory explains why the French courts regard the agent as, in principle, entitled to compensation. It does not, however, identify exactly what he is entitled to compensation for. One possibility might have been to value the total goodwill of the principal's business and then to try to attribute some share to the agent. But this would in practice be a hopeless endeavour and the French courts have never tried to do it. Instead, they have settled upon compensating him for what he has lost by being deprived of his business. That is the "*préjudice subi*". The French case law makes it clear that this ordinarily involves placing a value upon the right to be an agent. That means, primarily, the right to future commissions "which proper performance of the agency contract would have procured him": see *Saintier and Scholes,* op.cit, pp. 187-188. In my opinion this is the right for which the directive requires the agent to be compensated.'

So there is no valuation done of the overall business of the principal but instead of the right to be the agent.

Lonsdale case: Future revenue stream

In Lonsdale the court went on to say:

'Having thus determined that the agent is entitled to be compensated for being deprived of the benefit of the agency relationship, the next question is how that loss should be calculated. The value of the agency relationship lies in the prospect of earning commission, the agent's expectation that "proper performance of the agency contract" will provide him with a future income stream. It is this which must be valued.'

So if there is no future revenue stream because the agent did so badly even if he earned a fortune two years before he would receive nothing on this analysis. It may be argued that if the principal undertook steps which rendered the agency worthless to avoid the regulations or perhaps even without that aim this could be contrary to the duty of good faith and damages for breach of the good faith obligation might instead be payable but that has yet to be proved.

If the principal through judicious drafting of the agency contract made the value going forwards of the agency worth very little with rights allowing accounts to be removed and territories reduced perhaps again this would breach the good faith obligation and the agent would still be able to claim some form of compensation.

Valuations on this basis for private companies are done every day in practice. *Daltons Weekly* and other publications are full of companies for sale with their price based on turnover or profits and although it can be difficult and often very expensive (£20k plus in fees is not unusual) to value a private company, there is no market in the UK for resale of agency agreements whether they have a high on going revenue stream or not. The valuation is therefore a fiction to an extent. However in some countries like Germany agencies are bought and sold and in the UK franchisees will often pay a fee to become a franchisee and sell their right when they leave to another for a lump sum so the concepts are not totally alien.

The court in Lonsdale says the agency is valued even if the terms provide it is not assignable (as many of them are not) and that the lack of assignability does not affect the valuation.

Lonsdale — no other assumptions

The issue of lack of assignability can be ignored (if it we re not no one would buy the agency and the value would always be zero simply by virtue of the usual no assignment clause). No other assumptions are made however:

> '13 On the other hand, as at present advised, I see no reason to make any other assumptions contrary to what was the position in the real world at the date of termination. As one is placing a present value upon future income, one must discount future earnings by an appropriate rate of interest. If the agency was by its terms or in fact unassignable, it must be assumed, as I have said, that the hypothetical purchaser would have been entitled to take it over. But there is no basis for assuming that he would then have obtained an assignable asset: compare the *Crossman* case. Likewise, if the market for the products in which the agent dealt was rising or declining, this would have affected what a hypothetical purchaser would have been willing to give. He would have paid fewer years' purchase for a declining agency than for one in an expanding market. If the agent would have had to incur expense or do work in earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything.'

The court then rejected the French approach of two years' commission on termination on various grounds including that in France agencies are often sold and often for two years' gross commission. That is not the case in the UK.

The *King v Tunnock* case was not followed and the court said:

> '27 *King v Tunnock Ltd* was considered by Judge Bowers (sitting as a High Court judge) in *Barrett McKenzie v Escada (UK) Ltd* [2001] Eu LR 567. The judge was not attracted by the formulaic approach of the Court of Session but said (at p. 575) that the point on which he agreed with Lord Caplan was that —

> "one is valuing the agency and its connections that have been established by the agent at the time at or immediately before termination, and it is really a question of compensating for the notional value of that agency in the open market. . . .

> I agree that this is what compensation in article 17(3) means. My only caution is that one must be careful about the word "notional". All that is notional is the assumption that the agency was available to be bought and sold at the relevant date. What it would fetch depends upon circumstances as they existed in the real world at the time: what the earnings prospects of the agency were and what people would have been willing to pay for similar businesses at the time.'

Valuation and Expenses

Many agents have several agencies and because one agency ends does not mean their costs go down although the court did not seem to agree with this point in Lonsdale when it said:

> '29. In *Tigana Ltd v Decoro* [2003] EuLR 189 [discussed elsewhere in this chapter] the judge awarded the agent a sum equal to his commission less expenses over the 14 to 15 months during which the agency had subsisted. I would agree that prima facie the value of the agency should be fixed by reference to its net earnings because, as a matter of common sense, that is what will matter to the hypothetical purchaser. Furthermore, in the case of an agent who has more than one agency, the costs must be fairly attributed to each. He cannot simply say, as Mr Lonsdale did in this case, that the marginal cost of the Elmdale agency was little or nothing because he had to see the same customers and go to the same exhibitions for Wendel.

> '30. It may well be that 14 months commission adopted by the judge was a fair valuation. But he seems to have had no evidence that anyone would have paid this figure for a comparable business. Instead, he gave (at p. 221) a non-exhaustive list of 14 factors ((a) to (n)), some of them very wide ranging indeed, which he said would require consideration. The list gives no indication of the weight to be attributed to each factor.

> '31. More recently, in *Smith, Bailey Palmer v Howard & Hallam Ltd* [2006] Eu LR 578 Judge Overend (sitting as a High Court judge) dealt with claims by other agents who had worked for the respondent in this case. He noted that the Elmdale brand had been sold to a competitor for £550,000 and that, over the three years before the sale, 42% of the sales and distribution expenses had consisted of agent's commission. On these figures, he considered that it would be right to attribute 42% of the value of the brand to the agents. This seems to me a flawed method of calculation. First, it treats the entire value of the brand, i.e. the goodwill of the Elmdale name, as attributable to sales and marketing. No allowance is made for the possibility that some of the goodwill may have been attributable to the fact that the company made good shoes. Secondly, no allowance is made for the fact that the commission, which is treated as the measure of the proprietary interest of the agents in the assets of the company, is what the agents were actually paid for their services. On this theory, the advertising agents should have acquired an interest proportionate to what they were paid. Thirdly, the valuation is based entirely on cost rather than what anyone would actually have paid for the agency.'

Lonsdale — Amount awarded

Applying the principles described above the court awarded very little to the agent.

> '32. That brings me to the judgments in the present case. The claim was heard by Judge Harris QC in the Oxford County Court and his judgment was, if I may respectfully say so, a model of clarity and common sense. I shall extract one or two of the most important passages:
>
> "18. If it is kept in mind that the damage for which the agent is to be compensated consists in the loss of the value or goodwill he can be said to have possessed in the agency, then it can be seen that valuation ought to be reasonably straightforward. Small businesses of all kinds are daily being bought and sold, and a major element in the composition of their price will be a valuation of goodwill.
>
> 19. But neither side put evidence before the court about how commercial goodwill is conventionally valued. Nor was I told upon what basis claims of this type are conventionally settled. There was no evidence at all about how commercially to value such assets. It is of course for the claimant, as a seeker of compensation, to prove the value of what he has lost."'

The judge then found that net commission was running at about £8,000 a year and said:

> '33 . . . The value of that agency, the commercial value is what someone would pay for it; to acquire by assignment a business vehicle with a likely net annual income of £8,000 . . .
>
> 'Commonsense would indicate that few people wanting the opportunity to earn what the claimant was earning would be prepared to pay well over £20,000 for the privilege of doing so, still less would they do so in an industry in remorseless decline, and in which the likely buyers would be men of modest means. . .
>
> 'Given the absence of evidence about how commercially to value goodwill, or evidence about what price in practice might have been available, the court might be thought to be justified in simply finding that the claimant has failed to prove his case . . .
>
> 'This was an agency producing a modest and falling income in a steadily deteriorating environment. There is no evidence that anyone would have paid anything to buy it . . . I am strongly tempted to find that no damage has been established . . . But perhaps that conclusion, though I regard it as logical, is a little over rigorous given that the defendant has already made a payment. Doing the best I can, I find that the appropriate figure for compensation is one of £5,000.'

'The Court of Appeal approved of this approach. After a thorough review of the authorities, Moore-Bick LJ quoted paragraph 18 of the judgment (see above) and said that the judge was right in his approach. I agree. Furthermore, I do not think that the judge could have been faulted if he had simply dismissed the claim.'

Finding and paying valuers

The court did comment on the issue of introducing the new requirement for valuations. Although the writers' cases have ranged from an agent paid £1m in compensation to £6,000, many claims are at the lower end and indeed in one case it was cheaper for the principal to pay a nominal lump sum which would have been less than the 30% or third of the legal costs a successful defendant recovers when 'winning' litigation.

The court said:

> '35. That is sufficient to dispose of the appeal, but there are three additional comments to be made. First, Mr Moser urged your Lordships not to adopt a principle which required valuation evidence. Valuations, he said, were expensive and most claims were too small to justify the cost. Moore-Bick LJ said (at paragraph 57) that "in most cases" the court would be likely to benefit from the assistance of an expert witness but that in some cases it might be sufficient to place all the material before the court and invite the judge to act as valuer. It seems to me that once it is firmly understood that the compensation is for the loss of the value of the agency, relatively few cases will go to court. As Judge Harris said, small comparable businesses are bought and sold every day and it should not be difficult for the parties, with the benefit of advice about the going rate for such businesses, to agree on an appropriate valuation. It should not always be necessary for them to obtain a full scale valuation, involving the checking of income and expenditure figures and the application of the going rate to those figures. But I do not see how, if the matter does go to court, the judge can decide the case without some information about the standard methodology for the valuation of such businesses. In this case, the judge was simply invited to pluck a figure out of the air from across the Channel and rightly refused to do so. Nothing is more likely to cause uncertainty and promote litigation than a lottery system under which judges are invited to choose figures at random.
>
> 'It may also be possible, after a period of experience in such valuations, for the court to take judicial notice of what would be the going rate in what I might call the standard case, namely an agency which has continued for some time and in which the net commission figures are fairly stable. It should not be necessary to repeat boilerplate evidence in every case. But the judge must be reasonably confident that he is dealing with the standard case. Adjustments would be needed if, as in this case, the market was in decline or had disappeared altogether.'

The valuation issue is difficult and expensive in practice. A straight two years' commission was simpler but clearly the *Lonsdale* basis reflects current law.

The *Tigana v Decoro* case

Tigana v Decoro [2003] EWHC 23 (QB) (a copy of which is in Appendix 3) was a decision prior to Lonsdale but still provides interesting reading. In Lonsdale the court said of *Tigana* 'Instead, he gave (at p. 221) a non-exhaustive list of 14 factors ((a) to (n)), some of them very wide ranging indeed, which he said would require consideration. The list gives no indication of the weight to be attributed to each factor.' This is not exactly judicial endorsement for the factors in Tigana listed below.

The court in a then well argued judgment examined how compensation under regulation 17 was assessed, in a case where commission on orders received after termination under regulation 8(a) had led to a large award (US$606,836). That was relevant in assessing the regulation 17 compensation. This is an issue in practice which arises all the time — is there any set off between post termination commission and compensation. Here it was a factor in assessing that compensation but did not by any means distinguish it.

Here the court thought that the following matters were relevant to assessing regulation 17 compensation (see para 89 of the judgment):

89.1 The period of the agency, as provided for in the contract.

89.2 The period for which the agency in fact lasted up to termination.

89.3 The terms and conditions attaching to the agency as provided in the agency contract.

89.4 The nature and history of the agency and of the particular market involved.

89.5 The matters specifically mentioned in Regulation 17(7) (a) and (b).

89.6 The nature of the client base and of the kind of contracts anticipated to be placed (for example, 'one-off' or repeat).

89.7 Whether the principal has appointed the agent as its exclusive or non-exclusive agent.

89.8 The extent to which the agent has bound himself during the agency to act exclusively for the principal and the extent to which the agent is free to act for others (and whether in the same field of goods or services or not).

89.9 The extent to which the principal retains after termination of the agency benefit (for example, by way of enhanced trade connection or goodwill) from the activities of the agent during the agency.

89.10 The extent to which an agent is free, after termination, to have dealings with customers with whom he dealt during the agency (A restraint of trade clause will be a relevant consideration in this context).

89.11 Whether there are any payments under Regulation 8 (or other Regulations) which ought to be taken into account.

89.12 The manner in which the agency contract is ended: for example by notice given by the principal; or by notice given by the agent; or by effluxion of time; or as the case may be.

89.13 The extent to which the principal and agent respectively have financially contributed to the goodwill accruing during the period of agency.

89.14 The extent to which there may have been loss caused by any relevant breach of contract or duty.

90. It is clear that the 'damage' suffered by a commercial agent as a result of the termination of the agency (Regulation 17(6)) is — generally speaking (and breach of contract cases aside) — to be regarded as a putative loss and not simply (by common law standards) actual loss. This is shown by the exclusion of principles of mitigation and applicability of the compensation provisions to termination on death or retirement. Clearly one important element, as the recitals to the Directive show, is to avoid a principal being unjustly enriched by retaining for itself without payment the entirety of the benefit of goodwill to which the activities of the agent during the agency have contributed. But another element (which finds both reflection and emphasis in Regulation 17(7) (a)) is to compensate the agent for the loss of a beneficial agency contract. One can perhaps there see some analogy with redundancy payments in

> an employment context: although the analogy cannot be pushed too far, since the policy considerations behind redundancy payments for employees are rather different.

This is the nub of the judgment. The agent was awarded the sum of the commission earned over the period of the agency — effectively 15 months less 20% expenses — $452,346. The agent also received regulation 8 commission of US$606,836 and commission which was owed of US$350,000, a total sum of about £lm.

Case example: *Turner v Steinhoff Furniture Ltd* [2006] Eu LR 50

In this case of the writer, the judge assessed compensation relying on the *Tigana* judgment referred to in this chapter. The following extract from the judgment may provide some guidance for those seeking to advise on compensation and its assessment. The judge said:

> 'It seems to me that, whilst taking into account the list of suggested factors listed by Davis J, [in *Tigana*] one must not lose sight of the importance of the value which would have been attached to the agency at the date of its termination. Thus one needs to examine what a purchaser would have been prepared to pay for an assignment of the agency (assuming it was not one of those 'personal' contracts which are not capable of assignment). Having regard to the short duration of the agency and its lack of exclusivity, and even taking account of its indefinite duration and protection under the Regulations, it seems to me unlikely that a purchaser would be prepared to offer to pay a price based on two years' earnings — either gross or net.'

Future profitability of the agency was held not to be relevant. The assessment was at termination. The fact the new range of goods being introduced could have led the agent to earning higher commission had the constructive termination not occurred was irrelevant. The agency ran for 20 months only and was non exclusive. Those factors reduced the compensation sum awarded. The court ordered payment of a sum equivalent to the claimant's average gross commission over a period of 15 months ie £14,055.

Net or gross?

The cases have been contradictory on whether the agent's compensation under regulation 17 should be based on net or gross commission. In the *Tigana* case the court based it on net earnings and took off 20% for expenses (rather high but the sum on the facts of this case). The court specifically did not set a rule that compensation would always be based on net commission. In Lonsdale it was based on net income because in assessing what someone would pay to buy a business or the value of the goodwill of the agency what matters to the buyer is what profit would be made from taking the agency over.

Time limit

As with the indemnity, a claim must be made within a year of the termination of the contract by the agent notifying the principal he intends to make a claim. It is not provided that such notification should be in writing nor that legal proceedings actually have to be initiated in that time (regulation 17(9)).

Substantial benefits

Regulation 17(7) is a deeming provision. It describes when the damage for which the agency can claim compensation is deemed to occur. It refers to the agent being deprived of commission. Therefore the first issue to consider is what is the agent's lost commission — how much was he earning before, and how much would he have been likely to have earned had the contract carried on. In the *Skingsley* case, an agent was awarded four years' commission on the basis he was aged 61 and would have worked until he was 65. It is not a very well argued judgment and it misrepresents German law, but one can see how the judge reached his conclusion given the wording of regulation 17. However since *Lonsdale* a valuation report should ideally be obtained.

The agent must have brought substantial benefits to the principal. Where the sum total of the agent's efforts over the period of the agency is to reduce the number of customers in his area, even if the drop in sales is due to the principal's poor products or a recession, it is unlikely the agent can make a claim, but the German and other provisions examined above in relation to a similar substantial benefits provision in relation to the indemnity are relevant (see the indemnity section above in this respect).

In *Graham Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656 the court looked at what 'proper performance' of the agency contract means. One argument is that if proper notice is given of termination then the principal has properly performed the contract. The agent could not therefore have expected to earn any more than he would have earned in his notice period, and therefore the Regulations do not in that respect alter English law — a principal could still avoid paying anything if he gave the notice stated. This was clearly not the intention of the Regulations or the Directive on which they were based. The Court of Appeal decided the agent had a good arguable case for compensation even though the principal could under the contract have ensured that over the rest of the course of the agency term no commission was earned. The court said it should look at what would have happened had the contract been performed throughout its future life 'in the normal manner in which the parties intended [it] to be performed'.

In *King v Tunnock* [1999] 1 All ER 1946 the court in Scotland on appeal looked at the compensation provisions in detail. The court said that the indemnity and compensation provisions must not be confused and:

> 'The whole purpose of the 'termination' provisions is to reimburse the agent with the value of the goodwill of the business he has built up, which may be lost to him on termination but retained by the principal. The provisions are not intended to be punitive. They give the agent some security in the form of recompense. He receives no compensation if he assigns to another agency, because he is entitled to payment from the assignee whether he exacts it or not.'

This was also followed in *Lonsdale*, despite general criticism of that decision. The court said that the indemnity and compensation provisions should be interpreted so that they do not produce significantly different results, because the overall aim was harmonisation of the law: 'although this case is a "compensation" case it is I think both legitimate and indeed necessary to look at the "indemnity" provisions'. The court did not think regulation 17(6) should stand alone. If it did, then if the 'principal retired while the agent was still a young man the principal could find himself liable for a very large sum if all the court was required to consider was the effect on the agent's financial position as a result of termination'. In this case this is what the agent had done — he had estimated the number of working years left to him and estimated his annual earnings and multiplied one by the other and claimed £143,000, even though in this case the principal had decided to close down a loss-making business. It is not the basis now undertaken in assessing compensation after *Lonsdale*.

In the King case there was no finding as to whether substantial benefits accrued to the principal after termination, an important prerequisite before any compensation is payable (or indemnity for that matter). The agent's appeal was not allowed. The court noted that in *Page* supra the sum allowed (at the interlocutory stage) was 75% of a year's commission — ie the agent was allowed to retain goods worth that sum of the principal to set off against his entitlement which would be settled at a later court hearing.

In *King v Tunnock* the court said 'If the agent has negotiated a five year contract with the principal, and his agency is terminated after one, then the court should try to calculate the benefit that the principal will, in the normal course of business, receive in the following four years and made an award to the agent on that basis — see *Page*. If the agent and the principal have an open ended contract, then presumably the court must, in its discretion, fix a reasonable period (as the Germans did and as the Regulations do in the indemnity model by providing for a period of one year)'.

On the issue of whether regulation 17(6) can stand alone, it was pointed out that 17(6) makes no reference to the agent having to show that substantial benefits accrue to the principal. Regulation 17(7), it was argued, was just further explanation — examples of when damage might occur but it did not set out the preconditions. They were in 17(6) and therefore there was no requirement to show the substantial benefits. Regulation 17(7) states that damage is deemed to occur 'particularly' in the circumstances outlined. It does not say 'exclusively'. The Scottish court on appeal in *King* appears to have agreed that there was no need to show substantial benefits even though it is a requirement of French law (which has similar compensation provisions where agents normally receive two years' commission without deductions). The court concluded that the agent had not produced enough figures on items such as his expenses. The court said:

> 'Since the pursuer paid his own petrol and since the payment is a lump sum payment and applying the broadest brush to hand a deduction of 10% in my opinion ought to be made so that the Sheriff's two year gross figure of £27,144 should be reduced to £24,429.60. From that Figure I would have deducted (1) the award already made for severance without notice that is to say £4,762. (2) the benefits which the pursuer received during the two years in question [invalidity and sickness benefit he claimed after termination] and (3) his earnings of £50 per week from the date he commenced part-time employment. I cannot therefore precisely quantify the award which would have been made if regulation 17(6) stood alone, but no doubt if the matter were to go further the pursuer could produce the figure which would enable a precise figure to be struck if this approach commends itself. On the whole matter the appeal will be refused . . .'

It is a difficult judgment to follow and it is not always clear what the court is saying. It did in its day lend credence to the theory that French law is the most relevant when the compensation provisions are examined but since Lonsdale that is discretied. This was also mentioned in the indemnity case *Duncan Moore v Piretta* discussed previously where the court said the compensation provisions were derived from the law of France. The Commission make the same point in their 1996 Report referred to above.

The Commission's 1996 Report and compensation

The European Commission in their 1996 Report say that the compensation system was based on French law which dated from 1958. They say French law was based on what a successor to the agent would pay to buy the agency or the time it takes an agent to re-constitute the client base of which he has been deprived. The latter is a better indicator in practice in countries such as the UK where there is no tradition in most industries of new agents 'buying' an area, except perhaps in relation to franchising contracts which are not normally agencies in any event.

The Commission say:

> 'By judicial custom the level of compensation is fixed as 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. However, the courts retain a discretion to award a different level of compensation where the principal brings evidence that the agent's loss was in fact less, for example, because of the short duration of the contract or where, for example, the agent's loss is greater because of the agent's age or his length of service.'

The Commission mention the following points:

1. The sum in France is calculated on all remuneration and not just commission.
2. It is also based on the gross sum and with no deduction for expenses/costs.
3. Outstanding commission is included in the calculation.
4. The sum represents the part of the market lost to the agent and future occurrences are not taken into account such as if the principal ceases to

trade, whether the agent continues to work for the same clients or changes in the market place.

5. There is no duty on the agent to mitigate his loss.

The Commission also say 'Under French law and practice, compensation awarded in the vast majority of cases amounts to two years' commission which is twice the legal maximum provided for under the indemnity option. This clearly makes the appointment of an agent in France under French law a much more costly enterprise'. This had also led to some principals using other EU law, such as German law for their French agents. The Commission also point out that in the UK some have sought to apply common law principles which are very different from French law. In France the courts do not order two years' commission as compensation where the agent's loss is likely to be less, such as where there had been a short duration of the contract. The sum may exceed two years' commission where the agent's loss is greater because of his age or length of the agency contract.

Further examples of differences are in the taking account of future developments after termination and the obligation to mitigate a loss. The Commission say they think it unlikely the English courts will reach the two year sum payable in France:

> 'This no doubt derives from the previous legal position in the UK, that agency contracts could be terminated on notice without any payment being due. This naturally has had consequences for business practices. There was no real concept of goodwill attaching to an agency to which the agent had a right to share in.'

That was written a long while ago and since then the Lonsdale case has intervened. It is clea rnow that there is no two year rule and what matters is what lasting legacy the principal has after termination.

Estimating the loss for compensation

BIS/The DTI in their guidance notes on the Regulations, questions and answers section, ask if it is possible to include a liquidated damages provision in a contract. This would be where the parties estimate the loss likely to be suffered by an agent on termination. The DTI say this is possible where the sum represents a genuine pre-estimate of damage. However such clauses risk being rendered void by regulation 19. The parties may however want to set out a valuation basis in their clause in the agreement just as in joint venture/shareholder agreements the parties often agree a valuation basis in advance.

No contracting out

Regulation 19 provides that the parties may not derogate from regulations 17 or 18 to the detriment of the commercial agent before the agency contract expires. This means that once the contract is over the agent and principal can agree a binding of settlement of any dispute on whatever terms they wish. Therefore principals may be able to offer the agent a fairly derisory sum which he accepts in writing as a full and final settlement in which case the matter is over. However when the contract is in operation this cannot be done.

- One point to watch in settlement negotiations before the notice of termination period is over — in theory there the contract is still in operation and therefore a full and final settlement could be avoided later. Therefore it should be ensured either that the parties document that the agreement is ending early and they accept that, or that the settlement is signed after the period of notice is over and is the correct period of notice.
- Some contracts provide 'three months' commission shall be paid on termination'. This is hardly worth including. It can be overturned because of regulation 19 (unless the Regulations do not apply to the contract). In some cases it may result in an agent simply accepting the sum proffered but he is under no obligation to do so.
- Other contracts provide 'The Commercial Agents (Council Directive) Regulations 1993 do not apply to this agreement'. Again this is a completely worthless statement.
- A genuine liquidated damages provision can be included, though it does rather draw the agent's attention to his rights and may be offered in a case where the principal thinks the Regulations apply but they do not. It may even be a case where when the contract begins the Regulations do apply but by the time of termination the agent has taken on other activities which make the agency secondary (see Chapter 1) and thus there is no need to pay compensation at all. However, if the contract says compensation must be paid it must be paid.
- It would be possible to say that compensation of a certain amount (as liquidated damages) is payable if the Regulations apply, which would cover some of the points raised above. As most agents know they have an entitlement it does not do much damage to tell them as much in the contract.

The *Duffen* case and penalty clauses

The decision in *Duffen v FRA* [2000] Lloyd's Rep 180 centred on a clause in an agency contract which provided for a £100,000 payment if the contract was terminated early. It was an unusual contract, as it favoured the agent (most do not). The court found that the sum was unenforceable because it was a penalty clause and not a genuine pre-estimate of losses which would be enforceable by way of a liquidated damages clause. The court therefore found that the agent would be entitled to compensation under the Regulations in the normal way though this was not assessed in this judgment.

The facts

The agent was appointed exclusive UK and Irish agent of FRA on 1 August 1994 for a minimum four-year period. He was owed £27,000 plus in commission and sued for that as well as £100,000 under the penalty clause or an interim payment pending the full trial. The dispute, not relevant to this chapter, also centred on whether the agent had made a misrepresentation to the principal in a fraudulent way understating an English FRA company's debts in which the principal and agent both had a 50% stake and that he had misrepresented English law in statements he made about rights he had to retain stock. The court found the allegation of fraud incredible and said that it was not surprising that a bad debt was left out as there was no hope of recovering it.

The clause in question said:

> 'Upon the termination of this Agreement by the Agent pursuant to clause 6.3 the Principal shall immediately become liable to the Agent for and shall pay to the Agent forthwith the sum of £100,000 by way of liquidated damages which sum is hereby agreed by the parties to be a reasonable pre-estimate of the loss and damage which the Agent will suffer on termination of this Agreement by failure of the Principal to pay the sums which but for the Principal's breach hereof would have been payable to the Agent under the terms hereof.'

The court relied on *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL, in holding the clause void. The agent was entitled to a £4000 per month retainer and his commission and if this were not paid he could terminate the agreement for breach. The court said:

> 'The sum payable is not graduated. £100,000 is payable irrespective of the unexpired duration of the term. It would still be payable if termination occurred in the last month of the contract's life. The plaintiff could thus recover a substantial windfall. This, to my mind, would be both extravagant and unconscionable.'

The case is a useful warning to those who seek to include clauses providing for the sum paid on termination. They must be carefully considered.

Other contract clauses

Some contracts provide for the following:

1. Retirement of the agent at, say, 65 (see Chapter 5). The agent may still claim compensation on termination, though there is no clear case law on this.

2. The consequences of one partner in an agency partnership dying, leaving etc — perhaps the contract continues (no compensation payable).

3. Payment of an indemnity — the biggest issue of all: at least the indemnity is capped at a year's commission. Perhaps the contract could provide:

> Where the Commercial Agents (Council Directive) Regulations 1993 apply to this Agreement and are so held by a court, the agent shall be entitled to be indemnified where this agreement is terminated under clauses [xxx] where he meets the conditions for an indemnity in the Regulations provided the sum of such indemnity is smaller than that which would apply if he were entitled to compensation under such Regulations. Where larger, he shall, where he otherwise meets the requirements of the Regulations, be entitled to compensation provided in either case he claims within the statutory period.

4. Liquidated damages provisions such as:

> Where the Commercial Agents (Council Directive) Regulations 1993 apply to this Agreement and are so held by a court, the agent may be entitled on termination under clauses [xxx] to payment of a sum representing three months' commission for each year in which he has worked for the principal as agent or an indemnity if lower. The parties agree that such sum is a genuine pre-estimate of the agent's losses where he meets the conditions of the Regulations.

It is very doubtful whether a liquidated damages provision would work as it would be so hard in advance to calculate a genuine estimate of the sum concerned, given that compensation is not really damages for breach of contract.

It is important to ensure that it is only where the Regulations apply that there is an entitlement otherwise the agent may receive more than he is due. From the agent's perspective he may be better without a written contract at all, as many of its provisions will be designed to impose onerous duties on the agent with the aim of minimising compensation on termination. Some agents have their own short agreement they have principals sign. There is no need for this to refer to compensation.

In *McQuillan v McCormick* [2010] EWHC 1112 (QB) the court looked at valuation issues. It said:

> 'Under clause 9.3 [of the Agreement] the License Owner had the right to terminate on one year's notice if the orders did not amount to €300,000 in a calendar year. Under clause 9.4 there was a right to renegotiate every year. If no agreement could be reached the Agreement continued for a further 12 months and then terminates. It is thus realistically arguable that the agreement is in fact terminable on a year's notice. It will be seen from the second table in the appendix that the revised annualised income (with a multiplier of 1.5 incorporated to allow for the rising market) is £207,928.96 as at April 2008. It was agreed by the experts that the relevant reduction for the costs was £59,000. It follows that the income stream to be valued is approximately £149,000 per annum.
>
> 'If the contract between Mr McCormick and Pandora A/S comes to an end then there will be no income stream. In that event it is clear from Lord Hoffmann's speech that it is of no value. Thus the question to be asked is what is the value of an income stream of £149,000 which is increasing but which could be terminated within 2 years. When the question is asked in that way it becomes plain to my mind that the discount applied by the expert of 25% is far too small. For my part I doubt if anyone would pay more than 1 years purchase and I propose to value

the compensation at £150,000. It is to be remembered that this sum already includes a multiplier of 1.5 over the actual income.'

This is very like many cases — although *Lonsdale* requires a valuation approach in practice agents often receive one to two years' commission."

Claiming damages for breach of contract in addition

However, if the agent has a fixed term contract it may be that he will receive more in relation to common law damages for breach of contract. If the contract, for example, is supposed to run for four years and notice is given at the end of one year, then the agent under English common law may be entitled to three years' commission less any obligation to mitigate his loss etc. Can he also claim compensation too? That is not clear, but he probably can. As has been seen above in some of the decisions to date, the agent has been able to claim damages and compensation and indeed the Regulations (17(5)) expressly state that this is permissible. The fact that it is suggests compensation is for something other than the agent's losses for breach of contract, ie that compensation in some way is looking at the goodwill the agent has built up from which the principal shall continue to derive substantial benefits after termination. However, the position is unclear.

Legal costs and agents

Agents should ensure that they have full details available of expenses, future loss of earnings etc to provide where required when principals successfully bring in other issues, as described below. Many are represented free by their trade association or union.

Agents may have legal expenses cover through their trade association. This has enabled many agents to make a legal claim who would otherwise not be in a position to do so. Agents may be able to obtain assistance from their local citizen's advice bureau. Where the claim is under £5,000 they may be able to bring a claim in their local county court under the small claims procedure. Agents who are individuals are entitled to bring legal proceedings themselves if they choose not to use lawyers. Some lawyers may be prepared to bring a claim for an agent on a conditional fee agreement basis (no win, no fee) — however the agent would still need to pay disbursements such as court fees and insure against having to pay the other side's costs if they lose.

Advice to agents on claiming compensation includes:

1. Do not bring a claim until all commission due is paid, as often the first action a principal will take when presented with a claim is to hold back money legitimately due. Collect all commission owed before mentioning a compensation claim.

2. Make sure a claim is made within the 12-month period and in writing.

3. Do not assume there is an absolute entitlement to a payment on termination — many agents think this is the case. Take legal advice, and refer to Chapter 5 above.

4. Do not resign. Rights can be lost by so doing.

5. Avoid obvious breaches of the agency contract as otherwise the principal may be able to avoid payment of compensation/indemnity.

6. Do not accept any small sum in full and final settlement unless you are sure that it is acceptable.

7. Do not sign any document without legal advice.

8. Do not assume agency agreements are not legally binding just because the agent never signed them. Expressly reject them in writing and keep copies of letters. Also reject any change to an area product range or commission rate as otherwise it may be accepted by default.

9. Check the contract every time a change is proposed — such as the appointment of a sub-agent. It may be prohibited.

10. Do not accept the principal's first offer but only litigate where there is enough money at stake to make the trouble and expense worthwhile. If the case is unsuccessful all the agent's personal assets could be lost. It would not be unusual in a High Court litigation case for the other side to accumulate costs of up to £50,000 and more, and therefore litigation should not be entered into lightly. Obtain estimates of legal costs and ensure regular bills are sent out, and consider the question of costs against likely damages recoverable at every stage. Never litigate on principle.

11 Consider all 'without prejudice' offers carefully. It is better to accept eight months' commission after paying for a few solicitors' letters than spending two years getting a case to court, paying lawyers every month in that period and then finding the court awards less because the judge did not understand the Regulations properly. In *Barrett McKenzie v Escada* [2001] ECC 50 the agent rejected a 15-months' commission Part 36 offer. He then won less than that at trial and thus because of how Part 36 of the Civil Procedure Rules 1998 works had to pay both side's legal costs. He ended up without a penny and indeed owing more than he won.

12 Where several agents of the same principal have their contracts terminated, it can be sensible to pool resources and instruct one solicitor, assuming there are no conflicts of interest. It may even be possible to include both claims on the same summons, though this may be challenged by the defendant.

Reducing compensation — principals

The following guidelines help principals avoid claims:

1. Draft contracts well so that there are a number of possible substantial breaches of contract of which the agent can be accused and include an indemnity clause perhaps stating that indemnity if paid (capped at a year's commission but not necessarily as high as a year) if that is higher than compensation but if not then compensation will be paid but only if the Regulations apply and this is a situation under the Regulations entitling the agent to claim.

2. Consider using distributors or employees rather than agents.

3. Cut down the product range before a termination (ensuring the contract allows for this) so the agent's commission becomes very little and no one would buy the agency.

4. Keep full records of what the turnover on the area was before the agent started and any assistance or customers given to the agent by the principal although that will not at the end of the day help in reducing compensation it may have a practical effect in persuading an agent to accept less.

5. Do not mention compensation to the agent.

6. Persuade the agent to resign rather than give him notice of termination. In most cases there is no compensation on resignation and sack agents when profits are low in times of recession not at the top of market cycles

7. Keep good records and send regular notices to a non-performing agent. Do not accept and waive major breaches of contract by the agent.

8. Give the legal notice period required to be given and pay all commission up to the date of termination and a reasonable period thereafter as required by the Regulations.

9. Wait for the agent to make a claim. He may never do so. There is no obligation to pay anything unless he makes a claim within 12 months of termination (regulation 17(9)).

10. If he makes a claim, either do not reply or 'fob him off' in reply — not a particularly good practice or very moral but often successful as the agent cannot afford litigation in many cases. Many principals delay in replying to letters, though in practice it is normally better and cheaper to settle quickly.

11. Where the principal is itself an agent, there may be a claim against the principal's own principal.

12. If the principal has legal expenses insurance which may cover the costs speak to the insurers before taking any action.

13. If correspondence with the agent is not resulting in a quick solution just wait for the agent to sue. Often he will not.

14. If a county court summons arrives note all deadlines and take legal advice.

15. Consider making an offer in a sum advised by the principal's solicitors.

This means that if the agent is awarded less at trial there are significant cost disadvantages.

16. When negotiating or fighting a claim, try to show:

    (a) the Regulations do not apply — see Chapter 1 — on the grounds of secondary activities, no continuing authority to negotiate, activities outside the UK, etc;

    (b) there were no substantial benefits for the principal so no compensation or indemnity is payable / the agency has no resale value going forward on the *Lonsdale* principles;

    (c) the agent was in substantial breach of contract such as failing to make a contractual required target sum so no compensation or indemnity is payable and that this justifies immediate termination;

    (d) the agent had substantial expenses which should be taken off his commission in calculating the sum;

    (e) the obligation to mitigate loss (not clear this applies however after *Lonsdale*) and allowance for accelerated receipt;

    (f) poor continuing receipts after the agent left, or the agent took customers with him;

    (g) the worst period for commission receipts — in other words for compensation when no period for averaging is given, unlike the indemnity, and seek to illustrate that the future commission the agent would have earned had the contract carried on would not have been much;

17. Discount the sum reached on the above to take account that the agent is being saved litigation. Normally settlements at the door of the court are a lot higher than in correspondence.

Other contract provisions — indemnity or compensation

Some contract provisions have been examined in the section above. In other cases the parties may provide that an indemnity is payable. As seen above if the parties in the UK want an indemnity to be payable rather than compensation, then they need to provide for it in their contract.

It may be permissible to say that an indemnity will apply unless the sum assessed for compensation is less, in which case that will apply.

The first indemnity decision *Duncan Moore v Piretta* discussed under the indemnity section above resulted in the sum calculated for the indemnity being reduced when the final stage of calculation of application of the one year cap was completed. This perhaps shows the merits of the indemnity over compensation.

Restrictive covenants and agency

Regulation 20 of the Regulations provides that a restraint of trade clause is valid only if it is in writing and 'relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract'. It must not last for more than two years after termination of the agency contract. Nothing in the Regulations affects any rules of law which impose restrictions on restraint of trade clauses. This means in some cases a period of two years may be regarded by the court as void if it is unreasonable in all the circumstances under English restraint of trade law.

Mention was made above of the effect such a clause can have on compensation claims. If the agent cannot work, his claim may be higher — but only if compensation is assessed based on an obligation to mitigate loss and proof of the loss suffered, which is not apparently the case under French law on which the Agency Directive's compensation provisions are based.

In general, however, the question as to what restrictions should be imposed on the agent during and after the agency agreement is a commercial issue. During the term it would be expected that a restrictive covenant be imposed. Indeed it is arguable that an agent may be in breach of his duty of good faith if he takes on a competing agency. This is harder to maintain than enforcement of a clear clause. Once the contract is over, in many cases two years may be too long or unnecessary and a shorter period may be substituted such as one year or six months or even three months. In *Tigana* it was pointed out that a post termination restriction which could stop the agent earning money after termination could go to extend the compensation to which the agent would be entitled; thus only include one with care and after considering that potential disadvantage. In sales of a business the sellers expect to be subject to such restrictions but in agreeing to take on agency it is possible a buyer would pay less because of a long post termination restrictive covenant. In *Lonsdale* the Winemakers Federation of Australia were allowed to intervene and it was established that if a wine agent or any agent took all the customers with him then he did not receive compensation as the asset of the business/the goodwill etc had gone with the agent and nothing of value was left.

Litigating agency claims

This book concentrates on the Regulations and does not propose to cover in detail general principles of litigation. In most cases advice should be sought from solicitors with experience of litigation and the Regulations. Solicitors will be aware of the rules of litigation in general such as when to bring a claim in the High Court as opposed to the county court and what is the effect of a without prejudice offer.

Pre-action correspondence

In most agency cases correspondence between principal and agent or their solicitors is all that takes place before a settlement is reached. This would normally be along the lines of the letters given at the end of this book. Often one letter setting out the agent's full rights is sent at the same time as a 'without prejudice' letter settling or offering to settle for a particular sum. Sometimes a telephone call between lawyers or even contact direct between clients can hurry a settlement and avoid the need to litigate.

Where to litigate

Eventually it may become clear that litigation is required. First it should be checked whether the contract provides for disputes to go to arbitration or through the courts. In one case in which the author advised the contract provided for arbitration which the agent was glad to discover. However on further enquiry a £1,000 registration fee with the arbitration body was required as opposed to a court summons fee of £150. Litigation would have been much cheaper. The case settled in any event without either route being used. In other cases the parties may agree to submit to non-binding mediation. The writer has settled a number of agency disputes through mediation using the mediation body Centre of Effective Dispute Resolution (CEDR).

For claims over £50,000 the High Court will usually be used. However this is a very brief summary of the relevant rules and legal advice should be sought. The county court will be cheaper and may be faster. There may be more likelihood of a judge with an understanding of EU law in the High Court.

The stages of litigation are not set out here. Often counsel is used to draft the particulars of claim in agency cases though in practice most settle, and there may therefore be no advantage in involving counsel at an early stage and incurring the costs of so doing. For solicitors without experience of the Regulations, however, a counsel's opinion on the merits of the case will assist at an early stage.

Counterclaims

Defendants may like to consider a counterclaim against the agent. This is common. Sometimes it is justified — such as where the agent has samples or other property of the principal which he is refusing to hand back or owes money on his sample account to the principal. In other cases it is more spurious and designed to scare the agent into giving up his case or accepting a smaller sum in settlement. Examples include principals who make out a case that the agent had been handling competing products during the agency when he had not, or that his failure to maximise sales was a breach of contract or that the agent defamed the principal (sometimes true, sometimes invented).

Offers and settlements

If a 'without prejudice' offer is made, all the conditions required should be set out and a time limit placed on it. It may be without prejudice save as to costs.

An example of a settlement letter is given at the back of this book.

Advice on settling claims:

1. The principal may want the matter kept confidential; though in practice this can be hard to enforce.

2. There may be a deadline for payment of the money.

3. The sum to be paid should be clear. Do not say eight months' commission, for example, because often the greatest disputes are over what is an average month's commission. State the precise sum.

4. If commission is due on orders before and after termination specify this too. In many cases the principal and agent do not want to wait until all orders are received, and will settle on one sum they can accept even if later orders come in.

5. Deal with return of any property of either party held by the other.

6. State the sum is in full and final settlement. There is an example of a consent order following litigation in the county court (see Appendix 4, page 317). Sometimes principals have offered a sum to an agent on termination. He has taken it and then sued for more.

7. The settlement agreement itself should not be 'without prejudice' and must be legally binding. Both parties should sign and date it. If there is litigation then the consent order should be stamped by the court.

8. Deal with VAT. Agents should insist VAT is paid on the sum concerned in case later the VAT inspectors think it should have been paid. It should not cost the principal any more as he can claim back the VAT. The distinction appears to be that payment of commission and for services etc is VATable whereas compensation won in court is not normally so. However in the *Duncan Moore v Piretta* case (mentioned previously) VAT was paid on the whole sum but not on the interest. However it is more common that instead the principal gives a written indemnity to pay VAT if subsequently assessed on presentation of a VAT invoice.

9. Address any interest due to the agent and whether each side bears their legal costs. If commission is paid late statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 may be payable at base rate plus 8%. If there have just been a few letters, normally both sides will bear their own costs. If the agent has taken the case as far as witness statements and setting the matter down for a trial, then the agent normally, quite rightly, demands payment of his costs. Generally it is better at least for smaller agency claims if the figure for these costs can be agreed, rather than the bill going to taxation which can be a lengthy procedure. In some cases agents have their costs paid for by their trade association, but even there it is on the basis that the association's lawyers

will then recover costs from the principal so it does not mean the principal will then avoid having to pay the agent's costs.

10. Deal with any other remaining issues between the parties. They might want to agree a statement to be issued to customers or there might be assistance the agent must give to a new agent (unlikely if litigation has just finished).
11. Where the principal is abroad then issues such as the currency of payment should be ascertained.

If the matter is not settled early then the solicitors will need to ensure they proceed beyond issuing to the proceedings, defence, counterclaim reply etc to disclosure.

Disclosure

Many agents are bad at keeping records. Some are excellent. Some cannot even produce copies of commission statements over the years or their invoices. Normally one or other side will have clear details though of the commission paid. The following documents should be found:

1. The agency agreement or letter of appointment.
2. All letters over the years varying it such as reductions to commission rates, areas, exclusivity etc.
3. Correspondence about poor performance or target figures.
4. Sales manuals — they may contain contractual statements.
5. Details of turnover on the agent's area when he was appointed.
6. Details of customers 'given' to the agent and any valuation reports undertaken so far.
7. Details of those customers the agent has brought in.
8. Volumes of business with individual customers and how they have grown over the years.
9. Contrasts on commission and turnover figures with other agents in other areas — perhaps which illustrate how badly an agent was doing.
10. Evidence of breaches of contract of the agent — such as publicity over his appointment with a competitor.
11. Correspondence about the agent attending trade fairs or failing to do so or otherwise performing the contract, such as sheets completed after visits. Most of this correspondence is in e-mails these days so always ask to see those.
12. Complaints from customers, whether about principal or agent.
13. Complaints by agent to principal about defective products, failures to pay commission when due etc.

14. Full details of the agent's expenses incurred in relation to this part of the business and his accounts generally. Asking to see his tax returns can be illuminating.
15. Information on whether the agency activities are secondary or not. Is the agent also a distributor of goods etc and how has this changed over time?
16. Information on the agent's current financial position — out of work, new agencies, lower income in new employment.
17. Details of the principal's profits from the area; how a new agent is doing there; what customers have migrated after the agent left.
18. The principal's annual report and accounts.
19. Details of any common law damages suffered through a termination in breach of contract.

No list can be entirely comprehensive and each case will require different documents. In some cases most of the records will be held on computer. In others the parties are lucky if there are six documents — a few commission statements and virtually no correspondence and certainly no written contract.

Witness statements

Normally the agent himself will be the main witness and his contact at the principal the other. If he is accused of bad faith he may need customers as witnesses to support his position. If the agent is, as in one case, over 80, medical evidence may be needed as to his fitness to carry on. Agents' estates can also claim if the agent has died (the author knows of only one case of this), in which case the spouse or others with knowledge of the agent's activities may be needed as witnesses.

Trial

In the handful of cases known to the author where a trial date was set, settlement took place before the trial. However if the matter proceeds to that stage it is always worth trying to achieve a last minute settlement. If not, then the matter will proceed before a judge in the normal way. The handful of agency cases which have led to a trial illustrate how different the issues are. They range from a decision about whether the Regulations apply at all, to whether a penalty clause is enforceable, and to whether an agent can retain possession of goods worth £300,000 to set off against his claim to an agent claiming an indemnity specified in his contract.

Further information

Details for mediation of disputes can be found on the website of the Centre of Effective Dispute Resolution — CEDR — at www.cedr.co.uk.

International Dispute Resolution Centre
70 Fleet Street
London
EC4Y 1EU
United Kingdom
Tel +44 (0)20 7536 6000
Fax +44 (0)20 7536 6001
www.cedr.co.uk
E-mail info@cedr.co.uk

Details of virtually all the judgments to date are on the Fox Williams website at http://www.agentlaw /news/index.asp?ntype=3.

The Professional Sales Agents Association web site provides copies of the PSA's regular newsletter which briefly summarises their latest settlements and court judgments in favour of agents — see See http://www.unitetheunion.org/sectors/administration_professional/psa.aspx.

See also the Manufacturers' Agents' Association represents many agents — http://www.themaa.co.uk/.

Fergus Randolph and Jonathan Davey *Guide to the Commercial Agents Regulations* (2003) summarises many of the compensation cases.

See also Jeremy Schotes and Severine Saintier *Commercial Agents and the Law* (Lloyd's Commercial Law Library, 2005) (www.informalaw.com/comagents).

Corporate Briefing newsletter provides details of commercial agency cases from time to time - http://www.singlelaw.com/corporatebriefing.cfm.

The writer's firm litigates for principals and agents — www.singlelaw.com.