

Commercial Update

The Commercial Agents (Council Directive) Regulations 1993 contain detailed provisions dealing with termination of an agency contract of a commercial agent. A commercial agent is defined in the regulations as a self employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, the “Principal”, or to negotiate and conclude the sale and purchase of goods on behalf of and in the name of that Principal. (Reg 2(1)).

Regulation 17(1) provides that on termination of his agency the commercial agent is entitled to be indemnified or compensated for damage. This entitlement results from the idea that an agent may spend money, time and effort in establishing a market and goodwill for his principal, but then be deprived of the benefit of his investment through termination of his authority by a principal who seeks to deal directly with customers or employ another agent to do so.

In effect, the Regulations provide for the agent to be bought out by his principal.

The availability of an indemnity or compensation is not based on fault. Prior to EU legislation, English law had only been prepared to award an agent damages on termination of the agency where there has been breach of the agency contract by his principal.

In the recent case of **SOFTWARE INCUBATOR LTD v COMPUTER ASSOCIATES UK LTD** (2016) [2016] EWHC 1587 (QB), it was held that computer software and the promotion of computer software by an agent, came under the definition of ‘goods’ for the purpose of a commercial agent. In this case it was held that there was no reason to require the product to be a "chattel" in the traditional sense, especially when it was installed so as to operate in a physical environment, namely by being loaded onto a hard disk or server or some other permanent storage system and being run on a computer, tablet or mobile phone. The fact that the proprietorial character of software was intellectual and not real or personal did not alter that position.

Thus, the said regulations arguably now cover all intellectual property and agents selling intellectual property.

The issue now of course, is the effect BREXIT will have on commercial agents.

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