

Harminder Sandhu, Managing Director and Head of Dispute Resolution at Hawkins Hatton considers how to avoid commercial agent's compensation.

Commercial Agency Contracts are governed by the Commercial Agents Regulations 1993 ("Regulations"). The general rule is that if a Principal terminates the commercial agency contract, the Agent will be entitled to:-

1. Commission / remuneration for the remainder of the contract until date of termination;
2. Compensation or an indemnity payment if the contract contains an indemnity provision.

Compensation is calculated based on the value of the Agent's business / goodwill which has been built up for the Principal during the agency contract. The value takes into account the future performance of the Principal's business. Whereas an indemnity payment (if this is expressly provided for in the contract) is paid instead of compensation and is usually a maximum of one year's remuneration based on the Agent's average earnings.

If a Principal terminates the Agent's contract because the Agent has committed a serious breach of his duties then the Principal may be able to avoid payment of any compensation or indemnity. We have recently been involved in defending a substantial claim brought against our business client by a commercial agent whose agency was terminated for repudiatory breach. This claim reinforced the importance of the Principal carefully assessing the seriousness of an Agent's default prior to ending the contract.

For a repudiatory breach to be found generally a condition of the contract or other fundamental term which goes to the heart of the contract, must be breached. In addition the Agent must demonstrate a general intention not to continue to be bound or perform his obligations under the contract or Regulations. The test is so stringent that even breach of good faith or fiduciary duty can fall short of being assessed as a repudiatory breach if the consequences lack sufficient seriousness.

The position is akin to an employee's duties whereby an isolated incident may not justify ending the contract summarily. A one off incident may also not demonstrate an intention to abandon the agency contract. In the case we recently dealt with the

Agent demonstrated he had no intention to perform his contractual obligations when he indicated he did not have the resources to undertake client service visits, which formed a fundamental part of his business development role. This coupled with a catalogue of performance breaches and failure to perform his role culminated in termination of the agency contract.

The additional complication for the Agent in our client's case was the fact the agency had little or no value when assessed using standard methods of business valuation and the Agent's claim if any was confined to commission / expenses.

The test for whether an Agent has committed a repudiatory breach is one of an objective assessment in the context of the contractual relationship and particular circumstances involved.

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