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Agency case law update

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In this fourth article Adam Maher, a commercial agency specialist solicitor in our litigation department, explores recent decisions of the courts and their repercussions for commercial agents.

*Two recent cases have clarified in what circumstances the Commercial Agents (Council Directive) Regulations 1993 (“the Regulations”) will apply and thereby afford an agent the generous rights enshrined in the Regulations.*

## What is a “commercial agent”?

In the case of Raoul Sagal (t/a Bunz UK) –v- Atelier Bunz GmbH, heard by the Court of Appeal in July, Mr Sagal sought compensation from Atelier Bunz for termination of what Sagal claimed was an agreement protected by the Regulations. In order to successfully claim compensation from Atelier Bunz, Sagal first needed to prove to the Court that he was a “commercial agent” as defined by the Regulations. The Regulations define a commercial agent 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 or purchase of goods on behalf of and in the name of that principal”.

Atelier Bunz was a company based in Germany which designed and manufactured jewellery. After meeting with Sagal at a trade fair in Switzerland it was agreed that Sagal would be sole UK agent for Atelier Bunz.

The following trading practices were agreed between agent and principal:

- Sagal would take orders from UK customers and pass them to Atelier Bunz

- Atelier Bunz would then deliver the jewellery pursuant to the order and invoice Sagal directly
- Mr Sagal would then send confirmation of purchase notices to the customer and send out invoices in his own name including standard terms and conditions that referred to his own business and not to Atelier Bunz
- Atelier Bunz provided stock to Sagal with a 20% discount on the wholesale prices. Sagal then enjoyed an uplift on sales to UK customers
- Mr Sagal never held stock of his own, only placing an order with Atelier Bunz when he himself had received an order from a customer
- Atelier Bunz dealt with the return and repair issues, but any credit notes were issued to Sagal who in turn would issue his own credit note to the customer

Sagal argued that the substance of the relationship was more indicative of a commercial agency than a distributorship, whereas Atelier Bunz, argued that the documentation before the court evidenced a distributorship.

The court held that there were two types of a commercial agent contained in the definition in the Regulations; firstly those that negotiate only and secondly those that can negotiate and conclude contracts but only if acting in the name of the principal. The court held that the documents revealed that although Mr Sagal had authority to negotiate and

conclude contracts, those contracts were not in the name of the principal but instead were directly between Mr Sagal and the customer. This is despite the fact that when trading, Mr Sagal utilized the trading name of Bunz UK. Mr Sagal was therefore a distributor and not a commercial agent for the purpose of the Regulations.

The Court held that where there were documents, those documents would be “critical” in determining the status of the relationship. And so even though the contract was verbal, the documents evidencing the terms of trading, such as invoices, would carry much more weight than the oral evidence of the parties or other witnesses.

The case usefully clarifies the interpretation of the EU Directive and Regulations and the circumstances to which they will apply. Should an agent require protection under the Regulations he should ensure that all contracts are concluded between customers and the principal and not with agent directly.

If it is the agent’s obligation to organise invoices and credit notes he should ensure that such documents are prepared in the name of the principal and not in the agent’s name.

## Secondary activities

Should an agent get over the hurdle of proving that it is in fact a “commercial agent” under the Regulations, it must then also show that its activities as a commercial agent are not “secondary” in nature.

The Regulations are stated not to apply to “*person whose activities as commercial agents are regarded as secondary under English law*”. However, the interpretation of the regulations to determine exactly what a “secondary” activity is has posed some difficulties, not least because the regulations do not contain a clear definition.

The definition contained in the Schedule to the Regulations provides that activities will be secondary “*where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than as set out in paragraph 2*”. Paragraph 2 requires that

- the business of the principal should be the sale or purchase of goods; and
- the transactions are normally individually negotiated and concluded on a commercial basis; and

- a transaction with a customer is likely to lead to repeat business with that customer or transactions with other customers in the geographical area and that therefore there is a development of the principal’s goodwill by the agent.

In the case of John Harold Crane –v- Sky-In Home, Mr Crane was retained as a sales agent to supply and set up satellite television receiver boxes and to also sell Sky satellite television subscriptions.

The court was required to determine whether or not Mr Crane’s activities were “secondary” under the Regulations and in particular with respect of the third requirement above to generate goodwill on behalf of the principal.

Upon consideration of the evidence, the court determined that if there were to be any repeat business developed by the activities of Mr Crane, the repeat business would only arise as a result of the sale of the subscriptions and not the sale of the receiver boxes (which in any event were sold at a loss). The court held that any repeat business generated therefore related to the sale of services (and not goods) and that as agents dealing in services were not protected by the Regulations this contribution to goodwill could not be counted in determining whether or not Mr Crane’s activities were secondary or not.

In respect of the sale of the receiver boxes, the court held that such sales did not meet the requirement of generating repeat business or goodwill and that therefore Mr Crane’s activities were considered as “secondary”. The Regulations did not apply.

Agents who consider themselves to be commercial agents should evaluate whether or not their activities could be considered as “secondary” in light of this ruling. Failure to do so might lead to some agents acting under the misapprehension that they enjoy the extensive protection afforded by the Regulations.

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## What should you do now?

Neil Myerson LLP can offer commercial agents and principals a complete legal service at competitive rates. Our expert lawyers can advise at the outset of an agency relationship and negotiate the contract and are also on hand to assist when disputes arise.

For further information please contact Adam Maher on 0161 941 4000.

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