
Under the 1993 Regulations, commercial agents who sell goods as agents on behalf of others (their principals) have rights to seek either an indemnity or compensation in the event that their agency contract is terminated. The right to seek an “indemnity” must be written into the agency contract. If it is not, the agency has the right to seek compensation instead.

Article 17(6) provides that the entitlement to compensation is “for the damage [the agent] suffers as a result of the termination of his relationship with the principal.”

A Scottish decision from the Court of Session\(^1\) had suggested that the appropriate level of compensation payable was the gross commissions received by the agent in the two years prior to termination.

The House of Lords ruled this was wrong. The agent was to be compensated for the actual loss of the benefit of the agency relationship ie the prospect of the future income stream that the agent would have derived from commission had the agency agreement continued to have been performed.

The Lords rejected any suggestion that a notional valuation be given to the compensation, based on a standard formula (whether a multiple of gross commission or otherwise). The compensation should be equal to the loss that the agent had actually sustained.

The loss sustained by the agent is the sum that a willing (hypothetical) purchaser would have paid to acquire the income stream on the assumptions the agency had continued and that it would have been legally capable of being taken over by the purchaser. In calculating what a hypothetical purchaser would be prepared to pay it was permissible to take into account factors such as the expenses that the agent would have incurred to earn the commission, discounting future earnings to give present value to the income stream and more generally whether the agency was expanding or in decline. Put simply, therefore, the loss of the agency is to be valued in much the same way as any other business that is valued in income terms.

The decision is likely to be bad news for many agents who seek compensation – particularly where the agency is struggling and the levels of commission being paid are low. As the Lords recognised, valuations of this nature are frequently contested and require expert evidence to support them. This is likely to up the costs of litigation, at least in the short term until a number of cases have been through the courts which give more detailed guidance as to how agencies are to be valued for these purposes.

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\(^1\) King –v- Tunnock limited 2000 SC 424