Neutral Citation Number: [2013] EWHC 1564 (QB)

Case No: HQ11X03144

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/6/13

Before :

HIS HONOUR JUDGE RALLS QC

(sitting as a High Court Judge)

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Between :

INVICTA UK	**Claimant**
(a partnership)	
- and -	
INTERNATIONAL BRANDS LIMITED	**Defendant**

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- -

David Lewis (instructed by **Bankside**) for the Claimant

Fergus Randolph QC (instructed by Creed Lane Law) for the **Defendant**

Hearing dates: Hearing dates: 19th, 20th and 21st March 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Ralls QC :

1. The Claimant ("Invicta") brings this action against the Defendant ("IBL") under the Commercial Agents (Council Directive) Regulations 1993 SI ('the Regulations') and pursuant to common law. In summary, Invicta assert that it was IBL's commercial agent and that it is entitled to compensation for the value of the agency lost by termination of the agency pursuant to R17 of the Regulations. Additionally Invicta claims that the agency was terminated on short notice and it is thus entitled to payment in respect of notice (or damages in lieu of) either pursuant to the Regulations or, if the Regulations do not apply, at common law.

2. IBL deny that Invicta is a commercial agent. In particular they deny that Invicta had "any continuing authority as alleged to negotiate or negotiate and conclude the sale of goods on behalf of the Defendant. Insofar as the said sentence refers to the 2009 agreement, it is denied that the said agreement gave rise to any continuing authority as alleged to negotiate or negotiate and conclude the sale of goods on behalf of the Defendant". At paragraph 10(2) of its Re Amended Defence, IBL aver that "at no material time did the alleged commercial agent have any continuing authority to negotiate or negotiate and conclude the sale of products;"

3. The key individuals representing the Claimant are Mr Ian Butcher and Mr Vic Hart who are the two partners in Invicta, a sales agency business they established in about 1990. Over the years Invicta have successfully represented a substantial number of principals in the food and drinks sector selling products to wholesalers/cash and carry outlets, and to a lesser extent, the multiple retail sector.

4. Invicta acts for principals across the whole food and drink industry, covering almost anything that one would find in a supermarket. Those who buy goods via Invicta and to whom it sells on behalf of its principals are all large concerns

ranging from independent wholesalers to national wholesalers. Ordinarily, Invicta does not deal with individual shops or retail outlets.

5. I am told that Invicta employs around 12 sales agents, each of whom covers a specific part of the country. Most of those sales agents would have about 70 potential buyers. Of those potential buyers some would operate from different depots or outlets of the same business.

6. IBL trades in wine, including its own brand "Makulu", a South African wine. IBL wanted to establish a significant market presence in the UK but it was having difficulty in securing listings in the major multiples and/or wholesalers. By 2008 IBL was becoming frustrated at not being able to grow its business quickly enough.

7. Mr Butcher of Invicta was introduced to Mr Patel of IBL in May 2008 by IBL's bank manager. IBL was interested in retaining Invicta as IBL's sales agent and, as a result, the parties commenced negotiations with a view to reaching an agreement .

8. It is clear from these discussions that IBL wanted a sales agent in the United Kingdom. Invicta proposed that they be retained on a fixed monthly retainer for a fixed period during which time Invicta would focus on getting IBL listed in Tesco and Booker and would also immediately start selling wine on IBL's behalf to smaller concerns. It would seem that this was the core of the agreement subsequently reached at the beginning of August.

9. Invicta was engaged to act as IBL's sales agent. This necessarily involved Invicta negotiating the sale of IBL's goods with customers and where possible concluding the sale of goods on behalf, and in the name of IBL. I am satisfied that without that requirement and some authority to negotiate and/or conclude sales Invicta would not have been able to perform its main obligation, namely generating sales.

10. It was agreed that IBL would pay Invicta £5,000 plus VAT per month for its services, upon Invicta securing the first order at the minimum order level, which, it was agreed, would be no less than one pallet (comprising 120 cases of 6 bottles per case) of a Single Key Unit ('SKU') or product per outlet. This meant that the minimum order a buyer could place was for one pallet of, say, Makulu White Chardonnay, rather than a pallet made up of two products such as the Makulu White Chardonnay and Makulu Pinotage.

11. A 'very basic Draft Agreement' was drawn up by James Burgess, an external consultant appointed by IBL. The Draft Proposed Agreement Issue 1 is at [2/21/268] in my documents bundle. The draft was amended to change Invicta Limited to Invicta UK (see page 280 and 283). In fact, Invicta began selling for IBL before the agreement was signed, so Invicta says the agreement came in to effect on about the 21st August 2008. Invicta formally agreed to the simple form agreement on 29 August. Invicta say that in fact an agreement was reached during various discussions in early and mid-August, evidenced in part by the draft written agreement [2/21/280] in my document. Described in the document as a "Simple Form Agreement".

12. IBL produced documentation consisting of a new account proposal form and terms and conditions, which was to be used by new customers to open accounts direct with IBL (not Invicta). It was envisaged by IBL that it (not Invicta) would contract direct with the customer. The Claimant asserts that this is entirely consistent with Invicta acting as commercial agent within the meaning of the Regulations.

13. Invicta represented IBL throughout September 2008. However, it soon became apparent that getting IBL listed as a supplier, and its Makulu range listed as a product, with some of the major customers might be difficult.

14. IBL preferred to contract directly with the customer. This requirement was written into the contract but IBL recognised that to maximise listings, particularly with the multiple retail sector, they would have to be flexible and, where necessary, use Trading Partners International's ("TPI") existing listings. TPI was

a company incorporated by Mr Hart and Mr Butcher for the purpose of importing, from Australia, liquorice products and selling them in the UK. It was a company in which Mr Hart and Mr Butcher were co-shareholders with another and it held supplier listings in Tesco and other multiple retailers.

15. I accept that it was for that reason that the agency was switched to TPI. The start date was backdated although I also accept the Claimant's contention that the correct legal analysis is that the agreement was initially between IBL and Invicta and assigned to TPI on 30 September 2008, albeit Invicta still ran the agency using its personnel. The signed TPI / IBL agreement is at [2/21/302] in my bundle of documents.

16. The Court of Appeal judgment in Rossetti Marketing Limited v Diamond Sofa Co Ltd EWCA Civ (July 2012) supports this analysis. In Rossetti, the agency was commenced in the name of Solutions Marketing Limited, and was 'transferred' to Rossetti on the same terms. Rossetti was in fact owned by the same person and there was continuity of representation throughout. The Master of the Rolls held [55] that reg. 18(c) clearly envisages that, where a principal agrees to instruct a new agent in place of an existing agent in circumstances where the existing agent has transferred the agency business to the new agent, the new agent is to be treated as having taken an assignment of the existing agent's rights and duties. The fact that the common law might treat the new agency as a new contract is neither here nor there.

17. Of particular relevance to this case is the largest customer VDS – who sourced and supplied various product lines for McColls (a large, multiple-outlet retailer) which purchased in excess of £3,000,000 of the Defendant's goods. VDS purchased goods from IBL in its own name as principal and then, having added an amount in respect of profit, sold on to McColls; the contractual chain is clear from the documents. Thus IBL contracted directly with VDS following negotiations with Invicta on IBL's behalf. The Claimant says that this demonstrates the classic nature of this commercial agency. IBL were entirely clear that VDS was their customer, as explained in the 13 September 2008 email [2/21/297] in my documents. That represented a significant success for IBL, as

Invicta had obtained for them a potentially very lucrative account. Examples of the IBL/VDS order forms are at [4/1340 onwards] in my bundle of documents.

18. As of 1st March 2009, TPI ceased its involvement in sales on behalf of IBL. Notice was given to IBL by letter dated 24 February 2009 and it was agreed that the contract would revert to Invicta on the same terms. The Claimant argues that this constitutes a 'statutory assignment' as envisaged in Rossetti.

19. The transition was seamless, as one would expect because Invicta had in fact undertaken all sales activities on behalf IBL since the inception of the first Invicta agency in late August 2008 to the cessation of the TPI agency. Invicta commenced its second period of agency on 1 March 2009. Whilst the 2009 Agreement provides for a 1 April 2009 start date, that date is, in fact, wrong.

20. The 2009 Agreement was in the same form as the draft sent on 10 September 2008. The difference from the signed TPI agreement was the omission of the requirement to sign up customers in IBL's name where possible. Having heard what the parties say about that, I think that it is most likely the result of an inadvertent error caused by IBL using, by mistake, an earlier draft version of the 2008 agreement. Mr Batty confirms that he was asked to draft an agreement with Invicta and told by Mr Singh that "nothing had changed with the Agreement – it was to remain a Simple Form Agreement with the responsibilities of the parties remaining the same". Mr Butcher signed the 2009 Agreement on behalf of Invicta on the 27th May 2009.

21. The 'Initial Purpose', which is stated consistently in all of the written agreements, was for "IBL to provide and deliver Wine and Wine Products to Selected Invicta/TPI Outlets throughout the UK in quantities of not less than one pallet as one delivery per Outlet".

22. To achieve this primary role Invicta was authorized to negotiate on behalf of IBL on a continuing basis, to negotiate the listing of Makulu and subsequently the Santa Regina and Crocodile Creek ranges of South African wine. This could only

be achieved by negotiating a supplier listing in the name of IBL or by using an existing supplier listing in the name of TPI/Invicta or another third party.

23. By letter dated 13th December 2010 IBL terminated the 2009 Agreement with effect from 31st December 2010. In the letter IBL stated that the 1st April 2009 agreement had expired but had thereafter continued on a monthly basis. This is denied by the Claimant and I agree that there is no proper basis to assert that the agreement rolled over on a monthly basis as opposed to the formation of a new agreement for an indefinite duration.

24. The Claimant argues that whether one considers the notice period pursuant to the provisions set out in the Regulations or, in the alternative, under common law, the notice given was inadequate. The Defendant does not dispute the first point and accepts that if I conclude that the Regulations do apply then two months notice should have been given.

25. The origin of the Commercial Agents (Council Directive) Regulations 1993 as amended ("the Commercial Agents Regulations") is the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents ("the Directive")..

26. According to its recitals the Directive sets out the co-ordinating measures to be implemented across the European Union to further competition in the Common Market, the protection of commercial agents vis a vis their principals, the security of commercial transactions, and the conclusion and operation of commercial representation contracts of parties in different Member States.

27. The Regulations track closely the language of the Directive. They were implemented by the United Kingdom in 1993 and came into force on the 1st January 1994. They brought about a fundamental shift in English law to a regime in which, whatever the parties agree, a commercial agent is entitled to recover compensation for the value of the agency lost by termination of the agency. That right is contained primarily in regulation 17, which mirrors article 17 of the Directive.

28. In accordance with standard techniques of interpretation, the Directive, and the Regulations based on it, must be interpreted in the light of their wording and purpose of the Directive: Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, [8]-[10] [1990] 1 ECR 3313. As the authors of Bowstead & Reynolds on Agency explain, standard English methods of statutory interpretation are, in many cases of dispute, not appropriate: See para. 11-004. What is demanded is that the Directive be interpreted uniformly throughout the Community, and in a purposive manner: Case C-381/98, Ingmar GB Ltd v Eaton Leonard Technologies Inc , [23]-[24] [2001] ECR 1-9305. The legislative intention is designed to protect commercial agents. Further, it is clear that whether a party is a commercial agent is a test of substance. How the parties describe themselves is not necessarily determinative.

29. Following article 1.2 of the Directive, a commercial agent is defined in regulation 2(1) 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.

30. Whether a party is a commercial agent within the meaning of the Directive or the Regulations is a straightforward matter, to be determined by reference to the terms and the context of the agreement: Sagal (Trading as Bunz UK) v Atelier Bunz GmbH [2009] EWCA Civ 700 [13] and [17].

31. I agree that the word “negotiate” (and its equivalents in the other languages of the EU) is to be widely construed. In the case of Parks v Esso Petroleum Co Ltd [1999] 18 Tr L Rep [33 E – 34 B], a definition along the lines of “deal with, manage or conduct [a sale]” was accepted. There is no need for the agent necessarily to be involved in a process of bargaining over price. In the case of P J Pipe & Valve Co Ltd v Audco India Ltd [2005] EWHC 1904 (QB) [154] [155] it was held to be no bar to the claimant’s reliance on the Regulations that it was found not to have been engaged to solicit orders at all, but rather to promote the principal’s capabilities to contractors generally and seek its designation as an

approved vendor pre-tender, and to provide feedback and advise the principal at different stages of the pre-tender and tender process.

32. The wider definition to include the introductory nature of the commercial agent's role, is supported by the judgment of Mr Justice Davis in Tigana Ltd v Decoro Ltd [2003] EWHC 23 (QB). Further, the premise of Article 7.1 is that transactions are "…concluded as a result of his action" and "…concluded with a third party whom he has previously acquired as a customer for transactions of the same kind".

33. Thus, the activities of a commercial agent extend to procuring transactions and acquiring customers for repeat orders. Neither of these activities need include negotiating the terms of the transaction, provided that the agent gets business in for the principal.

34. The Claimant submits that whether an agent has continuing authority to negotiate is to be determined, in the first instance, at the time when the agency agreement was made. This, they say, is consistent with the court's approach to a similar question raised in Tamarind International v Eastern Natural Gas (whether one transaction is likely to lead to further transactions with the same customer or to customers in the same geographical area). It follows that whether that authority comes to be exercised less frequently (or even not at all) as the agency continues and customer relationships are established and then cemented, is neither here nor there, unless the continuing authority is withdrawn.

35. Therefore, one must establish whether Invicta in 2008 (more precisely at about 21st August 2008) was a commercial agent not whether Invicta in 2009 was a commercial agent, as if the relationship at the outset was one of commercial agency, then the transferred agency continues as a commercial agency with the rights and liabilities passed to the transferee. That must be assumed to be so as a purchaser would not purchase the commercial agency if the commercial agency functions were no longer being performed. I agree with the claimant's submissions on this point.

36. Alternatively if I am wrong, and there was no statutory assignment the date for assessment is 1st March 2009. The position as inherited from TPI (and by extension from Invicta's earlier agency) is nevertheless relevant as part of the background and matrix of fact.

37. The Claimant argues that the evidence clearly proves that Invicta was authorised to negotiate the sale of IBL's goods, and to enter into contracts in IBL's name whenever possible. They say Invicta was, to quote the Regulations, a self-employed intermediary who had continuing authority to negotiate the sale or purchase of goods on behalf of IBL or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of IBL. The conclusion is the same whether one applies the narrow or the wide definition of 'negotiate'.

38. The context of the 2008 and 2009 agreements, alternatively the 2009 agreement in isolation - which was effectively continued on the same terms as to the 2008 agreement - could not be clearer. At the core of both agreements was the requirement for Invicta to sell IBL's products and to contract in IBL's name where possible. That is a classic commercial agency relationship. Read in context, on proper construction, the first section (headed "Initial Purpose of the Agreement") of the 2008 and 2009 agreements and the requirement to open accounts in IBL's name where possible imports an obligation to negotiate and/or conclude transactions on IBL's behalf and in IBL's name.

39. The commercial purpose of the agreement was for Invicta to sell goods on behalf of IBL to customers. Invicta could not perform its duties without such authority. Thus IBL's authority to negotiate and/or conclude transactions was given inside the parameters of the 2008 and 2009 agreements.

40. Alternatively, Invicta contend that there was an implied term of the 2008 and 2009 agreements, implied on grounds of obvious implication/necessity and/or business efficacy, that Invicta was vested with continuing authority to negotiate and/or conclude the sale of goods on behalf of IBL

41. Further, as a matter of fact, in the performance of its duties under the 2008 Agreement Invicta negotiated and concluded the sale of goods on behalf of IBL with IBL's authority. Thus, if there was no implied term at the outset of the 2008 Agreement then at inception of the 2009 Agreement by a previous course of dealing between the parties the 2009 Agreements included the implied term as set out above.

42. The following factors, Invicta says, make good the submission that Invicta was IBL's commercial agent:

    i. Invicta was instructed to conclude all transactions in the name of IBL if possible; this included Invicta negotiating with VDS and concluding the sale of goods with VDS on behalf of and in the name of IBL as clearly demonstrated by the documentation [2/21/297 – third from last paragraph]; the inquiry as to whether Invicta was a commercial agent can stop there. Determined by reference to the terms and the context of the agreement at the date it is concluded, Invicta was unquestionably a commercial agent. If more is needed then:

    ii. Invicta's field sales role did not materially change after first instruction in August 2008. Invicta negotiated on behalf of IBL with all customers and all potential customers. Invicta was referred to in IBL's sales literature as "U.K. Sales Contact":

    iii. There appear to have been three kinds of transaction. Establishing a supplier listing for IBL (Type 1). Using an existing TPI/Invicta listing (Type 2). Utilizing a third party's listing with a customer (Type 3). Although there were three types of transaction. (in fact properly to be viewed as two types (1) and (3) being ostensibly the same) Type 2 was only used where necessary as a means to secure IBL a 'backdoor' listing. Type 2 transaction represented the significant minority of sales made. Further, the customer was well aware that IBL was the principal and Invicta the agent. It is clear from the evidence that I have heard that Invicta sales representatives would visit a prospective customer

and present the product along with the advertising material prepared by IBL.

iv. Even when Invicta used its own account it only accepted orders approved by IBL and from customers who satisfied IBL's credit checks or credit checks made on IBL's behalf;

43. There are four principal issues which I need to determine in this case.

(1) Is the 2008 Agreement relevant to the Claimant's claim?

(2) Do the Regulations apply to the 2009 Agreement on its termination?

(3) If they do, what compensation is payable (in addition to the two months notice £10,000 plus Vat already agreed)?

(4) If not, what payment in lieu of notice is due at common law

44. The answer to the first question is that it is not relevant to any claim under the Regulations as presently pleaded as the claims for notice and post-termination compensation are predicated on the termination of the 2009 Agreement: see paragraphs 25 and 27 of the Re-Amended Particulars of Claim. If the Regulations do not apply, then the 2008 Agreement might possibly be relevant to the determination of reasonable notice by operation of the common law. It might also be relevant to consider whether the Claimant and/or TPI were originally appointed as commercial agents and whether in fact they acted as such prior to the 2009 Agreement and thereafter continued to do so.

45. It is the second question that forms the principal area of dispute between the parties. In order to answer this question it is suggested that I must first decide at which moment in time the question applies. The claimant says that it is at inception of the agreement. The Defendant argues that a perusal of the Court of Appeal's judgment in Bunz shows that the terms of contracts made with third parties are relevant to the determination as to whether an entity falls within the scope of the Regulations; and these contracts must logically be made after the agency agreement between the parties. They continue by saying that it is clear from the authorities dealing with the issue of the application of the Regulations, rather than the schedule, that the reality is contrary to the Claimant's stated position. In other words, in order for the court to

determine the application of the Regulations, it must look at all the relevant factors including the manner in which the relationship between the parties actually operated. To some extent I agree with the Defendant. It seems that if the court is going to take a broad and purposive approach to construction of an agreement, it might well be legitimate to look to see how the agreement operated in fact as an aid to interpretation, particularly, if the wording of the agreement is unclear or ambiguous. Having considered the matter carefully I agree with the Claimant's assertion that one should at least start by considering the agreement at its inception. However, as one is applying European Regulations and striving for consistency it may be legitimate to investigate what actually happened.

46. The Defendant contends that the claimant did not have the requisite authority and furthermore their activities were secondary. The burden is on the Claimant to prove both of these issues on the balance of probabilities. The court has conducted a fairly wide ranging enquiry. I have considered the negotiations between the parties, the correspondence and the contractual documents themselves and examples of the order forms, invoices and the like used during the operation of the agreement. I have heard evidence from Mr Butcher and Mr Denby on behalf of the Claimant and Mr Singh on behalf of the Defendant.

47. All witnesses agree that Invicta was authorised to negotiate the sale of goods on behalf of IBL and the authority was continuing. Mr Singh accepted in cross-examination that this was the position from "first to last" at whatever time one were to examine the position. The sales function was the primary purpose of the agreement and this is clearly demonstrated by the agreed sales figures. I am satisfied that Invicta could not possibly perform its obligations under the agreement unless it was authorised to negotiate; which is precisely why it was so authorised and I find as a fact that the authority was continuing; that authority led to introductions and concluding transactions in the Defendant's own name in accordance with the Defendant's requirements. This in turn led to sales increasing from approximately £180,000 to about £4.2 million. Invicta was authorised to approach VDS on IBL's behalf and a successful introduction was made. Invicta caused IBL to contract directly with VDS and monitored the continuing sales. All this is consistent with the wording

of the written contract which unambiguously appoints Invicta as agent with authority to negotiate.

48. During the course of the trial I was provided with a schedule of "Agreed Sales Figures". This shows that sales by IBL in the name of IBL to VDS for onward sale to McColls were £3,389,709.31; sales by IBL in the name of IBL to independent cash and carry customers were £228,676.64; sales by IBL to Bookers in the name of Invicta were £576,488.74; sales by Invicta/TPI on behalf of IBL to independent customers between September 2008 and December 2010 were £26,649.14. Total sales were £4,221,523.83. VDS sales as a percentage of total sales equals 80.29 percent, whilst Booker sales equate to 13.66 percent. Thus I have no difficulty in concluding, and I find it as a fact, that the great majority of sales were negotiated by Invicta on behalf of IBL and such sales were then concluded by Invicta on behalf of and in the name of IBL.

49. When considering the totality of the evidence I am satisfied that it is overwhelmingly in favour of the Claimant. I find as a fact that Invicta were appointed as commercial agents with continuing authority to negotiate on behalf of IBL and that their activities were not secondary. I have no difficulty in concluding that the Regulations apply to the 2009 agreement and that they would also have applied to the 2008 agreement. I also find as a fact that Invicta acted in its capacity as commercial agents up until that time that the agreement was terminated. I would therefore come to the same conclusion concerning the applicability of the Regulations whether I chose to consider the position at the inception of the contract, at its conclusion or at any other time in between.

50. The agency was terminated by letter of 13 December 2010 written by Mr Singh for and on behalf of IBL with effect from 31 December 2010.

51. Ordinarily, on termination of a commercial agency the agent is entitled to R15 notice (provided that the agency was for an indefinite period). R7 commission on transactions concluded during the course of the agency relationship, R8 commission – commonly known as ‘pipeline commission’ (R7 and R 8 don’t apply in this case as

Invicta was paid by fixed retainer), and R17 compensation – compensation for loss of the value of the agency.

52. I now turn to consider the third question. Under Regulation 14, an agency contract for a fixed period which continues to be performed by both parties after that period has expired is deemed to be converted into an agency contract for an indefinite period. That is the case here. Regulation 15 provides that an agency contract for an indefinite period benefits from certain minimum notice periods for termination, save where the parties agree on a longer period. There was no more extended period agreed here. The notice period fixed by the Regulations is 1 month in the first year of an agreement, 2 months in the second year, and 3 months for agencies which go into their third year and beyond. The 3 months period would be applicable in this case if the 2008 agency were assigned to the Invicta in 2009, alternatively, if no statutory assignment, then 2 months' notice. However, the Claimant only seeks payment in respect of two months notice in its pleaded case; hence the assignment issue is of little or no consequence.

53. The parties may not agree on any shorter periods of notice (Regulation 15(3)). In breach IBL afforded Invicta 14 days' notice. The Defendant does not challenge this and agrees that the Claimant is entitled to £10,000 plus VAT if I conclude, as I have, that the Regulations apply.

54. Furthermore, if the Regulations apply the Claimant is entitled to compensation for the damage suffered as a result of the termination. R17 provides:

> "(2) Except where the agency contact otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.
>
> (6) ..... the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal."

55. The Regulations themselves are, however, somewhat ambiguous as to precisely how a payment of compensation should be calculated. Some clarity was provided by

the House of Lords' decision in Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd [2007] UKHL 32. In that case, the House of Lords chose not to adopt the approach of the French courts of awarding an agent compensation equivalent to twice the average annual gross commission over the three years prior to termination. Instead, the court held that compensation should be valued by reference to the "notional value" of that agency on the open market. In other words, the compensation properly payable to an agency upon termination is the value of the agency business on the assumption that it had continued and was available for purchase on the open market.

56. Lord Hoffman, who delivered the leading judgment in Lonsdale, stressed however that all that was notional was "the assumption that the agency was available to be bought and sold at the relevant date. What [the agency] 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."

57. The court recognized that valuing compensation on that basis would require evidence as to the value of the agency from an independent expert. Lord Hoffman also said that, prima facie, the value of the agency should be fixed by reference to net-earnings and in the case of an agent who had more than one agency it was necessary to attribute the costs fairly to each one. This methodology is similar to that which is used in different circumstances, for example, to value a family business in matrimonial proceedings or a minority shareholding (but subject to discount) in proceedings under Section 459 of the Companies Act.

58. Invicta relies upon the expert accountancy evidence on the value of the agency provided by Mr Ross MacLaverty, a forensic accountant. IBL rely upon their expert Ms Nelder. Unfortunately Ms Nelder was not able to attend court to give evidence but Mr David Bowes, one of her colleagues, did his best to answer questions about her report.

59. The experts agree that (i) they should arrive at the price which a notional purchaser would pay for the income stream which the IBL agency would have

generated (Joint Statement hereafter "JS" Para 3.2); (ii) apply a multiple to the net profit (JS Para 3.15); (iii) the direct costs of the agency are £25,104 (JS Para 4.11) and a notional cost for Mr Butcher is £6,793.

60. The principal disagreements between the experts are the indirect costs which should be taken into account in arriving at the potential profits or net income and the multiplier. The difference between the experts on costs is £8,658.

61. Mr McLaverty is of the opinion that £28,103 is the appropriate multiplicand whereas in Ms Nelder's opinion £17,280 is correct. As to the multiplier, in Mr McLaverty's opinion 7 is correct and in Ms Nelder's opinion 2 is correct.

62. In summary Mr McLaverty's expert evidence is that:

(i) The estimate of the relative expenses which he attributes solely to the IBL agency on a turnover basis for each year are £31,897 (inc the notional cost of Mr Butcher);

(ii) The majority of the overhead expenses do not relate to the IBL agency and are to be regarded as fixed costs, by which he means those expenses continue whether or not Invicta had the IBL agency (Report at 2.14 and JS Para 3.8);

(iii) The net annual value of the agency (after expenses but before tax) is £37,800 (JS Para 4.4), and the net profit after tax is £28,103 (Report at 3.10 and JS Para 4.6);

(iv) The appropriate multiplier Mr McLaverty says is 7 and that, if applied to the multiplicand, gives £153,440;

(v) He sense checks the figure of £153,440 by using an alternative valuation method - the value of the future net income stream as if it were an annuity. The alternative method delivers a valuation of

£170,976, broadly consistent with the figure derived from the primary valuation method.

(vi) In his opinion the value of the IBL agency is within the range of £153,440 to £170,976.

63. Ms Nelder calculates the net profit before tax to be £17,280. The principal difference between the experts is the costs which are attributed to the agency. Mr McLaverty is of the opinion that the majority of the fixed costs do not relate to the IBL agency, being expenses that would continue whether or not Invicta had the agency, and also on the assumption that the notional purchaser would be 'standing in the shoes' holding multiple agencies.

64. Mr McLavery's approach to costs is pinned on the fact that Invicta operates multiple agencies with annual commission across all the agencies hovering around £1 million mark. £60k generated from the IBL agency represents only circa 1/20th of annual commission. Therefore, he says, the IBL agency represents only a small part of the business as a whole and as such it is unreasonable to assume that any central cost will be cut. In such an instance only the direct costs would be an appropriate deduction against profits and cash flows. Thus, if for the purposes of valuing the business the fixed costs are not apportioned to the lost IBL agency, it is difficult to see how IBL can justify apportioning part of those fixed costs to the IBL agency for the purposes of calculating net profit.

65. Ms Nelder's approach is to apply 'absorption costing' whereby all the costs including indirect and fixed costs (overheads) are apportioned to cost centres/income streams using pre-determined rates. So she includes in her apportionment all the costs in question (£8,658), namely rent and rates, use of house, repairs, computer running costs, hire of equipment, legal and professional, accounting, bank charges, depreciation, HP interest and Mr Hart's notional employment costs. As I have said the counter argument is that these costs will continue to be incurred in any event, and, assuming that the notional purchaser is in a similar position to Invicta i.e. holds multiple agencies, that notional purchaser's fixed costs will not increase by purchasing the IBL agency as the infrastructure will already be in place.

66. As to the multiplier, Ms Nelder takes into account the facts recounted to her by Mr Pattni, IBL's accountant, that the majority of sales that IBL made were invoiced to Invicta. That is factually incorrect but it is not clear to me whether that affected her apportionment of costs or her choice of multiplier. Mr Bowes was not able to explain Ms Nelder's assessment that the multiplier should be only 2 apart from saying that it accorded with her "feeling" of what was fair. That said this is not a case where either expert is able to produce any comparables nor are there any applicable tables of multipliers and one must be cautious not to overstate what a willing purchaser would pay for a future income stream. They will want to assess the risks and to have regard to the time it will take to recoup their investment. Furthermore although a fixed fee agreement such as this has some advantage in terms of certainty, there is a corresponding disadvantage that the agreement does not provide any opportunity to increase revenue by earning any commission in respect of increased sales.

67. Having heard the evidence I prefer the opinion expressed by Mr MacLaverty but subject to some qualification. Despite accepting what he says about fixed costs, I think that some small adjustment on account of these costs is both reasonable and fair. Accordingly I reduce the multiplicand by £500 to £27,603. As for the multiplier, having considered his reasons, Ms Nelder's view and the joint report, I am satisfied that this should be fixed at 4.5. If my arithmetic is correct this gives a compensation amount assessed at £124,213.50 to which must be added the £10,000 referred to above.

68. Having concluded that the Regulations do apply, it is not necessary to answer the fourth question. However for the sake of completeness, had I been required to do so I would have fixed the reasonable notice period, at common law, at six months. I hope the parties will be able to agree a draft order. If there are any outstanding issues, such as costs, which cannot be agreed, I will arrange a further short hearing as soon as possible. Finally, I should like to thank counsel on both sides for their assistance in this case.