

## commercial agents

**Many businesses around the UK use commercial agents. These people are typically not employees, but instead, are self employed individuals or even limited companies who are paid a commission on sales.**

Under the EU agency directive they are protected by law. In particular, agents who market goods are often paid 2 years' commission on termination of their agency agreement, when they die or are too old or ill to continue. Many UK companies have stopped using agents entirely in the 12 years since the law came into effect because the costs of paying off an agent are so high.

However, what has never been very clear is how the compensation is assessed. Some agency agreements in the UK specify that the agent is paid an 'indemnity' on termination. It is always wise to include this (unless advising the agent) as the sum paid is capped at a year's commission. If there is no indemnity clause then the agent is entitled to compensation for loss suffered. It is not lawful to specify compensation or indemnity is not payable.

The law cannot be avoided.

Very recently the Court of Appeal in one case *Lonsdale v Howard & Hallam Ltd* had to look at how to work out what compensation is paid to the agent. It said the correct measure of damages is the loss of the agency business, including whatever goodwill attaches to it. This will often require expert evidence and there is no presumption (as some of the earlier cases said) that the starting point for compensation for agents is two years' earnings, as that does not involve any reasoned attempt to ascertain the true extent of the agent's loss. All cases suggesting there is a presumption of two years' loss of earnings were wrongly decided and there is no reason to say compensation must be 'just and reasonable'. The court must assess what the true loss is and value the goodwill of the 'asset' - customer base, etc, which the agent has built up, from which the principal (the company appointing the agent) will benefit going forward.

If you need advice on agency law contact us for further information. In particular there are lots of clauses you can include in agency contracts to protect your legal position.

## preparing for age discrimination laws



**Are you ready for 1st October? The Government has published the draft Employment Equality (Age) Regulations 2006 which will come into force on that date.**

Many businesses around the UK need to consider now how the new laws, which will prohibit age discrimination at both the younger and older end, might affect them.

The regulations will prohibit direct and indirect age discrimination, harassment and victimisation. The Age Regulations are expected to come into force on 1 October 2006. They have been published in draft form so anyone wishing to comment on them now has the chance to do so. The Regulations:

- prohibit unjustified age discrimination in employment and vocational training
- require employers who set their retirement age below the default age of 65 to justify or change it
- introduce a new duty on employers to consider an employee's request to continue working beyond retirement

- require employers to inform employees in writing, and at least 6 months in advance, of their intended retirement date. This will allow people to plan for their retirement
- remove the upper age limit for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement
- include provisions relating to service related benefits and occupational pensions.
- The regulations also remove the age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay.

If you would like some advice on how the new law will affect you, please contact us.



# legaleye

## pensions a-day

**Few readers will have missed the fact that major pensions law changes come into force from 1st April 2006, but many may fail to take action to improve their own tax position.**

Changes include:

- Earliest retirement age for most people rises to 55 from 50 from 2010
- Maximum contribution will be the lower of your annual earnings or £215,000 in the 2006/07 tax year. So high earners, on say £300,000, who, for example, have an inheritance of £215,000 could put it all in their pension.
- Single Lifetime Allowance of £1.5m for 2006/07. So if your pension will yield you about £70,000 a year you will be at that level. Check immediately. If the fund exceeds this and retirement is in 2006/07 there will be punitive rates applied of up to 55%. Measures can be taken to freeze the pot so do take

advice. Some people will have to stop contributing to pension funds to avoid the penalty charge, although the £1.5m will increase over time.

- Small pensions – pension pots of up to £15,000 can all be taken in cash now, 25% of which is tax free cash.
- 25% in cash – some changes are made but the right to receive 25% of a pension fund as tax free cash continues. Indeed people can take it without retiring when they reach the right age and the Government has had to act to stop people taking the 25% and then reinvesting it in a pension to get another 40% tax relief on the re-contribution.
- Self invested pensions – SIPs can be used to buy assets such as commercial property as indeed has been the case for many years, although a plan to allow residential property to go into a SIP was stopped at the last minute. No one must benefit from the SIP personally – thus to invest in wine and drink it or buy art works and then hang them on your

walls would be prohibited!

- Annuities – it will no longer be compulsory to buy an annuity at age 75. Alternative Secured Income arrangements can be set up instead and the unused part can be passed to heirs on death. In that case, an income must be taken from the fund which will be taxed. The minimum amount will be £1 a year and the maximum will be linked to annuity rates. So if someone chooses to work until they die, well over age 75, they can at 75 set up an ASI and leave the balance for their heirs – this would be subject to inheritance tax if the sum inherited exceeded those limits.

There are two new kinds of annuity - the Limited Period Annuity and the Value Protected Annuity, lasting five years, after which time you can buy another one, or a normal lifetime annuity. The latter will pay out unused amounts to heirs but with a lower annuity. Take advice *now* on how the new pensions rules affect you.

## late payment

**Do your customers pay you on time? There is a right to charge statutory interest for late payment, and it is wise to regularly have your standard terms of business checked to ensure they are completely up to date on these or other matters.**

Lots of businesses have no written terms which legally can put them at a disadvantage

except in this area – the right to charge interest on over due money is automatic. From 1st January 2006 the rate businesses can charge for late payment changed. This is an automatic right under the Late Payment of Commercial Debts (Interest) Act 1998. The rate was cut by a quarter of a percentage point following the reductions in the Bank of England's base lending rate.

The late payment interest rate is set twice a year and is calculated by adding 8% to the

base rate. It has fallen from 12.75% to 12.5%. That is still high and buyers need to be aware that their terms and conditions may not lawfully make any substantial reduction in this amount. Thus specifying interest at 0.025% for example would be void.

Conditions may either say nothing about interest in standard terms of sale, or state the statutory rate applies or some other rate which is not out of line with the statutory rate.

## the london olympics association right

The London Olympics Bill, which deals with London's bid to host the 2012 Olympics, is working its way through Parliament. It will create a London Olympics association right (LOAr) to protect the official sponsors of the London Olympics against 'ambush marketing'. LOAr will be infringed by any person who, in the course of trade, uses a representation in relation to goods or services in a manner likely to create an association between the London Olympics and goods and services or a person providing goods and services.

An 'association' includes any kind of contractual or commercial relationship or any kind of corporate or structural connection. Use of a representation includes using a combination of one or more of the expressions 'games', 'Two Thousand and Twelve', '2012' and 'twenty

twelve' or with one or more of the expressions 'gold', 'silver', 'bronze', 'London', 'medals', 'sponsor' and 'summer'. Such use will be presumed as being likely to create in the public mind an association between a person, goods or service and the London Olympics, unless evidence is provided to the contrary. In other words, there is a presumption of wrongdoing which the person accused must show to be wrong: - a reversal of the usual burden of proof in English law.

LOAr will not be infringed by the use of a representation where an authorisation has been granted by the London Organisation Committee of the Olympic Games (LOCOG). Nor will it be infringed by a registered trade mark in relation to the goods or services for which it is registered. It looks like the new bill is a legal minefield.



## buying and selling goods abroad - customs' transit procedures



One of the most interesting legal areas that intellectual property and competition

lawyers engage in, relates to free movement of goods in the EU.

In a European Court of Justice (ECJ) decision, the court had to look at the law in this area. This concerned an importer, Class International BV (Class) and a trade mark owner SmithKlineBeecham plc and Beecham Group plc (SKB) which owns the well known Aquafresh trade mark for toothpaste. The EU rules in this field mean that if an importer buys the trade marked products in any EU/EEA state which have been freely put on the market there by the trade mark owner or with its consent, they can resell without threat of trade mark infringement actions in any other EU/EEA state. However if they import them from outside the EU/EEA they infringe the trade mark.

An earlier Tesco/Levi decision and other cases has confirmed this.

Here, Class brought into the EU genuine Aquafresh toothpaste from South Africa. Customs suspended the consignment in case it was counterfeit. (It was not). Class wanted the goods back to sell outside the EU on the grounds they had never been 'imported' into the EU and were just in transit. EU regulations in this field allow detention of counterfeit and pirated goods in transit, but not for genuine branded product.

In the latest case, the court referred to the ECJ a number of questions as to whether brand owners are entitled to oppose the unauthorised introduction of genuine branded goods into a Member State where the goods are in transit, or held in a Customs warehouse, with the Customs status: 'non-Community goods'. The Court said that a trade mark owner is entitled to oppose the release of genuine branded goods for free circulation. It is also entitled to oppose the 'offering' or 'putting on the market' of the goods while they have the Customs status 'non-Community goods', if such offering or sale will necessarily mean they will be put on the market in the EU. It may not oppose entry of the goods into the EU under the 'external transit' procedure or the Customs warehousing procedure. The onus is on the trade mark owner to prove either that the goods have been released for free circulation or that there has been an offering or sale that necessarily entails their being put onto the market in the EU.

## deleting your emails

**You might think deleting an email means it disappears but in fact they can be restored. Sometimes a court orders that they must be handed to someone else too.**

Some years ago, the UK Information Commissioner's Office issued guidance on the right of 'subject access' under s7 of the Data Protection Act 1998 and information in emails. It addressed the issue of when a deleted email would need to be retrieved in response to a subject access request. Solicitors who do litigation routinely have to examine issues of what electronic documents and emails are disclosable to the other side in any court case.

The Information Tribunal has made a ruling now under the Freedom of Information Act 2000, which has a similar provision entitling requests for information to be made. This involved a request to Royal Mail for personnel data which had been 'deleted'.

The Tribunal decided that the data had been deleted so could not be handed over in this case but it also examined the law generally as to what data is held.

The Tribunal said that it "understands that information which is held electronically and then deleted (and even emptied later from a 'recycle bin' or 'trash can') is still in fact retained in its original form on the computer system until it is subsequently and actually overwritten by other information." In view of this "it may be incumbent on a Public Authority to make attempts to retrieve deleted information. Accordingly the authority should establish whether information is completely eliminated, or merely deleted." The Tribunal seemed to hold that all backed up data is archived until it is completely deleted. This overturns guidance from both the Information Commissioner and the Department of Constitutional Affairs which both felt that information on a back up server or about to be permanently deleted was not 'held'. That was clearly nonsense so the guidance

will have to be changed after this decision.

Government bodies holding data have now been held to have an obligation to do things such as simple restorations from 'trash can' or 'recycle bin' folders or from back-up tapes. However, if the work of a restoration using specialist employees for local authorities is more than £450 and Government departments £600, there is no obligation to retrieve it. That of course, is not the legal position if a court case is going on when the court Civil Procedure Rules will apply on these issues. There have also been some changes recently to the court rules on electronic disclosure too.

It is wise that you have an email policy for your staff to follow, which also lets them know when their emails or web use might be monitored by the employer.

We can draft such a policy for you or give you legal advice in this area.

### unfair business practices - consultation

**How good are your salesmen and women? Do they use sharp practices to get a sale? If so, it might be wise to give them some training on the current and proposed laws in this area.**

The Government has issued a consultation on bringing an EU Unfair Commercial Practices Directive into force in the UK. The Directive prohibits unfair trading which is principally going to be unfair marketing and selling practices, including unfair advertising. It also deals with matters which may mislead consumers by any act or omission or by use of harassment, coercion or undue influence in an aggressive manner.

The new rules also outlaw practices that, while clearly unfair, are currently not unlawful.

These include:

- aggressive doorstep selling
- scams requiring competition 'winners' to call premium-rate numbers
- bogus closing down sales
- taking advantage of children's 'pester power'
- advertising unavailable products at low prices to attract consumers in order to sell them higher priced goods; and
- falsely claiming consumers will get a better deal if they sign up immediately.

The new rules are due to be in force next year but now is the time both to comment on the consultation and to check current practices are compliant.

### packaging rules

**Changes to packaging rules have been announced which should mean that more packaging waste will be recycled and recovered, and that there will be more businesses involved according to the Department for Environment, Food and Rural Affairs (Defra).**

Defra and the Welsh Assembly confirmed that leased packaging, such as pallets and crates, will now be fully subject to the regulations subject to Parliamentary approval.

Ben Bradshaw, Local Environmental Quality Minister, said that the measures would spread compliance costs more equitably among businesses. The UK has to meet new, higher recovery and recycling targets for packaging waste by 2008. In order to meet that target, packaging laws require target levels of packaging waste recycling by all businesses that handle over 50 tonnes of packaging a year and with turnover in excess of £2 million a year.

So far, the Producer Responsibility Obligations (Packaging Waste) Regulations have succeeded in raising the recycling rate of packaging waste from around 27% in 1997 to just below 50% at the end of 2004. Mr Bradshaw also confirmed that some of the administrative and cost burden would be eased for smaller businesses following the proposal to simplify small businesses' data requirement.

A number of technical changes will also be adopted including the removal of the 'reasonable steps' wording from the regulations. Proposals to include packaging from franchise businesses were welcomed in consultation, but further details of the proposal are still under consideration in a later consultation, the outcome of which will be known shortly.

If you are concerned about waste and packaging issues contact us for further information. We can also advise on the regulations known as WEEE which also apply in this area.

### new EU rules on choice of law

**If you do business outside of the UK then you will be familiar with the question of where a dispute will be heard and which country's laws apply.**

Always check any contract to see if it has a clause about this and change it to English law where possible. The European Commission has proposed to modernise rules on choice of law. It already introduced its Brussels regulation (44/2001) which deals with 'jurisdiction' (which gives courts the power to deal with disputes). The new proposal relates to the Rome Convention 1980, which the Commission will update and convert into a measure of EU law which it is likely to call

Rome 1. Confusingly, there is also a measure called Rome II which deals with non-contractual cross-border disputes, such as those on product liability or defamation. For those in business, it is Rome 1 which will be most material. Most cross border disputes for those involved with buying and selling relate to contract disputes, the subject of the latest proposal.

At the moment the Convention is not binding and not accepted by all EU states and cannot be imposed on them. The new change would force it on them all. It would continue to allow parties to contracts to choose in the contract terms the law which would apply. They could also choose if certain international conventions would apply and the Vienna Convention on the international sale of goods.

If you have any jurisdictional issues or questions about international contracts, contact us for help and advice.