

No. A3/2003/0275, Neutral Citation Number: [2003] EWCA Civ 1238

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
(His Honour Judge McGonigal)

Royal Courts of Justice
Strand
London WC2

Friday 25th July, 2003

B e f o r e:

LORD JUSTICE WARD,
LORD JUSTICE TUCKEY
AND
MR JUSTICE LIGHTMAN

STUART LIGHT AND OTHERS

Claimants/Respondents

— v —

TY EUROPE LIMITED

Appellant/Defendant

Computer Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel: 020 7404 1400 Fax: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Conor Quigley QC and Mr J Dhillon (instructed by Messrs Eversheds, London EC4) appeared
on behalf of the Appellant Defendant.
Mr John Hand and Mr Oliver Segal (instructed by Messrs C W Harwood & Co, Leeds) appeared on
behalf of the Respondent Claimants.

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE WARD: I shall ask Lord Justice Tuckey to deliver the first judgment.
2. LORD JUSTICE TUCKEY:
3. 1.A commercial agent for the purposes of The Commercial Agents (Council Directive) Regulations 1993 means:
4. "a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal') ..." (Regulation 2(1)).
5. Regulation 17 entitles a commercial agent to compensation from the principal "after termination of the agency contract".
6. 2.The first question which arises on this appeal is whether a sub-agent of the principal, who therefore has no contract with him, has a right to compensation against the principal. The second question is whether an agency contract for a fixed term "terminates" at the end of the term so as to give the agent a right to compensation.
7. 3.These questions arise on appeal from a judgment on preliminary issues of Judge McGonigal given in the Leeds Mercantile Court. He answered both questions in the affirmative but granted permission to appeal.
8. 4.Ty Inc design and manufacture cuddly toys. Before 1 June 1997 its UK distributor was Ty UK Ltd, a company partly owned by Mr Swallow. Ty Inc became dissatisfied with their distributor but could only persuade Ty UK to relinquish its rights by, among other things, giving Mr Swallow sole selling rights for Ty products in the UK for three years from 1 June 1997. To this end Ty UK was liquidated and a new Ty company, Ty Europe Ltd, entered into a selling rights agreement with a new Swallow company, Swallow Corporate Sales Ltd (SCS), under which SCS would sell Ty products for Ty Europe on commission (usually 15%). This agreement required SCS to promote and sell Ty products on terms and conditions and at prices established by Ty Europe and gave Ty Europe an absolute right to decline or cancel orders. The selling rights agreement was not renewed at the end of the three year term and SCS dropped out of the picture. It has apparently ceased trading and has no assets.
9. 5.Some of the nine claimants worked for Ty UK as self-employed sales agents before 1 June 1997 under contracts which could be terminated on notice. With effect from 1 June 1997 these claimants entered into sales agency agreements with SCS. These agreements were superseded by ones which took effect from 1 June 1998. Each of the claimants entered into one or other or both of these agreements which were on similar terms. The earlier agreement under the heading "Termination" provided that it would "remain in effect until" SCS ceased to be the sole agent; the later "until 31 May 2000".
10. 6.The sales agency agreements recited that SCS was the sole authorised agent of Ty Europe for the sale of Ty products and that those products would be the items supplied to SCS by Ty Europe from time to time. The agent was to make every reasonable effort to promote and sell the products in his territory on terms and conditions and at prices established by SCS and be paid commission (usually 10%).
11. 7.The judge found that when SCS came on the scene the sales agents were led to believe that it was simply a sales administration company. It was run initially from Mr Swallow's garage and called itself the Ty Sales Office. Mr Swallow described himself as Ty Europe's Sales Manager. Very little changed on the ground except that the order forms which the

sales agents used were on Ty Europe as opposed to Ty UK paper and their commission was paid by SCS. The sales agents said (and the retailers to whom they sold believed) that they were now representing Ty Europe. The products were delivered directly by Ty Europe to the retailers who paid Ty Europe for them. Most queries relating to the sales were dealt with directly between the sales agents and Ty Europe.

12. 8.The sales agents, including all but one of the claimants, were offered employment as sales representatives by Ty Europe from 1 June 2000, but the claimants declined such offers and started these proceedings against Ty Europe (the appellant) for compensation under the Regulations the following year.
13. 9.The preliminary issues which the judge tried were:
14. 1.In respect of the claimants' agencies (the subject of these proceedings) was the defendant the claimants' "principal" and were the claimants the defendant's agents within the meaning of the Regulations ("the sub-agency question").
15. 2.Given that the agency agreements between the parties were entered into for a period of two years and that they expired on 31 May 2000, is compensation payable in principle pursuant to Regulation 17 of the Regulations where the agents' agreements pursuant to their express terms expired automatically at the end of that two year period ("the effluxion of time question").
16. 10.Before the judge the appellant submitted that the claimants were not its commercial agents because their authority only came from SCS. Authority for the purpose of the Regulations could only be derived from an agency contract with the principal and there was no such contract. In rejecting these arguments the judge said:

"26.A statement that someone has authority to act for another describes, therefore, a factual state of affairs which results from a variety of legal relationships or from factual circumstances. Authority is often, but not always, derived from a contract. It is not necessary for an agent to have authority to act for a principal that there is a contract directly between that agent and the principal. Authority can be delegated to a sub-agent by an agent of the principal with the express or implied consent of the principal. Such assent may be implied where it is reasonable to presume from the facts that the principal and the agent intended that the agent should have authority to delegate his authority to a sub-agent.

27.I find as a fact that the Claimants had continuing authority to negotiate the sale of Ty products on behalf of Ty Europe. Whether they derived that continuing authority from the acts of Ty Europe accepting the orders the Claimants negotiated with the retailers or that authority was delegated to them by SCS does not matter for the purposes of Regulation 2(1) which defines 'agent' and 'principal' by reference to the existence of a state of affairs, namely that the agent has 'continuing authority'."
17. The judge then went on to consider whether other provisions in the Regulations gave the words "continuing authority" some special meaning and concluded that they did not.
18. 11.On the effluxion of time question the judge followed decisions of Judge Alton in the Birmingham Mercantile Court (Whitehead v Jenks & Cattell Engineering Ltd unreported 2 February 2001) and Lord McEwan in the Court of Session (Frape v Emreco International Ltd [2002] EuLR 10) and held that the word "termination" as it appears in Regulation 17

covers not simply termination by deliberate act of a party but also termination by the expiry of a fixed term.

19. 12. Both parties have relied on a number of the provisions of the Regulations to support their arguments so I shall start by summarising them. They implemented Directive 86/653 which recites that its purpose is to harmonise the law concerning commercial representation within the community and to afford protection to commercial agents vis-à-vis their principals. The recitals add somewhat delphically:

"Whereas in this regard the legal relationship between commercial agent and principal must be given priority."

20. The English language version of the Directive is substantially reproduced in the Regulations – so-called "copy out" implementation. Nothing turns on such differences as there are and so I shall only refer to the Regulations.

21. 13. Part I contains the definition of commercial agent to which I have already referred. Part II is headed "Rights and Obligations". The agent is to look after the interests of his principal and act in good faith. In particular he is to conclude the transactions he is instructed to take care of and communicate all necessary information to and comply with reasonable instructions given by his principal (Regulation 3). The principal must also act in good faith. In particular he must provide the agent with the necessary documentation relating to the goods and obtain for him information necessary for the performance of the agency contract. He is to inform the agent of his acceptance, refusal or non-execution of any transaction which the agent has procured for him (Regulation 4).

22. 14. Part III deals with remuneration. In the absence of any agreement between the parties the agent is entitled to customary or reasonable remuneration (Regulation 6). Rights to commission during the agency contract and after it has been terminated and when it should be paid are dealt with by Regulations 7 to 11. Regulation 12 requires the principal to supply the agent with commission statements and gives the agent the right to demand information from the principal and in particular an extract from his books in order to check what is due.

23. 15. Part IV is headed "Conclusion and Termination of the Agency Contract". Regulation 13 gives each party the right to receive from the other a signed written document setting out the terms of the agency contract, including any terms subsequently agreed. An agency contract for a fixed period which continues to be performed by both parties after this period has expired is deemed to be converted into a contract for an indefinite period (Regulation 14). Notice periods entitling either party to determine an agency contract for an indefinite period are specified in Regulation 15.

24. 16. I need to set out Regulation 17 in full. It says:

"Entitlement of commercial agent to indemnity or compensation on termination of agency contract

(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.

(2) Except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.

(3) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to an indemnity if and to the extent that –

(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

(4) The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.

(5) The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.

(6) Subject to paragraph (9) and to regulation 18 below, 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.

(7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which –

(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or

(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

(8) Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.

(9) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement."

25. 17. Regulation 18 says that compensation is not payable to the agent where the principal has terminated the agency contract because of default by the agent justifying summary termination, where the agent has himself terminated the agency contract unless such termination is justified by the principal's conduct or age, infirmity or illness of the agent so that he cannot reasonably be required to continue his activities, or where the agent has assigned his rights and duties under the contract to another person with the agreement of the principal.

26. 18.Many of the provisions of the Regulations cannot be waived or derogated from. They do not apply to persons whose activities as commercial agents are to be considered secondary. The schedule to the Regulations seeks to define who such persons are by a double negative. Put simply, if the primary purpose of the arrangement between the agent and his principal is for the agent to develop a market in goods from his own resources his activities will not be considered secondary. Indications that the activities are not secondary include the fact that the principal is the manufacturer, importer or distributor of the goods, the goods are identified with the principal in the market and are not normally available in that market other than by means of an agent and that the agent devotes substantially the whole of his time to representative activities.
27. The sub–agency question
28. 19.The starting point must be the definition of commercial agent in Regulation 2(1). It is common ground that the claimants were "self–employed intermediaries" who negotiated "the sale of goods on behalf of another person". On the judge's finding of fact (against which there is no appeal) they did so with the appellant's authority, which was obviously continuing. It seems to me therefore that the claimants were commercial agents of the appellant as defined by this part of the Regulations. This conclusion however is only the starting point. The further question is whether there has to be a contract between the commercial agent and the principal before the substantive provisions of the Regulations apply.
29. 20.The appellant's submissions are simple. The Regulations as a whole make it clear that a contract is required by their repeated reference to "the agency contract" which in many of the provisions can only mean a contract between the commercial agent and his principal. There was admittedly no agency contract between the claimants and the appellant. Their contracts were with SCS who was the appellant's only commercial agent. The fact that SCS appointed its own agents to perform its selling obligations could not affect the appellant's position and was none of its business. SCS could have engaged the claimants under contracts of employment.
30. 21.Mr Hand QC, for the claimants, contends that no such contract is required. Regulation 2(1) defines the scope of the Regulations and says nothing about contract. Many of the Regulations are premised on the assumption that there will be such contract and some of them obviously cannot apply to a principal and sub–agent relationship, but others can and should apply, particularly Regulation 17. This can be achieved by a purposive construction so as to afford sub–agents such as the claimants with the protection which the Directive was designed to confer and which otherwise they will be denied. Thus in Regulation 17 the words "the agency contract" should be construed to include a sub–agency contract such as the claimants' contracts with SCS. Although this means that these words would have different meanings in different Regulations this was justified in order to achieve their purpose.
31. 22.There is no UK or European case which sheds any real light on how this question should be answered. It should be noted however that in each of the reported cases which we have been shown involving the Regulations there has in fact been a contract between the commercial agent and the principal.
32. 23.I think the conclusion that such a contract is required is inescapable. The substantial rights and obligations laid down in the Regulations were only intended for those in a contractual relationship. The Regulations assume the necessity for a contract. The words "the agency contract" cannot have been intended to have different meanings depending

upon their context. Although they are not defined they must have the same meaning throughout. In some cases they must and can only refer to a contract between the commercial agent and his principal. The most striking example of this is Regulation 13 where the commercial agent and the principal are given mutual rights to receive "a signed written document setting out the terms of the agency contract". A sub-agent, for example, cannot be required to comply with the instructions of the principal (Regulation 3(2)(c)). The agent's rights to documentation and information (Regulation 4) and to see extracts from the principal's books (Regulation 12) are what one would expect in a contract between agent and principal but not in a relationship at one remove such as that of principal and sub-agent. If the Regulations had been intended to cover such a relationship they could have said so, but they do not.

33. 24.The definition of commercial agent in Regulation 2(1) does not refer to an agency contract but says nothing to suggest that a contract is not required. One would expect there to be a contract where one party confers authority on an agent to act on his behalf in a commercial context.
34. 25.If any sub-agent selling goods on behalf of the manufacturer, importer or distributor was its commercial agent there would inevitably be chaos and confusion. How would the principal know who all his commercial agents were? Would sub sub-agents also be included? How would he know who to remunerate under Part III of the Regulations? Might he be liable to pay commission or compensation both to the agent and the sub-agent? If the principal's relationship is governed by the contract which he has with his agent, supplemented as necessary by the Regulations, no such uncertainties arise.
35. 26.In the present case there were good commercial reasons for the introduction of SCS into the contractual chain. As its commercial agent I cannot see why SCS did not have a Regulation 17 claim for compensation against the appellant based on the claimants' and its success in promoting and selling Ty products, subject to the effluxion of time question. The claimants were probably not SCS's commercial agents because they were not selling on its behalf, but I can see no reason why as SCS's agents they should not have been able to establish a stake in SCS's compensation claim. Whether they could have compelled SCS to make such a claim is more problematical, but a combination of commercial pressure and resourceful lawyers might have done the trick. So I see no need to try and give the Regulations a meaning they will not bear in order to confer a right to compensation on sub-agents such as the claimants.
36. 27.If in order to avoid liability to its commercial agents under the Regulations a principal sets up a sham structure the courts would be entitled to ignore it, applying well-known general principles, but it is not suggested that this is such a case.
37. 28.Mr Hand submitted that at least there was some doubt about the scope of the Regulations and so we should refer the question to the ECJ. I do not think this is justified. The Regulations are clear.
38. 29.It follows from what I have said that I think the judge's answer to this question was wrong. Once he had concluded that the claimants were commercial agents within the definition in Regulation 2(1) he only looked at the rest of the Regulations to see if they gave any different meaning to the words "continuing authority". He did not therefore really give any detailed consideration to the real point at issue.
39. The effluxion of time question
40. 30.In view of my answer to the first question it is unnecessary to consider this question for

the purposes of this appeal. Nevertheless, as the point has been argued and this court has not considered it before, I will deal with it shortly.

41. 31. Since the judge's decision in this case and the two cases on which he relied there is now a fourth case in which courts in the UK have decided that Regulation 17 applies to agreements which come to an end by effluxion of time. The fourth case is Tigana Ltd v Decoro [2003] EWHC 23 (QB), [2003] EuLR 189, a decision of Davis J. He dealt with this point between paragraphs 71 and 83 of his judgment. He said that all the intrinsic indications were that "termination" in Regulation 17 meant no more than "come to an end". A purposive construction reinforced this view since there could be no policy or purpose for excluding contracts which expire by effluxion of time in Regulations designed to protect commercial agents.
42. 32. I find Davis J's reasons compelling. I think the word "termination" is used in an intransitive sense meaning no more than "comes to an end". If it had been intended to exclude agency contract which comes to an end by effluxion of time, Regulation 18 could have said so. The inclusion of termination on the grounds of age, infirmity etc makes clear the sense in which the word is used. There is no reason why agents whose contracts which come to an end by effluxion of time should not be afforded the protection of the Regulations.
43. 33. Faced with the rising tide of authority against him Mr Quigley, for the appellant, did not seriously argue the contrary, although he suggested that the decisions could be explained on the basis that in each case the parties had an expectation that the agency contracts would be renewed. This was not the stated reason for any of these decisions and the concession that Regulation 17 applies to cases where there is such an expectation undermines any argument that it does not apply to a fixed term contract which comes to an end.
44. 34. Be that as it may, Mr Quigley focused his argument before us on the proposition that in principle compensation is not payable in such a case (see how this question was framed for the judge). He argued that Regulation 17 provides compensation "for damage". Damage is not defined but is deemed to occur in circumstances which deprive the agent of the commission which proper performance of the contract would have yielded. Where the principal has paid all the commission due to his agent under a fixed term contract it has been properly performed and so the agent has been deprived of nothing.
45. 35. Interesting though these submissions are, I am not persuaded that an agent on a single fixed term contract which comes to an end will be denied compensation as a matter of principle. The compensation provisions derive from proprietary remedies developed in some civil law jurisdictions. Compensation may be payable not only on the basis that the agent has suffered loss, but on the basis that his efforts have provided benefit to the principal (see the latter part of Regulation 17(7)(a)). Furthermore Mr Quigley conceded that a claim based on failure to amortize costs (Regulation 17(7)(b)) would not be affected by his arguments.
46. 36. So I think the judge answered this question correctly and, whilst an agent on a single fixed term contract which comes to an end may not in fact recover compensation, there is no reason in principle why he should not do so.
47. Conclusion
48. 37. I would allow this appeal on the sub-agency question, which I would answer: No. This makes it unnecessary to decide the effluxion of time question, but I think the judge answered it correctly.

49. MR JUSTICE LIGHTMAN:

50. 38.I agree with the judgment of Tuckey LJ. I venture to add a few words of my own in view of the importance of the two issues of construction of the Council Directive 86/653/EEC of the 18th December 1986 on the coordination of the laws of Member States relating to self-employed commercial agents ("the Directive") and the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") which implements the Directive in this country. The two issues are whether the provisions of the Directive (as implemented in the Regulations) provide protection for sub-agents as well as the commercial agents of a distributor of goods and whether in principle Article 17 of the Directive and Regulation 17 of the Regulations are apt to provide for payment of compensation where the agency agreement between the principal and the commercial agent expired automatically at the end of a fixed period.
51. 39.39.The Preamble and Article 1.1 of the Directive state clearly that the purpose of the Directive is to harmonise the protection available to commercial agents vis-à-vis their principals. It does so by requiring the adoption of a uniform code of law throughout the European Union regulating the terms of agency agreements between commercial agents and their principals and accordingly their respective rights and duties.
52. 40.The Directive begins in Article 1.2 by defining the term "commercial agent" for the purposes of the Directive. The term "commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person. Article 2.1 provides that the Directive shall not apply to commercial agents whose activities are unpaid. (These provisions are carried over into national law by Regulation 2.1 and 2.2). Implicit in these provisions is the requirement that to fall within the provisions of the Directive a commercial agent must be a paid agent of the principal. Article 2.2 authorises Member States to provide that the Directive shall not apply to persons whose activities as commercial agents are considered secondary by the law of that Member State. Regulation 2(3) states that the provisions of the schedule to the Regulations shall have effect for the purpose of determining the persons whose activities as commercial agents are to be considered secondary. The schedule provides that it is a characteristic of the activities of a commercial agent that the transactions he procures will lead to further transactions in the future.
53. 41.Article 3 (reflected in Regulation 3) sets out the duties of a commercial agent owed to his principal and Article 4 (reflected in Regulation 4) sets out the duties owed by a principal to his commercial agent. Article 5 (reflected in Regulation 5) provides that the parties cannot by agreement derogate from those duties. Article 6 (reflected in Regulation 6) provides (in the absence of any agreement on this matter between the parties) for payment of remuneration by the principal to his commercial agent. When it is agreed that the commercial agent is to be remunerated in whole or in part by commission, Article 7 (reflected in Regulation 7) makes provision for payment of commission in respect of transactions concluded during the period covered by the agency contract and Article 8 (reflected in Regulation 8) makes provision for payment of commission in respect of transactions concluded after the agency contract has terminated. Article 13 (reflected in Regulation 13) provides that both the principal and the commercial agent are entitled to receive from each other on request a signed written document setting out the terms of the agency contract. Article 17 requires Member States to ensure that the commercial agent after termination of the agency contract is indemnified or compensated for damage in accordance with the Article. Regulations 17.6 and 17.7 (giving effect to this requirement) provide as follows:

"(6)Subject to paragraph (9) and to regulation 18 below, 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.

(7)For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which-

(a)deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or

(b)have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

42.Article 18 (reflected in Regulation 18) provides as follows:

"The [indemnity or] compensation referred to in regulation 17 above shall not be payable to the commercial agent where-

(a)the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to regulation 16 above; or

(b)the commercial agent has himself terminated the agency contract, unless such termination is justified-

(i)by circumstances attributable to the principal, or

(ii)on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or ..."

54. 43.Article 20.3 (reflected in Regulation 20) provides that a restraint of trade clause shall be valid for not more than two years after termination of the agency contract.

55. 44.Turning to the first issue, it is quite clear that to obtain the benefit of the protection of the Directive (as I have already pointed out) the commercial agent must be entitled to remuneration for his services from the principal. For this purpose there must be a direct legal, indeed contractual or quasi-contractual, relationship between the principal and the commercial agent. This is reflected and fleshed out in the detailed provisions of the Directive relating to the terms of the agency contract between them.

56. 45.A sub-agent in whose case such a relationship is lacking cannot qualify for protection merely because he is self-employed and has authority delegated to him by the principal's agent to buy or sell goods on behalf of the principal. The Directive is concerned only with the legal relationship between the principal and his commercial agent. The legal relationship between the commercial agent and sub-agent is quite separate and distinct. If a sub-agent is to be given rights and protection against the principal, that is a matter for national legislation or for agreement between the three parties concerned. The problems in the way of conferment of such rights would be substantial, for it would expose the principal to double liability both to his commercial agent and to any (often unknown) sub-agents. It is

sufficient to say that the Directive in no way seeks to cover this ground.

57. 46. Turning to the second issue, in my judgment the answer given by Davis J in *Tigana Ltd v. Decoro* [2003] EuLR 189 is compelling. In my judgment Article 17 and Regulation 17 are apt to provide for payment of compensation where the agency agreement between the principal and the commercial agent expired automatically at the end of a fixed period because: (1) the characteristic of a commercial agent entitled to the protection of the Directive is (as reflected in the schedule to the Regulations) that his services rendered during the period of his agency agreement will continue to produce profits for his principal after his agency agreement has terminated; and (2) it is the purpose of the Directive (and in particular Article 17) to secure that, unless (as provided in Article 18) the principal has terminated the agency agreement because of default by the commercial agent or the agent has himself terminated the agency agreement without justification, the commercial agent shall have a share of these post-termination profits. The word "terminate" in the context of the Directive is apt to include the situation where an agency contract expires by effluxion of time. It is sufficient for this purpose to refer to Article 20.2 which provides that a restraint of trade clause shall be valid for not more than two years after termination of the agency contract. The term "termination" in this Article must plainly include expiration by effluxion of time. This conclusion may place a premium on a principal, when sufficient grounds exist, terminating an agency contract on grounds of default as provided for in Article 18 prior to expiration of the agreement by effluxion of time rather than allowing the agency contract to run its full course.
58. 47. I would therefore allow the appeal.
59. LORD JUSTICE WARD:
60. 48. Each of these nine claimants asserts that he or she is a commercial agent and as such is entitled "after termination of the agency contract" to make a substantial claim for compensation "for damage" under Regulation 17 of the Commercial Agents (Council Directive) Regulations 1993, which implement Council Directive 86/653/EEC of 18 December 1986.
61. 49. It is clearly a matter of great importance to the parties and especially, perhaps, to the claimants. To succeed it seems to me that the claimants must at least establish, first, that they are commercial agents; secondly, that there has been a termination of the agency contract, and thirdly, that they have suffered damage as a result of the termination of their relations with their principal.
62. 50. The first question is, therefore, who is a commercial agent? Article 2(1) of the Directive defines "commercial agent" as follows:
- "... 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 ..."
63. 51. In my judgment that question ought to be answered more by an analysis of the facts of the case than of principles of English law of agency, which may or may not appear to be abstruse to those schooled in the civil law. On the facts as found by the judge, from which there is no appeal, these claimants undoubtedly did have "continuing authority to negotiate the sale" of the goods on behalf of Ty Europe Limited. In English law parlance, they did not have actual authority, which is "a legal relationship between principal and agent created by a consensual agreement to which they alone are parties" (per Freeman & Lockyer v

Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 at p.502). They did, however, have apparent or ostensible authority, which is the "authority of an agent as it appears to others" (per Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 at p.583). The important fact, which is common ground, is that the claimants have no contractual relationship with the defendant. Before passing from the definition, it should be observed that it also serves to define "the principal", because the person on whose behalf the sale is negotiated is called the "principal" and the use of quotation marks and the parenthesis in the Directive show that the words are intended to be definitive. So the principal for this purpose is Ty Europe Limited.

64. 52.The second question is this: has there been a termination of the agency contract? That breaks down into two sub-issues: first, has there been a termination; and secondly, is it a termination of an agency contract?
65. 53.As to the first part, I can add little to the judgments of my Lords. I agree that termination includes termination by effluxion of time.
66. 54.The crucial question upon which this claim depends is whether the ending of the trading relationship which may exist between the claimants and the defendant is the termination of an agency contract. If compensation is to flow from a termination of an agency contract, one would naturally expect that the contract giving rise to that entitlement to compensation is a contract between whomsoever claims the compensation and whomsoever must pay it. So why should it be otherwise here?
67. 55.Having listened carefully to the cogent submissions advanced both by Mr John Hand QC and by Mr Oliver Segal, there seem to me to be three main pointers away from that natural construction to be given to the phrase "agency contract". The first is that, being a European Directive, the words must be purposively construed. Here the undoubted purpose is to protect the commercial agent and to give him a raft of rights and remedies. I accept that. The second argument (which perhaps I put in my own words) is that, because there are different chapters in the Directive dealing with different aspects, the Articles can be, and therefore should be, separately read and must be applied purposively if the circumstances embrace them. So, for example, in Articles 3 and 4 reference to "his principal" and "his commercial agent" confine one to those bound together by their legal relationship to each other: that is, the agent to the sub-agent, but not the sub-agent to "the principal". Article 6 fixes the commercial agent's remuneration under "his agency contract", which can only mean, I would have thought in this case, the claimants' contracts with SCS. Other Articles refer to "the agency contract", such as Article 13. Whilst that is clearly not applicable as between the principal and the sub-agent, it can nonetheless bring important benefits to the commercial agent who is a sub-agent vis-à-vis the agent to whom he is contractually bound. Thus it is argued that it is not necessary to give the phrase "the agency contract" the same meaning throughout the Directive. It is not a case of apples improperly turning into pears: it is rather a case that, in the wardrobe of rights and remedies, if the cap fits, the commercial agent may wear it.
68. 56.The third point made by Mr Segal was that it is not unusual for parties to one contract to be given by virtue of that contract rights over as against third parties further down a contractual chain:for example, the consumer's rights against the manufacturer under consumer credit legislation. There it is an express provision. Here it will have to be implied.
69. 57.There is, I suppose, a grain of support from this argument which may be found in Article 17 itself. Whereas the Member States have to take measures necessary to ensure that the commercial agent is compensated "after termination of the agency contract", the

compensation provided for by Article 17(3) (which is translated into Regulation 17(6) of the Regulations) is for "the damage he suffers as a result of the termination of his relations with his principal". The claimants' relations with Ty Europe end because the agency contract with SCS has terminated. But once again it may be said that the two relationships – the one factual, as between the claimants and the defendant, and the other contractual, as between the sub-agents and the agent – can live together.

70. 58.I do not dismiss those arguments as fanciful. But that does not mean that I find they are correct. I have given this matter anxious thought, but I conclude, like my Lords, that a coherent construction must be given to the Directive, for otherwise chaos and confusion does prevail. The underlying theme throughout is that the Directive and Regulations apply only where the commercial agent is contractually bound to the principal. If sub-agents were intended to have been brought under their aegis, the Directive and Regulations would have made explicit provision for that.
71. 59.So I conclude that the claimants will fail to bring themselves within the Regulation. For that reason I need not address the third question which arises in the case.
72. 60.It follows that I, like my Lords, am bound to allow the appeal. Although the questions framed in the preliminary issue are not exactly questions which would have been appropriate to deal with the issues as we have addressed them, I agree that the appeal should be allowed and the answer "No" given to the first question, which makes it unnecessary to consider the second question at all.
73. Order:appeal allowed and action dismissed; no order for costs here and below; interim payment below of £60,000 to be repaid within six weeks; permission to appeal to the House of Lords refused.