

Neutral Citation Number: [2009] EWHC 2857 (Comm)

Case No: 2009 Folio 379

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MERCANTILE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2009

Before: Mr Justice Simon

Between:

Claramoda Limited

Claimant

and

**Zoomphase Limited
(trading as Jenny Packham)**

Defendant

Mr Oliver Segal (instructed by **Elborne Mitchell**) for the **Claimant**
Mr Philip Moser (instructed by **Be.**) for the **Defendant**

Hearing dates: 2-3 November 2009

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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MR JUSTICE SIMON

Mr Justice Simon:

Introduction

1. This is the trial of a preliminary issue ordered by HH Judge Mackie QC on 5 May 2009.
2. The Claimant is an agency representing a number of producers of fashion garments in sales to shops, boutiques and department stores. The Defendant was one of those clients. It is a manufacturer of women's couture clothing under the Jenny Packham Couture and Jenny London brands. From about July 1998 the Claimant was the Defendant's exclusive agent in the United Kingdom and the Republic of Ireland for the sale of its mainline evening-wear collection.
3. It is common ground that the agency relationship continued until sometime between the end of October 2006 and the second week in January 2007. The precise date is crucial because the Claimant has made a claim for compensation under the Commercial Agents (Council Directive) Regulations 1993 arising from the termination of the agency.
4. Regulation 17(9) contains an important limitation on the right to obtain compensation:

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.
5. On 27 November 2007 the Claimants wrote a letter notifying the Defendant that it intended to pursue an entitlement. It follows then that, if the agency contract terminated before 27 November 2006, the Claimant has lost its entitlement to compensation.
6. The Defendant contends that the agency was terminated no later than 31 October 2006; and that the claim is therefore time-barred. The Claimant argues that it ended some-time in the first or second week of January 2007; and that consequently, its claim was made in time.
7. The issue for determination has been expressed in the following terms

What was the effective termination date of the agency; and did the Claimant give notice of its intention to pursue a claim for compensation within 12 months of that termination date in accordance with Regulation 17(9) of the Commercial Agents (Council Directive) Regulations 1993?

The Background

8. Before considering the facts which are material to the issue it is necessary to refer briefly to the interpretation provision in Regulation 2 of the 1993 Regulations. Subsection (1) is in these terms

In these Regulations -

"commercial agent" means 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; ...

9. Regulation 3 sets out the duties of the commercial agent

(1) In performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith

(2) In particular the commercial agent must –

(a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;

(b) communicate to his principal all the necessary information available to him;

(c) comply with reasonable instructions given by his principal.

10. The fashion business revolves around two identifiable seasons: the Autumn/Winter season and the Spring/Summer season. The commercial activity in relation to these two seasons takes place well in advance. So far as is material to the present case: the Autumn/Winter collections are sold to the trade from about mid-January until the end of March; and orders for the Spring/Summer main collections are taken from about the end of July until mid-October. Delivery of the Spring/Summer season collections are made between mid February and mid April, with earlier deliveries when this is possible. There is also a pre-season collection where orders are taken earlier, and a couture collection for which orders are taken later in the selling season.
11. The Spring/Summer 2007 pre-season collection was sold up to the end of August 2006 with an anticipated delivery period between the end of October and the end of November 2006.
12. The Claimant has its own permanent sale showrooms where it shows the various collections which it represents. Nayla Moussalli is one of the Directors. She is responsible for the sales and representation of the fashion houses to customers. Her husband, Samir Moussalli, is another Director. He is mainly responsible for the financial aspects of the Claimant's business. At the material time Lynn Sherriff was employed as the Claimant's showroom manager.
13. The Defendant's business also had its own staff and is managed by its CEO, Mathew Anderson. From 2 January 2007, Rachel Foley was engaged by the Defendants as its Sales Manager, having been recruited on 13 December 2006.

Outline chronology

14. It is common ground that there was a meeting between Mr Anderson and Mrs Moussalli, and a later telephone call between Mr Anderson and Mr Moussalli, on 5 December 2005 in which the termination of the agency was discussed. Mr Anderson told the Claimant that the Defendants were looking to bring the sale of the collections 'in-house', and were looking for premises from which this could be done. Although there is a dispute as to what precisely was said, it is common ground that the Claimant understood that it was very likely (if not certain) that the last season in which it would be acting as agent would be the Spring/Summer 2007 season.
15. There is an issue about two further telephone calls. The first in February 2006, in which according to Mr Moussalli he rang Mr Anderson in order to find out about the Defendant's progress in finding a suitable shop to sell the collection in-house. The second was a call which, the Claimant contends, was made by Mr Anderson in November 2006.
16. Mr Moussalli's evidence about the second call is contained in §16 of his witness statement.

In about mid November 2006, after the main selling period had been completed, Mr Anderson telephoned me. He informed me that he was not sure, at that time, whether the Defendant would be ready to start representing its collection in house for the forthcoming Autumn/Winter 07/08 season. He said that the shop was far from being ready, that the Defendant had not yet secured a temporary showroom and that it did not have the sales personnel in place ... Mr Anderson asked me whether [the Claimant] would be prepared to afford the Defendant the option of continuing to act as its agent for the next season if it had not finalised all the necessary arrangements. Mr Anderson said he would let me know in January 2007 whether [the Claimant] would be needed to continue as agent.

According to the evidence of Mr Moussalli, Mrs Moussalli and Ms Sherriff, the three of them then discussed the Defendant's proposal (as recounted by Mr Moussalli) and, without great enthusiasm, agreed. Mr Anderson has always denied that such a conversation ever took place.

17. The main collection for the Spring/Summer 2007 season was sold up to the end of October 2006, with further commercial activity between the parties from this time until the second week of January 2007. The nature of this activity, and the documents which it generated, was the subject of close analysis during the course of the trial; and it will be necessary to consider at least some of the material later in the Judgment.
18. According to Mr Moussalli he made a further telephone call to Mr Anderson in the second week of January 2007 and asked whether the Defendant needed the Claimant to act as its agent for the Autumn/Winter season 2007/2008. According to his evidence Mr Anderson 'confirmed' that the Defendant would be taking the collection in-house for the new season. Mr Anderson recalled Mr Moussalli telephoning in January, but could not remember what they had talked about.

19. At some time after 23 January 2007 Ms Foley wrote on behalf of the Defendant to its customers informing them that that the collections would be represented in house from the Autumn/Winter season 2007/2008 onwards. The new collection was to be shown at an interim showroom at West Halkin Street in Knightsbridge; and a permanent showroom would be opened in Mayfair for the following season.
20. On 27 November 2007 Hextalls LLP (solicitors then representing the Claimant) wrote giving notice of the claim.

This letter is to give you formal written notice of our client's intention to bring a claim against you for compensation under Regulation 17 of the Commercial Agents (EC Directive) Regulations 1994, following termination of our client's commercial agency by you in or about January 2007.

21. On 3 December Mr Anderson replied on behalf of the Defendant.

Thank you for your letter dated 27/11/07 in respect of your client's intention to bring a claim for compensation. Having enjoyed a good working relationship with Nayla and Samir, I do hope that they will appreciate I have always conducted my business in a straightforward and direct way with them. Having received your letter without recourse to a name of your colleague on the document eleven months after our work with Claramoda terminated, I would like to invite Nayla and Samir to sit down with me and Jenny soonest and listen to what they have in mind in respect of regulation 17.

22. The Claimant relies on the reference to their letter being sent 'eleven months after' work terminated as supportive of their contention that agency continued after the end of October 2006.

The parties' submissions in outline

23. Mr Segal, for the Claimant, submitted that, although the primary agency duties may have concluded at the end of the selling season in October 2006, there were secondary duties which continued until the start of the following season; and that this state of affairs was appropriately reflected in the terms of the Defendant's letter of 23 January 2007 to its customers.
24. For the Defendant, Mr Moser submitted that the Claimant's continuing authority as agent terminated when the main collection orders were finalised on or before 31 October 2006. He accepted that commercial activity continued after this date, but submitted that this was not such as to cast doubt on the fact that termination occurred earlier

Discussion

25. Before coming to my conclusions there are 4 preliminary points to be noted.

26. First, one of the unusual features of the present dispute is the almost complete lack of written contractual material of the type which is very often seen in disputes under the Regulations. This is not a case in which the extent, nature and duration of the contractual relationship can be identified from written documents which have contractual effect. There was no written agreement relating to the commencement of the relationship and no termination notice ending it.
27. In these circumstances, the surrounding circumstances, the oral evidence and the conduct of the parties evidenced by the documents has played a more important part than it does in other disputes under the Regulations, see for example the observations of Rix LJ in *Mercantile International Group v Chuan Soon Huat Plc* [2002] EWCA Civ 288 at [30-31] and Longmore LJ in *Sagal (trading as Bunz UK) v Atelier Bunz GmbH* [2009] EWCA Civ 700 at [17].
28. Secondly, the nature of the Defendant's business involved commercial activity in relation to sales after the end of the main Spring/Summer collection selling season. In both 2006 and 2005 there are documents showing such activity: correspondence dealing with order confirmations and discrepancies in the documentation, repeat orders and/or increases in the number of pieces ordered, requests for promotional material, amendments to orders and requests from customers to buy from stock, and chasing for payment.
29. Thirdly, I accept the evidence of Mrs Moussalli that even with extensive use of email, much of this commercial activity was conducted by telephone, of which there is no documentary evidence.
30. Fourthly, one of the issues raised in the case was as to the length of the Spring/Summer 2007 season, since it was the Defendant's case that in December 2005 the agency was terminated by Mr Anderson as from the end of the Spring/Summer season. The Claimant's case was that the selling season continued until the start of the following selling season, which began in the middle/end of January 2007. The Defendant's case was that there was a distinct gap between the end of the selling season, which they submitted was not later than 31 October 2006, and the beginning of the next season which they submitted began towards the end of January. For reasons which I will come to it is not necessary to form a concluded view about this general question.
31. I turn then to the issues which do arise.
32. Although it was common ground that the Defendant gave oral notice of the termination of the agency at the end of the Spring/Summer season during the conversations in December 2005, I find that the date on which the termination of the agency would take effect was left vague. I do not accept that Mr Anderson said that the agency contract would terminate either 'before the Autumn/Winter 07/08 season' [as stated in §19 of his witness statement], nor after the Spring/Summer 20 07 collection had been sold [as suggested in §20 of his witness statement]; and I specifically reject his evidence, given in the course of cross-examination, that he said the agency would come to an end 'at the end of October'. This evidence was inconsistent with the Defendant's solicitor's letter of 11 April 2008 which described the contract as coming to an end at the completion of the 'selling cycle' in September 2006; and was evidence which was tailored to fit the Defendant's case at trial.

33. The reason why the date was left vague was because, although the Defendant plainly wished to bring the collection in-house and informed the Claimant about this plan, Mr Anderson did not wish (for sound commercial reasons) to preclude the possibility of continuing the agency for one more season if he was unable to get the showroom that he wanted and the staff that he needed.
34. Although it was not mentioned in the Letter before Action or in the Particulars of Claim, possibly because it was not thought relevant, I find that there was a telephone call from Mr Anderson to Mr Moussalli in November 2006. Mr Moussalli's evidence that he received such a call was clear; and Mrs Moussalli and Ms Sherriff both described the discussion which followed the call. It is inherently unlikely that all this was invented, and I am not prepared to accept Mr Anderson's denial at face value.
35. As already noted, taking the selling of the collection in house for the Autumn/Winter season depended on both a showroom and staff. It is clear that as late as November 2006 Mr Anderson had secured neither the showroom, nor an experienced manager to run it. Although he may have been confident of acquiring a lease of the shop in West Halkin Street, the premises were not finally secured and fitted out as a showroom until January 2007; and Ms Foley was not engaged as the Sales Manager until sometime in December. It would have made sound business sense in November 2006 for Mr Anderson to have at least explored the possibility of extending the agency with the Claimant. Although Mr Anderson gave evidence that, if he had been unable to secure a new showroom in time, he would have used the Defendant's showrooms in Gospel Oak, it would have been a last resort in the light of its distance from central London.
36. Mr Jason Broderick, then the evening-wear buyer for Harrods and a man who was well-regarded by both parties, may have been told by Mrs Moussalli in the Autumn of 2006 that the Defendant had terminated the agency; but I do not accept that he was told that the Claimant was winding down its activities on behalf of the Defendant, although this may have been an assumption he made. I am also satisfied that the Elie Saab brand which was suggested, during the course of the hearing, as a possible replacement for the Defendant was not considered to be so by the Claimant. I should also record parenthetically that Mr Broderick showed little enthusiasm at the possibility of visits by underground and bus to Gospel Oak in order to see the Defendant's main collections.
37. It is clear that the main selling of the Spring/Summer 07 collection had been completed by the middle of October 2006. However the issue on the Defendant's case is not when the selling was concluded but when, in the absence of a clear termination date, the Claimant's implicit authority to negotiate sales of the Defendant's dresses came to an end.
38. In *Parks v Esso Petroleum Co. Ltd* (2000) Eu LR 25, Morritt LJ offered guidance as to the meaning of the word 'negotiate' in the Regulation 2(1). At p.33H he made it clear that the concept of negotiation,

does not require a process of bargaining in the sense of invitation to treat, offer, counter-offer and finally acceptance, more colloquially known as a haggle.

It involves a more general concept of dealing with, managing, or conducting a sale.

39. With this point in mind, it is clear from the documents that the date by which the authority was implicitly withdrawn was a date after 31 October.
40. Although Mr Moser was right that (subject to one sale) no Agent's Order Forms were submitted by the Claimant after 25 October (508) and no Order Confirmations from the Defendant are dated after 30 October (542), there was plainly continuing commercial activity, demonstrating an authority to negotiate sales, after 31 October.
41. First, on 9 November (276) the Defendant sent an email response to the Claimant about a particular customer's request about the availability of 12 dresses. The response indicated that 4 designs were available.
42. Secondly, the Pre-season delivery for the Spring/Summer 2007 collection was made from 17 to 30 November 2006. It was common ground that the pre-season delivery gave rise to enquiries from customers about the possibility of amending their orders and that such enquiries were made to the Claimant who would deal with them. It was at this stage that the customer would see the goods as manufactured and might ask for a repeat order. On about 8 January 2007 the Claimant faxed a repeat order enquiry about a particular dress (model ND127, colour cyclamen, size 16). The Claimant was informed that the dress was not available from stock, but could be delivered by 31 March 2007. On 12 January 2007 the Claimant confirmed the order with the stipulation that it be delivered no later than 31 March. In due course, the garment was supplied and the customer was invoiced.
43. The importance of these particular transactions is not so much in whether sales were made; but as showing a continuing authority to negotiate which extended after 31 October.
44. I have also concluded that, although Regulation 2(1) defines the role of a commercial agent by reference to a continuing authority to negotiate, the agency contract does not necessarily terminate when the agent ceases to negotiate sales. For example, in the present cases, and as Mr Anderson acknowledged, during November 2006 the Claimant was involved in dealing with customer's concerns about their orders and confirming discrepancies in the paper-work. Examples of this are the email exchanges of 9 November and thereafter (275, 283), the fax of 3 November (584), the order confirmation of 9 November (486) and the passing-on of requests for promotional material on 23 November (288 and 298).
45. This reducing, but continuing, commercial activity was indistinguishable from the type of commercial activity which occurred during the previous Spring/Summer season 2006, reflected in the documents disclosed in the period September 2005 to January 2006.
46. It is not necessary definitively to establish the date on which agency terminated since the Defendant has not suggested any alternative date after 31 October. However in the light of the terms of the preliminary issue I shall do so.

47. In my judgment the effective termination date was in mid-January, shortly before the trade began preparations for the new season, and shortly before Ms Foley's letter to the Defendant's customers sent sometime after 23 January 2007.
48. In reaching these conclusions I have considered the terms of Mr Anderson's letter of 3 December 2007, in which he referred to the solicitor's letter of 27 November being received 'eleven months after our work with Claramoda terminated.' It seems to me that there is a danger in reading too much into this letter. It is sufficient to note that the reference to work with the Claimant having terminated 11 months before is not consistent with the Defendant's case that the agency terminated on 31 October 2006.
49. For these reasons I answer the preliminary issue as follows:
 - (1) The effective termination date was mid-January 2007, and it is unnecessary to be more precise on the facts of the present case; and therefore,
 - (2) The Claimant's notice contained in the letter of 27 November 2007 was given within 12 months of the termination date.