HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 32

on appeal from: [2006] EWCA Civ 63

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Lonsdale (t/a Lonsdale Agencies) (Appellant)
v.
Howard & Hallam Limited (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Neuberger of Abbotsbury

Counsel

Appellants:
Philip Moser
(Instructed by Morgan Cole, Oxford)

Respondents:
Oliver Segal
(Instructed by Harvey Ingram LLP, Leicester)

Interveners
Fergus Randolph
Ms Victoria Wakefield
(Instructed by APP Law on behalf of Winemakers' Federation of Australia)

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ON
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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with it, and for the reasons which he gives would dismiss the appeal and decline the appellant's request that a question be referred to the Court of Justice of the European Communities.

LORD HOFFMANN

My Lords,

2. Mr Graham Lonsdale is a commercial agent in the shoe trade. On behalf of his principals he travels around his territory with catalogues and samples, calling on retailers and attending exhibitions. In 1990 Howard & Hallam Ltd ("H & H"), shoe manufacturers of Leicester, appointed him to sell their Elmdale brand in south-east England. A few years later he was appointed by a German manufacturer to sell their Wendel brand in a slightly larger territory.

3. Wendel seems to have sold well and by 2000 accounted for two-thirds of Mr Lonsdale's business. Elmdale, on the other hand, was in terminal decline. Like many UK shoe manufacturers, H & H were unable to compete on style and price. Sales, and with them Mr Lonsdale's commission income, fell year by year. In 1997-1998 his

gross commission was almost £17,000 but by 2002-2003 it had fallen to £9,621. In 2003 H & H ceased trading and sold the goodwill of the Elmdale brand to a competitor. There were no express terms about the termination of his agency – indeed, there was no written agreement at all. The agency was therefore terminable by reasonable notice. H & H gave Mr Lonsdale six months' notice. This is agreed to have been reasonable. He has been paid the commission on the sales which he generated. So he has no further contractual entitlement.

4. Mr Lonsale has however a statutory entitlement to compensation under the Commercial Agents (Council Directive) Regulations 1993, which was made to give effect to 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. As the relevant regulations reproduce the language of the directive, it will be simpler to go straight to the directive. It contains a number of provisions about commercial agents but we are concerned only with article 17, which deals with the termination of the agency contract:

> Article 17
>
> 1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.
>
> 2.(a) The commercial agent shall be entitled to an indemnity if and to the extent that:
>
> - 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
>
> - 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. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;
>
> (b) The amount of the indemnity may 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;

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

3. The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,

- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

4. Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death.

5. The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

6. The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this Article, and shall if necessary submit to it proposals for amendments.

5. It will be noticed that although the purpose of the directive is said to be the coordination of the laws of the Member States relating to self-employed commercial agents, article 17 allows Member States to choose between two different rights, one or other of which must be accorded to a commercial agent on the termination of the agency. He must be given a right to either an indemnity in accordance with article 17(2) or compensation in accordance with article 17(3). The English words "indemnity" and "compensation" are not very illuminating in marking the distinction between these two rights. They are both ways of

dealing with the unfairness which it was thought might arise if the termination of the agency leaves the agent worse off and the principal better off than if the agency had continued. It appears that the right under article 17(2), which the draftsman has chosen to label "indemnity", is derived from German law and is now contained in section 89b of the *Handelsgesetzbuch*. The right to "compensation" under article 17(3) is derived from French law and is now contained in article 12 of the *Loi n° 91-593 du 25 juin 1991 relative aux rapports entre les agents commerciaux et leurs mandants.* The two systems can plainly lead to different results, so that, on this point at any rate, the extent of the coordination achieved by the directive is modest.

6. The United Kingdom chose both systems, in the sense that it allowed the parties to opt for an indemnity under article 17(2) but provided that in default of agreement the agent should be entitled to compensation under article 17(3): see regulation 17(2). In the present case the parties made no choice and Mr Lonsdale is therefore entitled to compensation under article 17(3).

7. The question in this appeal is how the compensation should be determined. But for this purpose it is necessary first to decide exactly what the agent should be compensated for. Only then can one proceed to consider how the compensation should be calculated.

8. On this first question the directive is explicit. The agent is entitled to be compensated for "the damage he suffers as a result of the termination of his relations with the principal." In other words, the agent is treated as having lost something of value as a result of the termination and is entitled to compensation for this loss.

9. As this part of the directive is based on French law, I think that one is entitled to look at French law for guidance, or confirmation, as to what it means. Article 12 of the French law says that the agent is entitled to "une indemnité compensatrice en réparation du préjudice subi". The French jurisprudence from which the terms of the article is derived appears to regard the agent as having had a share in the goodwill of the principal's business which he has helped to create. The relationship between principal and agent is treated as having existed for their common benefit. They have co-operated in building up the principal's business: the principal by providing a good product and the agent by his skill and effort in selling. The agent has thereby acquired a share in the goodwill, an asset which the principal retains after the termination of the

agency and for which the agent is therefore entitled to compensation: see *Saintier and Scholes*, Commercial Agents and the Law (2005) at pp 175-177.

10. This elegant theory explains why the French courts regard the agent as, in principle, entitled to compensation. It does not, however, identify exactly what he is entitled to compensation for. One possibility might have been to value the total goodwill of the principal's business and then to try to attribute some share to the agent. But this would in practice be a hopeless endeavour and the French courts have never tried to do it. Instead, they have settled upon compensating him for what he has lost by being deprived of his business. That is the "*préjudice subi*." The French case law makes it clear that this ordinarily involves placing a value upon the right to be an agent. That means, primarily, the right to future commissions "which proper performance of the agency contract would have procured him": see *Saintier and Scholes*, *op.cit*, pp. 187-188. In my opinion this is the right for which the directive requires the agent to be compensated.

11. Having thus determined that the agent is entitled to be compensated for being deprived of the benefit of the agency relationship, the next question is how that loss should be calculated. The value of the agency relationship lies in the prospect of earning commission, the agent's expectation that "proper performance of the agency contract" will provide him with a future income stream. It is this which must be valued.

12. Like any other exercise in valuation, this requires one to say what could reasonably have been obtained, at the date of termination, for the rights which the agent had been enjoying. For this purpose it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract. He must be assumed to have been able to take over the agency and (if I may be allowed the metaphor) stand in the shoes of the agent, even if, as a matter of contract, the agency was not assignable or there were in practice no dealings in such agencies: compare *Inland Revenue Commissioners v Crossman* [1937] AC 26. What has to be valued is the income stream which the agency would have generated.

13. On the other hand, as at present advised, I see no reason to make any other assumptions contrary to what was the position in the real

world at the date of termination. As one is placing a present value upon future income, one must discount future earnings by an appropriate rate of interest. If the agency was by its terms or in fact unassignable, it must be assumed, as I have said, that the hypothetical purchaser would have been entitled to take it over. But there is no basis for assuming that he would then have obtained an assignable asset: compare the *Crossman* case. Likewise, if the market for the products in which the agent dealt was rising or declining, this would have affected what a hypothetical purchaser would have been willing to give. He would have paid fewer years' purchase for a declining agency than for one in an expanding market. If the agent would have had to incur expense or do work in earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything.

14. Mr Philip Moser, who appeared for Mr Lonsdale, objected that this method of calculation was likely to produce less than he would have been awarded by a French court. And it does appear that it is common practice for French courts to value agencies at twice the average annual gross commission over the previous three years. Mr Moser said that in stipulating that agents should receive compensation under article 17(3), the directive was adopting the French practice as Community law. This, he said, was confirmed by the report on the application of article 17 (COM(96) 364 final) which the Commission, pursuant to article 17(6), had issued in 1996. It noted that a body of case law had developed in France concerning the level of compensation. By "judicial custom", this was fixed as two years' commission, which, they said "conforms with commercial practice". However, the courts retained a discretion to award less when "the agent's loss was in fact less." The report said that in France the directive had made no difference: "pre-existing jurisprudence has continued to be applied." In England, however, there had been difficulties of interpretation. There was, at that stage, no case law but "the parties in practice are attempting to apply common law principles". In particular, it was difficult to see how these principles would enable the courts to reach the figure of twice gross commission which was regularly awarded by French courts. The Commission said that there was "a need for clarification" of article 17. But nothing has been done about it.

15. Mr Moser invited your Lordships to treat the Commission as having indorsed the French method of calculating compensation under article 17(3) as the appropriate interpretation of that article as a Community instrument. It would follow that all Member States which adopt article 17(3) would be bound to treat twice gross commission as the normal compensation for termination of an agency, subject to

variation in exceptional cases in which the principal could prove that the actual loss was less or the agent could prove that it was more. If your Lordships did not accept this as the plain and obvious meaning of the directive, he submitted that the question should be referred to the Court of Justice.

16. My Lords, I do not accept this submission, to which I think there are at least three answers. First, the Commission report was not indorsing any method of calculation as a true reflection of Community law. That was not its function. The Commission was required by article 17(6) to report on the implementation of the Article, and, if necessary, to submit proposals for amendments. It reported on the basis of information supplied by Member States and noted that the UK position (so far as it could be ascertained in the absence of any judicial pronouncement) was different from the French. But there is no suggestion that either approach would fail to implement the directive.

17. Secondly, the provisions of article 17(3) which say what the agent is entitled to be compensated for are perfectly plain. It is the damage which he suffers as a result of the termination. The French domestic law, as I have pointed out, says exactly the same. Where French and English courts differ is in the method by which that damage is calculated. But the Court of Justice has made it clear that the method of calculation is a matter for each Member State to decide. In *Case C-465/04 Honeyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-02879 at paragraphs 34-36 the Court of Justice said:

> "34. … It must be observed that although the system established by article 17 of the Directive is mandatory and prescribes a framework…it does not give any detailed indications as regards the method of calculation of the indemnity for termination of contract.
>
> 35. The Court thus held that, within that framework, the Member States may exercise their discretion as to the choice of methods for calculating the indemnity [Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305 at paragraph 21]
>
> 36. Therefore … within the framework prescribed by article 17(2) of the Directive, the Member States enjoy a margin of discretion which they may exercise…"

18. Thirdly, it seems that commercial agencies in France operate in market conditions which are different from those prevailing in England. It would appear that in France agencies do change hands and that it is common for the premium charged on such a transaction to be twice the gross commission. Whether the judicial practice of estimating the value of the agency at twice gross commission is based upon this fact of French economic life or whether vendors of agency businesses are able to charge such a premium because the purchaser knows that he will be able to recover that amount, either from the next purchaser or from the principal on termination of the agency, is unclear. *Saintier and Scholes, op.cit,* at p. 187 describe it as a "chicken-and-egg process". There does seem to be evidence that some principals demand payment of an estimated twice gross commission in return for the grant of a commercial agency (even if they have to lend the agent the money) because they know that they will have to return this amount to the agent on termination. At any rate, whatever the origins of the practice, it would appear that twice gross commission is often the real value of an agency in France because that is what you could sell it for in the market. As the Commission significantly remarked, the French system "conforms with commercial practice". There is no such market in England. It would therefore appear that the difference between French and English practice exists not because their respective courts are applying different rules of law but because they are operating in different markets.

19. Mr Moser said that the adoption of anything less favourable to commercial agents than the French method of calculation would not give effect to the purpose of the directive, which is to protect the interests of the commercial agent. No doubt this is one of its purposes: in *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, 660 Staughton LJ said, with more than a touch of irony, that the directive appeared to be based upon a belief that "commercial agents are a downtrodden race, and need and should be afforded protection against their principals." But these are generalities which do not help one to decide what protection is sufficient to give effect to the policy of the directive. One may however obtain a useful cross-check by considering what an agent could obtain under a system which provided him with an indemnity, since there is no doubt that this too would satisfy the policy of the directive.

20. It is a condition of the indemnity that the agent should have "brought the principal new customers or…significantly increased the volume of business with existing customers" and that the principal "continues to derive substantial benefits from the business with such

customers": article 17(2)(a). It follows that in a case such as the present, in which the principal went out of business and therefore derived no benefit from the customers introduced by the agent, no indemnity will be payable: see *Saintier and Scholes, op.cit,* at p. 204. In addition, article 17(2)(b) limits the indemnity to one year's commission. In the face of these provisions which will satisfy the policy of the directive, it is impossible to argue that it requires a payment of twice gross commission whether the principal has derived any benefit from the termination or not.

21. In my opinion, therefore, the courts of the United Kingdom would not be acting inconsistently with the directive if they were to calculate the compensation payable under article 17(3) by reference to the value of the agency on the assumption that it continued: the amount which the agent could reasonably expect to receive for the right to stand in his shoes, continue to perform the duties of the agency and receive the commission which he would have received. It remains to consider some of the English and Scottish cases in which the question has been discussed.

22. The decision of the Court of Session in *King v Tunnock Ltd* 2000 SC 424 is the only appellate case containing a full discussion of the way compensation should be calculated. Mr King sold cakes and biscuits for Tunnock Ltd. He had taken over the agency from his father in 1962. It was his full time occupation. In 1994 the company closed its bakery and terminated the agency. The evidence was that over the previous two years he had earned gross commission amounting in total to £27,144. The sheriff held that he was not entitled to compensation because the principal, having closed the business, would not enjoy any benefits from the goodwill generated by the agent. But an Extra Division of the Court of Session reversed this interlocutor and awarded compensation in the sum of £27,144.

23. I respectfully think that the sheriff was right. In view of the closure of the business, the agency was worth nothing. No one would have given anything for the right to earn future commission on the sales of cakes and biscuits because there would be none to be sold. Nor had the principal retained any goodwill which the agent had helped to build up. The goodwill disappeared when the business closed. The reason why the business closed is not altogether clear but Mr King's low earnings for full time work over the previous two years suggests that it was not doing well. Even if one assumes that commission would have continued at the same rate, it is hard to see why anyone should have paid

for the privilege of a full time job which earned him less than he would have been paid as a bus conductor.

24. I am bound to say that I do not find the reasoning of the Extra Division, delivered by Lord Caplan, at all convincing. He said that the agency had existed for many years and that it was likely that the agent had good relations with customers. That, no doubt, was true. But Lord Caplan then went on to say:

> "In these circumstances we consider it likely that the pursuer would have expected and required a relatively high level of compensation to surrender his successful and long-established agency. The compensation would, of course, require to be tied to the commission he was earning. Thus this is a case where we can conclude, even on the limited information that is available, that the agent would have expected to receive a capital sum representing at least the total for the last two years of his earnings to be paid before he would voluntarily have given up his agency."

25. "[He] would have expected to receive…". I daresay he might. But would anyone have given it to him? Lord Caplan does not seem to have considered it relevant to ask. It appears that, following *King v Tunnock Ltd*, it is standard practice for the former agent to give evidence of what he would have expected to receive for his agency. In this case, Mr Lonsdale said in a witness statement that he had been advised by an accountant that an established method of valuation was to take the gross profits and multiply them by two and a half. For the last completed accounting year before closure his gross commission was £12,239.34 and he therefore valued the business at £30,598.35.

26. Mr Lonsdale at least claimed to have the support of an accountant for his valuation, although he did not call him as a witness. But the Court of Session appears to have arrived at the figure of twice gross commission without any evidence at all. Lord Caplan said that he was "reassured" that this would be standard compensation in France, but, for the reasons I have explained, the French practice is of no evidential value whatever.

27. *King v Tunnock Ltd* was considered by Judge Bowers (sitting as a High Court judge) in *Barrett McKenzie v Escada (UK) Ltd* [2001] EuLR 567. The judge was not attracted by the formulaic approach of the Court of Session but said (at p. 575) that the point on which he agreed with Lord Caplan was that —

> "one is valuing the agency and its connections that have been established by the agent at the time at or immediately before termination, and it is really a question of compensating for the notional value of that agency in the open market …."

28. I agree that this is what compensation in article 17(3) means. My only caution is that one must be careful about the word "notional". All that is notional is the assumption that the agency was available to be bought and sold at the relevant date. What it 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.

29. In *Tigana Ltd v Decoro* [2003] EuLR 189 the judge awarded the agent a sum equal to his commission less expenses over the 14 to 15 months during which the agency had subsisted. I would agree that prima facie the value of the agency should be fixed by reference to its net earnings because, as a matter of common sense, that is what will matter to the hypothetical purchaser. Furthermore, in the case of an agent who has more than one agency, the costs must be fairly attributed to each. He cannot simply say, as Mr Lonsdale did in this case, that the marginal cost of the Elmdale agency was little or nothing because he had to see the same customers and go to the same exhibitions for Wendel.

30. It may well be that 14 months commission adopted by the judge was a fair valuation. But he seems to have had no evidence that anyone would have paid this figure for a comparable business. Instead, he gave (at p. 221) a non-exhaustive list of 14 factors ((a) to (n)), some of them very wide ranging indeed, which he said would require consideration. The list gives no indication of the weight to be attributed to each factor.

31. More recently, in *Smith, Bailey Palmer v Howard & Hallam Ltd* [2006] EuLR 578 Judge Overend (sitting as a High Court judge) dealt with claims by other agents who had worked for the respondent in this case. He noted that the Elmdale brand had been sold to a competitor for £550,000 and that, over the three years before the sale, 42% of the sales and distribution expenses had consisted of agent's commission. On these figures, he considered that it would be right to attribute 42% of the value of the brand to the agents. This seems to me a flawed method of calculation. First, it treats the entire value of the brand, i.e. the goodwill of the Elmdale name, as attributable to sales and marketing. No allowance is made for the possibility that some of the goodwill may have been attributable to the fact that the company made good shoes. Secondly, no allowance is made for the fact that the commission, which is treated as the measure of the proprietary interest of the agents in the assets of the company, is what the agents were actually paid for their services. On this theory, the advertising agents should have acquired an interest proportionate to what they were paid. Thirdly, the valuation is based entirely on cost rather than what anyone would actually have paid for the agency.

32. That brings me to the judgments in the present case. The claim was heard by Judge Harris QC in the Oxford County Court and his judgment was, if I may respectfully say so, a model of clarity and common sense. I shall extract one or two of the most important passages:

> "18. If it is kept in mind that the damage for which the agent is to be compensated consists in the loss of the value or goodwill he can be said to have possessed in the agency, then it can be seen that valuation ought to be reasonably straightforward. Small businesses of all kinds are daily being bought and sold, and a major element in the composition of their price will be a valuation of goodwill.
>
> 19. But neither side put evidence before the court about how commercial goodwill is conventionally valued. Nor was I told upon what basis claims of this type are conventionally settled. There was no evidence at all about how commercially to value such assets. It is of course for the claimant, as a seeker of compensation, to prove the value of what he has lost."

33. The judge then found that net commission was running at about £8,000 a year and said:

> "20. …The value of that agency, the commercial value is what someone would pay for it; to acquire by assignment a business vehicle with a likely net annual income of £8,000…
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> 22. Commonsense would indicate that few people wanting the opportunity to earn what the claimant was earning would be prepared to pay well over £20,000 for the privilege of doing so, still less would they do so in an industry in remorseless decline, and in which the likely buyers would be men of modest means…
>
> 23. Given the absence of evidence about how commercially to value goodwill, or evidence about what price in practice might have been available, the court might be thought to be justified in simply finding that the claimant has failed to prove his case…
>
> 30. This was an agency producing a modest and falling income in a steadily deteriorating environment. There is no evidence that anyone would have paid anything to buy it…I am strongly tempted to find that no damage has been established…But perhaps that conclusion, though I regard it as logical, is a little over rigorous given that the defendant has already made a payment. Doing the best I can, I find that the appropriate figure for compensation is one of £5,000."

34. The Court of Appeal approved of this approach. After a thorough review of the authorities, Moore-Bick LJ quoted paragraph 18 of the judgment (see above) and said that the judge was right in his approach. I agree. Furthermore, I do not think that the judge could have been faulted if he had simply dismissed the claim.

35. That is sufficient to dispose of the appeal, but there are three additional comments to be made. First, Mr Moser urged your Lordships not to adopt a principle which required valuation evidence. Valuations, he said, were expensive and most claims were too small to justify the cost. Moore-Bick LJ said (at paragraph 57) that "in most cases" the court would be likely to benefit from the assistance of an expert witness but that in some cases it might be sufficient to place all the material before the court and invite the judge to act as valuer. It seems to me that

once it is firmly understood that the compensation is for the loss of the value of the agency, relatively few cases will go to court. As Judge Harris said, small comparable businesses are bought and sold every day and it should not be difficult for the parties, with the benefit of advice about the going rate for such businesses, to agree on an appropriate valuation. It should not always be necessary for them to obtain a full scale valuation, involving the checking of income and expenditure figures and the application of the going rate to those figures. But I do not see how, if the matter does go to court, the judge can decide the case without some information about the standard methodology for the valuation of such businesses. In this case, the judge was simply invited to pluck a figure out of the air from across the Channel and rightly refused to do so. Nothing is more likely to cause uncertainty and promote litigation than a lottery system under which judges are invited to choose figures at random.

36. It may also be possible, after a period of experience in such valuations, for the court to take judicial notice of what would be the going rate in what I might call the standard case, namely an agency which has continued for some time and in which the net commission figures are fairly stable. It should not be necessary to repeat boilerplate evidence in every case. But the judge must be reasonably confident that he is dealing with the standard case. Adjustments would be needed if, as in this case, the market was in decline or had disappeared altogether.

37. Secondly, there is the question raised by the Winemakers' Federation of Australia Inc, who were given leave to intervene and made submissions. They are concerned about the case in which the agent is able to transfer the goodwill he has created with customers to another principal: for example, to persuade the supermarkets to whom he has been selling the produce of one winery to transfer to another. In such a case the former principal would not retain the goodwill which the agent had created and it would be unfair to have to pay compensation on the basis that the agent had gone out of business.

38. In my opinion circumstances such as these will be reflected in the process of valuation. The hypothetical purchase of the agency does not involve an assumption that the agent gives a covenant against competition. If the situation in real life is that the hypothetical purchaser would be in competition with the former agent and could not have any assurance that the customers would continue to trade with him, that would affect the amount he was prepared to pay. If it appeared that all the customers were likely to defect to the former agent (or, for that

matter, to someone else), he would be unlikely to be prepared to pay much for the agency.

39. What matters, of course, is what would have appeared likely at the date of termination and not what actually happened afterwards. But I do not see think that the court is required to shut its eyes to what actually happened. It may provide evidence of what the parties were likely to have expected to happen.

40. Thirdly and finally, there is the question of whether a reference should be made to the European Court of Justice. Mr Moser says that the differences in opinion between the Scottish and the English courts and between various English judges show that the law is uncertain. That is true, but what is uncertain is not the meaning of the directive. It is clear that the agent is entitled to compensation for "the damage he suffers as a result of the termination of his relations with the principal" and that the method by which that damage should be calculated is a discretionary matter for the domestic laws of the Member States. It is the way in which our domestic law should implement that discretion which has been uncertain and the resolution of that uncertainty is the task of this House and not the European Court of Justice.

41. I would therefore dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

42. I have had the privilege of considering the speech of my noble and learned friend, Lord Hoffmann, in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeal.

LORD CARSWELL

My Lords,

43. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hoffmann. For the reasons which he has given, and with which I fully agree, I too would dismiss the appeal and decline to make a reference.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

44. I have had the privilege of reading in draft my noble and learned friend Lord Hoffmann's speech, with which I fully agree, and to which there is nothing I can usefully add. Accordingly, I too would dismiss this appeal.