Commercial Agents and the Art of Negotiation

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Introduction

The recent judgment of Mr Justice Clarke in *Kenny v Ireland ROC Limited* [2005] IEHC 241 provides useful guidance on what constitutes a "commercial agent" for the purposes of Article 1(2) of Council Directive 86/653/EC on the co-ordination of the laws of the Member States relating to self-employed commercial agents ("the Directive") and the European Communities (Commercial Agents) Regulations, 1994 and 1997.

In holding that the plaintiff was a commercial agent within the meaning of the Regulations of 1994, Clarke J. held that the term "negotiating" did not require a process of bargaining in the sense of invitation to treat, offer, counter-offer and finally acceptance. The High Court held that the test for determining whether a person was a commercial agent was whether that person brought a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of products on behalf of a principal. In some cases that skill could involve a skill in bargaining but could also be a skill in marketing or promotion.

Importantly, the judgment also held that written terms of an agreement will not necessarily be the sole means of determining the contractual arrangements between parties, particularly in relation to a long lasting and evolving business relationship.

This article examines the judgment in detail and considers the consequences of the decision for agents and principals.

Commercial Agents Directive

Council Directive 86/653/EC provides certain protections for commercial agents arising on the termination of their agency agreements. The aim of the Directive was to eliminate the differences in the treatment of sales agents within the single European market. It establishes a minimum package of rights for commercial agents, while allowing Member States to offer greater protections under their national laws.

The Directive requires each Member State to implement national laws to ensure that every "... commercial agent is, after termination of the agency agreement, indemnified ... or compensated for damage...". Ireland implemented the 1994 and 1997 Regulations to give effect to this protection. The rationale of this provision is to provide the commercial agent with a fair level of compensation for the loss of goodwill based on past commissions earned in the event of the termination of the agency agreement.

Background

The proceedings in *Kenny v Ireland ROC Limited* arose from the business relationship between the parties, which lasted for a significant number of years during which time the plaintiff ran a series of petrol stations trading under the Esso banner. The defendant, Ireland ROC Limited (IROC) was a wholly owned subsidiary of Esso Ireland Limited. Under the agreement in question, Mr Kenny was appointed to run the newly-redeveloped Martello Service Station in Dublin where he sold petrol and non-petrol products on behalf of the defendant. The arrangement continued for several years until the defendant validly terminated the agreement.

Mr Kenny commenced proceedings asserting that the nature of the contractual arrangements between himself and IROC was such that he was an agent of IROC for the purposes of Council Directive 86/653/EC and the relevant Irish implementing Regulations. On that basis, he claimed compensation for the termination, under the Regulations. The preliminary issued considered by Clarke J. was whether Mr Kenny constituted a commercial agent of the defendant for the purposes of the Directive and the Regulations.

Legislation

Article 1(2) of the Directive provides that the commercial agent shall mean "a self-employed intermediary who has continuing authority to negotiate the sale of the purchase of goods on behalf of another person, hereinafter called "the principal", or to "negotiate and conclude such transactions on behalf of and in the name of the principal".

Article 2(2) provides that "each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities are commercial agents are considered secondary by the law of that member state".

Effect was given to the Directive in Ireland by the European Communities (Commercial Agents) Regulations 1994. Article 2(1) of those Regulations defines "commercial agent" in exactly the same terms as those specified in the Directive. Ireland did not avail of the opportunity to exclude from the

operation of the Directive commercial agents who might be considered secondary. A different view was taken by the United Kingdom so that the definition of commercial agent that operates with in the United Kingdom is more restrictive that that which operates in Ireland. The 1994 Regulations were amended by the European Communities (Commercial Agents) Regulations 1997.

It is against this background that the High Court considered whether Mr. Kenny was a commercial agent as defined.

Other Authorities

Reference was made to the only Irish decision that considered the meaning of the term commercial agent as defined, *Cooney & Company and Another v Murphy Brewery Sales Limited* (unreported, High Court, Costello P., 30 July 1997). *Cooney & Company* related to an application for an interlocutory injunction. Costello P. had to consider whether the Directive applied to an agreement for the distribution of Heineken and Murphy Stout products, which had been terminated.

Considering the definition of "commercial agent", Costello P. decided that negotiation does not in some way require bargaining or haggling so as to endeavour to reach some sort of arrangement between the agent and the proposed customer in relation to the purchase by the proposed customer of the products. Costello P. concluded that, in that case, the plaintiff constituted the commercial agent of the defendant for the purposes of the Directive.

European Jurisprudence

The limited comment on the term "commercial agent" in the European Courts was considered next. In *Bellone v Yokohama Spa* (C-215/187, 1988 ECR section 1, 2191) Advocate General Cosmos stated in his Opinion that three necessary and sufficient (substantive) conditions were required for a person to be considered a commercial agent: that he is (a) a self employed intermediary (b) that the contractual relationship is of a continuing character and (c) that he exercises, on behalf of and in the name of the principal, an activity which may consist either simply in being an intermediary for the sale or purchase of goods or in both acting as intermediary and concluding sales or purchases of goods.

Interestingly, the European Court of Justice in its judgment simply repeated the definition of commercial agent as is found in the Directive and did not specifically adopt the test as formulated by the Advocate General. Clarke J. did however conclude that the Advocate General's opinion was of "some materiality", even though the term "negotiate" was not included in the test.

UK Position

The decision of the Court of Appeal in *Parks v Esso Petroleum Company Limited* (2000) EU LR 25 was also considered by the High Court. The *Parks* case was similar to *Kenny* in that the plaintiff, Mr Parks occupied a service station owned by Esso pursuant to an agency agreement, which appeared in some respects to be similar to that of Mr Kenny. However, Clarke J. noted a significant difference between the *Parks* case and the case before him; the agreement between Mr Parks and Esso related solely to the sale by the plaintiff of motor fuels and Mr Parks, like Mr Kenny also operated a shop and a car wash but in the case of Mr Parks, unlike Mr Kenny, these were operated on his own account and not as agent for Esso.

In considering whether Mr Parks, in carrying out the business of operating a petrol station, could be said to be a commercial agent, Morritt L.J. considered the definition of "negotiation" in the *Oxford English Dictionary*. He concluded that this definition did 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". But equally, he said, "it does require more than self-service by the customer followed by payment in the shop of the price shown on the pump". In Morritt L.J's view, there was no process of negotiation involved in the activities carried out by Mr Parks.

UK Law Distinguished

The distinction between the implementation of the Directive in Ireland and the United Kingdom was noted by Clarke J. Article 2 (2) of the Directive provides as follows: "...each of the Member States shall have the right to provide that the Directive shall not apply to those persons *whose activities as commercial agents are considered secondary by the law of that Member State.*" (emphasis added)

The United Kingdom had chosen to exercise its discretion to exclude persons whose activities as commercial agents were considered secondary. In implementing the Directive, Ireland did not exercise this discretion and therefore no similar exclusion applied under Irish law. According to Clarke J, there could be no doubt that the Court of Appeal in *Parks* placed at least some reliance on the fact that the Regulations in the United Kingdom made it clear that cases where goods were selected by customers who merely ordered through the agent, gave rise to the activity of the agent concerned being regarded as secondary and thus permissibly excluded from the operation of the Directive as implemented into UK law.

Qualifying as a Commercial Agent – The Test

In order to qualify as a commercial agent the person concerned must meet three tests. The first two, that the agent be self-employed and have a continuing authority on behalf of the principal were uncontroversial on the facts of the case in *Kenny*. The contentious issue concerned the meaning of the phrase "negotiate the sale or the purchase" or the phrase "negotiate and conclude such transactions". Clarke J. confirmed that the real issue depended upon the true meaning of the term "negotiate".

In considering the various authorities referred to above, Clarke J. concluded that active bargaining is not required to qualify as negotiation. The proper approach is whether the person who may be said to be negotiating has to "deal with, manage or conduct" the sale or purchase concerned and in doing so, to use some skill or consideration. The skill or consideration must, in some manner, be brought to bear on the sale or purchase.

Clarke J. pointed to the fact that the business of the purchase and sale of goods is conducted in very many different ways. It was emphasised that in some types of

business it would be commonplace for there to be significant bargaining prior to any sale being concluded. In other cases, he noted that the price will be relatively fixed and the manner in which persons may secure additional sales will be by virtue of other aspects of the way in which the goods are presented to the public (such as through marketing and promotion) or by the attractiveness of the presentation of the product.

Clarke J. asserted that the precise way in which a particular type of good is typically sold should not necessarily be a significant factor in determining whether a person engaged in the sale of that good on behalf of a principal in order to be regarded as a commercial agent. The true test, he said, is whether having regard to the manner in which the sale of the good or goods concerned is carried out (or where relevant the purchase of such goods) it is necessary for the agent to bring a material level of skill to the activity (*i.e.* dealing with, managing or conducting the sale or purchase concerned).

The skill that may be brought to the activity may vary depending on the way in which the good concerned is typically sold. In some cases, it may involve a skill in bargaining while in other cases it may be a skill in marketing and promotion. In other cases again, it may be a skill in the presentation of the product in such a way to make it attractive to members of the public so that they will purchase more of it.

Clarke J. concluded that in substance, there was no material difference between an agent who uses a skill in judgment to individually promote a product to one or more identified individual potential purchasers, and an agent who having regard to the nature of the product of the principal which he is involved in seeking to sell uses more general methods (but applying equal skill) to making the products attractive to the public generally and thus increase sales.

Difference in Approach

Clarke J. noted that it was difficult to see how the role of the distributors in *Cooney & Company* was, in practice, any greater than that of Mr Parks. The nature of the contractual arrangements in *Cooney & Company*, he said, could be characterised as being largely automatic; the business involved a defined range of products at prices fixed by the principal and in circumstances where there would appear to have been an express agreement that the principal was to be primarily responsible for promotion (by the employment of sales representatives) and back-up.

While accepting that there may be a difference in the approach taken by Costello P. in *Cooney & Company* from that taken by the Court of Appeal in the *Parks v Esso* case. Clarke J. was satisfied that he should follow the reasoning in *Cooney & Company*. If the decision of the Court of Appeal in *Parks* was to be taken as implying that it is not possible for a person to be a commercial agent while that person exercises skill in attracting customers but where the ultimate transaction is by self service and payment, Clarke J. concluded that he did not regard the *Parks* judgment as persuasive and decided not to follow it.

Mr Kenny's Position

Having identified the appropriate legal test to be applied, Clarke J. then considered the nature of the obligations that Mr Kenny's contract required him to carry out on behalf of IROC.

Beyond Written Contract

Clarke J. held that while significant regard has to be given to the terms of the written contract between the parties (in the absence of that agreement being a sham), nonetheless, the way in which parties actually implement their arrangements must also be given significant weight. This is, according to Clarke J., particularly so in cases where the relationship lasts over a number of years and where, in practice, the way in which the parties do business may be said to evolve.

Where there has been a significant evolution in the way in which parties conduct business and where, on the facts, that evolution has become a significant and permanent feature of the relationship between the parties, then it is appropriate to have regard to that feature of the business in assessing the true characterisation of the relationship between the parties.

Looking at the arrangements "in the round", Clarke J. was satisfied that there was, to the knowledge of the defendants, a significant and relatively permanent practice, which amounted a variation in the strict terms of the written agreement between the parties. This practise was such as conferred on Mr Kenny a greater degree of autonomy both in the identification of suppliers, the negotiation of terms with suppliers, and the setting of the retail prices than would have been in strict accordance with the terms of the agreement.

"Limited but not insignificant autonomy"

It was found that the arrangements, as so operated, gave Mr Kenny a "limited but not insignificant degree of autonomy" in relation to the products that would be sold for re-sale in the service station shop. Those arrangements also gave Mr Kenny a limited but not insignificant autonomy in relation to identifying potential new suppliers of such products, dealing with the terms and conditions upon which such products were supplied, and perhaps to a greater extent, in relation to the retail prices. By influencing such matters, Clarke J. concluded that Mr Kenny had the opportunity to play a material role in the level and types of sales and purchases at the station.

Clarke J. was also satisfied that Mr Kenny had a significant opportunity to influence the overall volume of sales of all products (including motor fuels) likely to be sold at the Martello Service Station by "the exercise of skill in relation to identifying new or different product lines which might usefully be added to those on sale." Mr Kenny also had the opportunity to enhance the overall volume of sales of all products by means of the manner in which the station as a whole was operated and in particular the attractive presentation of the station and its product lines to potential customers.

Clarke J. concluded that the arrangements as they operated, with the knowledge and agreement of both parties, were such as allowed for the exercise by Mr Kenny of a significant level of "skill or consideration" in relation to "dealing with, managing or conducting" the purchase and sale of products on behalf of IROC. Mr Kenny satisfied the Court that he had "negotiated both the purchase and sale of goods" on behalf of IROC as his principal and Clarke J. found that as a preliminary issue, Mr Kenny was, at all material times, a commercial agent within the meaning of the 1994 Regulations.

Conclusion

This judgment offers welcome guidance to both agents and principals on how the nature of their arrangements can affect the classification of the agent as commercial agents. Principals must also take note that the written agreement will not be regarded as the sole means of determining the contractual arrangements between parties. Where there are long lasting and evolving business relationships the court will consider the arrangements as a whole when assessing the relationship between the parties.

A self-employed agent, with continuing authority to negotiate on behalf of a principal must be able to demonstrate that he dealt with, managed or conducted the sale or purchase concerned using some skill in order to benefit from the protection of the Regulations.