Neutral Citation Number: [2016] EWHC 1837 (Comm)

Case No: 2014 FOLIO 1553

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/07/2016

Before :

David Foxton QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) MR PAUL MONK **(2) INVENTABRAND CONSULTING** **(3) MR PHILIP COLLINS**	**Claimants**
- and –	
LARGO FOODS LTD	**Defendant**

- -
- -

Oliver Segal QC (instructed by **Bankside Commercial Solicitors**) for the **Claimants**
Alexander Brown and Stephanie Wood (instructed by **Blocks Solicitors**) for the **Defendant**

Hearing dates: 20 to 23 and 27 June 2016

- -

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.

……………………………………………..

David Foxton QC (sitting as a Deputy Judge of the High Court):

(1) Introduction

1. In this action, the Claimants seek damages for what they allege to be the unlawful termination of an agreement between the parties concluded in January 2011 ("the Agreement") and claim commission and compensation under Regulations 8 and 17 respectively of the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations").

2. The Claimants were represented by Oliver Segal QC and the Defendant ("Largo") by Alexander Brown and Stephanie Wood. I am grateful to all counsel for their conduct of the case, and for their oral and written submissions.

(2) The evidence

3. I heard oral evidence from six witnesses of fact. Mr Paul Monk and Mr Philip Collins gave evidence on behalf of the Claimants. Mr Maurice Hickey, Mr Asif Awan, Mr Martin McClinton and Mr Raymond Coyle gave evidence on behalf of Largo.

4. As is inevitably the case, the witnesses' recollection of events had to varying extents come to be conditioned by the parties' subsequent dispute or reflected the differing perspectives from which they approached the same issues (for example there was a natural tendency for each witness involved in achieving a particular outcome to regard their own contribution as the most important).

5. There were three areas where evidence given on behalf of Largo had particularly come to be coloured by the parties' subsequent dispute:

   i) The evidence of Mr Hickey as to the particular roles which Mr Monk and Mr Collins were intended to perform.

   ii) The evidence of Mr Hickey as to the significance of the document entitled "Example of Possible Calculation of Fees and Incentive payments 2011 to 2016" ("the Example Calculations").

   iii) The evidence of Mr Hickey and Mr Coyle concerning the circumstances surrounding the termination and (in Mr Coyle's case) the events at the meeting on 27 January 2012 when the agency was terminated.

   The factual case advanced in relation to these matters in the Defence was, in my view, wholly unrealistic. In fairness to these witnesses, the evidence given to the Court orally proved to be more nuanced, although there were still occasions on which the witnesses reverted to the untenable prior position.

6. I have taken these factors into account in the findings of fact I have made. Where recollections differed, I have found the contemporary documents and the inherent probabilities the surest guide in resolving disputed issues of contemporary fact.

7. I also heard expert evidence as to the value of the agency from Robert Holland and Fiona Hotston Moore. I am grateful to both experts for their assistance although, as will be apparent below, the expert evidence left a number of open issues which I have had to resolve as best I can on the material available to me.

(3) The claims

8. The Claimants brought the following claims:

   i) A claim for damages for breach of contract, on the basis that Largo had unlawfully terminated the Claimants' agency contract with Largo.

   ii) A claim under Regulation 8 of the Regulations for commission on transactions concluded after the agency contract had terminated.

   iii) A claim under Regulation 17 of the Regulations for compensation for termination of the agency.

(4) Chronological findings of fact

(A) The parties

9. Largo is a food manufacturing company in the Republic of Ireland specialising in the production of branded and own-label crisps and snacks. It is perhaps best known for the manufacture and distribution in the Republic of Ireland of "Tayto" crisps. It is the parent company of Northern Snack Foods Limited ("NSF") which sells Largo products in Northern Ireland and Scotland.

(B) Initial dealings

10. Largo had produced own-label crisps and snacks – that is crisps and snacks sold under the label and packaging of the retailer, rather than those of the manufacturer – for retailers in Great Britain from about 2004 to 2005. By March 2008 it was keen to expand its sales of branded products in Great Britain. In particular it was keen to obtain listings at major supermarket chains (or "multiples") in Great Britain of its "Velvet Crunch" brand, which was selling well in Ireland (North and South).

11. The First Claimant, Mr Paul Monk, has been involved in the sale of branded food products since 1978. He was commercial sales director and then Chief Executive of Golden Wonder, a major manufacturer of crisps and similar products. After 7 years at Golden Wonder, he set up trading as Inventabrand Consulting, a business which used Mr Monk's contracts, knowledge and experience to build relationships between retailers and clients. One important feature of that business was helping manufacturers or distributors of branded grocery products which were either new to market or relatively unknown to secure distribution through major retailers. This involved persuading those retailers to "list" the products – that is to approve them for sale through some or all of their stores.

12. The Third Claimant, Mr Philip Collins, had known and worked with Mr Monk for a number of years. He had worked at Golden Wonder from 1997 to 2011, and as a consultant for Mr Monk's Inventabrand Consulting business from 2007.

13. As a business development opportunity, Mr Monk invited Mr Clive Sharpe, a non-executive of Largo, and Mr Raymond Coyle, the founder, owner and managing director of Largo, to the England-Ireland rugby international on 15 March 2008. It is now common ground that the discussions on this occasion in due course culminated in a contractual relationship under which Mr Monk was paid a monthly retainer of £2,666.67, and this figure was increased to £4,000 a month in late 2009.

14. At a meeting on 12 March 2010, Mr Monk and Mr Coyle agreed that Mr Collins would assist Mr Monk and would be paid a monthly retainer of £2,500. There is an issue as to whether Mr Collins became a contractual counterparty of Largo, in addition to Mr Monk, which I address below.

15. There was a dispute, at least on the pleadings, as to the precise function which Mr Monk and Mr Collins were retained to perform. Largo's pleading suggested that Mr Monk's (and later Mr Collins') role was one of providing "input on how best to market Velvet Crunch" but that there was no agreement or indication that Mr Monk (and later Mr Collins) was appointed to act as agent on behalf of Largo. Largo's pleaded case cast Mr Monk and Mr Collins' roles in terms which were narrower than those justified by the objective facts, and this characterisation appears to have been driven in part by the legal argument which existed (at least until trial) as to whether the relationship between Mr Monk, Mr Collins and Largo fell within the terms of the Regulations.

16. It is conceded by Largo, at least at first instance, that the Regulations apply to the Agreement, while reserving the right to argue the contrary should the case proceed further. That concession was a realistic reflection of the effect of first instance decisions such as <u>PJ Pipe & Valve Co. Ltd. v. Audco India Ltd.</u> [2005] EWHC 1904 (Q.B.) (Fulford J) and <u>Nigel Fryer & anor v. Ian Firth Hardware Ltd.</u> [2008] EWHC 767 (Ch.) (Patten J.). Had the concession not been made, I would in any event have followed those decisions for the reasons they give.

17. However, given that Largo wish to reserve the right to re-open this issue of law in a higher court, I should set out my factual conclusions as to the role of Mr Monk (and later Mr Collins):

    i) They were to introduce both Largo, and Largo's products, to their contacts at retailers, with a view to assisting Largo in obtaining a listing of those products and, ultimately, sales.

    ii) To this end, they dealt directly with those retailers, promoting Largo's products to their contacts at those retailers and facilitating meetings between Largo's account managers and the buyers at the retailers.

iii) Mr Monk and Mr Collins did not have authority to conclude contracts on Largo's behalf with those retailers.

iv) When negotiations with those retailers got underway, the detail of those negotiations was to a large extent left to the buyers at the retailers (who were employed at more junior level than the senior level contacts accessed by Mr Monk) and the account managers at Largo. However Mr Monk and Mr Collins did have input into Largo's negotiating strategy when required, and would also become involved in those negotiations or aspects of them when this was felt to be helpful. They also helped with "fire-fighting" when issues arose.

v) Mr Monk and Mr Collins were also to provide advice and strategic insight to Largo including in relation to proposed new products.

vi) Finally, Mr Collins was also responsible for providing week-by-week management of Largo's GB sales team for its branded business.

18. In relation to the Agreement, Mr Brown for Largo accepts that Mr Monk and Mr Collins constituted agents for the purposes of the Regulations (subject to an issue of law reserved for appeal of whether anything short of an authority to commit Largo to contracts meets the requirement of Regulation 2(1)). If it is relevant, Mr Monk and Mr Collins also performed the role of commercial agents within the Regulations before the Agreement was signed. As Mr Hickey, Chief Executive of Largo, accepted in cross-examination, the Agreement did not change the roles already being performed by Mr Monk and Mr Collins, but rather sought to capture those existing roles in writing.

(C) Subsequent events

19. Mr Monk, and Mr Collins, set about introducing "Velvet Crunch" to their contacts in the retail industry in Great Britain. Those contacts were generally at more senior level, rather than with the buyers at the retailers who were ultimately responsible for placing orders. Where relevant to the claim under Regulation 8, I set out further details of the approaches made and success with particular retailers below. However a good example of Mr Monk's approach was in his dealings with Tesco, the largest Great Britain multiple, where he had a good and long-standing relationship with Mr Andrew Yaxley, then Commercial Director of Packaged Foods at Tesco UK. He pitched "Velvet Crunch" to Mr Yaxley at a weekend event, and this was followed by direct contact between Mr Awan of Largo and the Tesco buyer, Mr Tavoukdjian.

20. In addition to the approaches to the "multiples", Mr Collins was also involved in promoting the products to national retailers in the "Impulse and Convenience" sector, such as Poundland and Palmer and Harvey. Largo's Great Britain sales team, and in particular sales representatives Marcus Hudson and Asif Awan, reported to Mr Collins (as well as to Largo) and there were regular sales meetings. There are notes relating to a number of these meetings which formed part of the evidence at trial.

21. In 2010, Mr Coyle and Mr Monk had discussions about a potential new product, made from wholegrain and to be marketed as a sister brand to "Velvet Crunch". Mr Monk was closely involved in the development of this product which, at his suggestion, came to be known as "Wholly Crunch". The product was not a success, experiencing both production problems (the product tended to arrive broken) and suffering from a misplaced attempt to position the product in the health products sector. A fair summary of the reasons for this failure was given by Mr Coyle in the following terms:

"We got the best advice we could from Mr. Monk about the name, the design, the placement, we did not help on our side either, we did not deliver a good product, it was broken, and the whole venture was a failure, an expensive failure … There was breakage in some of the product, that is right. And the placement was in the wrong place, the name Wholly Crunch was ill-chosen, unfortunately. These things can happen. And it did not sit in the health category. Mr. Monk and I, I am equally to blame, probably more to blame than him for allowing it, we failed to fit in the health section, but being fried and also they would not take up the fact that the ingredients that were in it, it did not work".

22. Sales of "Wholly Crunch" into Great Britain following its introduction in 2010 were as follows:

2010	£242,000
2011	£44,000
2012	£0 (product withdrawn)

23. Sales of "Velvet Crunch", by contrast, did very well. I set out below figures showing the progress sales of "Velvet Crunch" into Great Britain from 2008 to 2013 (including for this purpose sales via NSF):

2008	£81,000
2009	£1,018,000
2010	£2,572,000
2011	£4,601,000
2012	£6,390,000
2013	£6,340,000.

(D) The Agreement

24. It is clear that Mr Monk was pushing for a revision to the terms of the agency, certainly during 2009 and 2010, so as to obtain a commission element to the remuneration. There was some dispute as to whether Mr Coyle of Largo had confirmed that there would be such an element. It was common ground that Mr Monk had made it clear throughout that he was seeking to negotiate such

an element. I conclude that it was clear between Mr Coyle and Mr Monk that there would be a discussion on this issue, and that Mr Coyle is likely to have made encouraging noises, albeit not in terms which committed Largo to any particular figure or approach.

25. I deal with the negotiation of the Agreement during 2010 in more detail below, together with the discussion of projected sales figures during the same period. It is common ground that those discussions culminated in the conclusion of the Agreement by early January 2011.

(E) The termination

26. It is clear that the termination of the Agreement came "out of the blue" to Mr Monk and Mr Collins. Whatever internal consideration may have been going on within Largo about the Agreement, nothing was said to Mr Monk and Mr Collins to indicate that termination was under discussion.

27. On 23 December 2011, Mr Collins sent Mr Hickey a query regarding the incentive scheme. Mr Hickey responded on 4 January 2012 attaching a copy of the Agreement, and stating:

> "I would suggest that Raymond and I meet with you and Paul to discuss progress and how we move forward. Would 25th or 27th of January work for you both – we can be flexible on travelling to London".

28. Although Mr Monk and Mr Collins would not have known this from the terms of the email, I think it likely that Largo had already formed the decision to terminate the Agreement under the "Term of Arrangement" clause, and to offer some considerably less remunerative deal, and that this was the "move forward" referred to, and the reason why Mr Coyle and Mr Hickey were signalling their willingness to travel to London for the meeting which did not otherwise have any obvious purpose.

29. In the event Mr Coyle met Mr Monk on 27 January 2012. At that meeting Mr Coyle told Mr Monk that Largo was terminating the Agreement, and offered an alternative arrangement which would pay £20,000 a year. There are various disputes of fact as to that meeting:

   i) I conclude that no particular sales targets or sales figures were given by Mr Coyle as the reason for termination. Had this been the case, I think that this would have been referred to in Mr Monk's follow-up email of 6 February 2012. It is likely that Mr Coyle said some general words to the effect of "it's not working" or "we are not happy", but little more specific than that. It is noteworthy that Largo's response sent on 2 April 2012 which was sent "to clarify our position and the background to our decision to terminate our commercial arrangement" did not suggest particular targets or sales figures were discussed at the meeting. Further, had more specific reasons for termination been given in the meeting, they would have been "answered" in Mr Monk's follow-up letter of 6 February 2012.

ii) Mr Monk suggested that he was told by Mr Coyle that the termination had been undertaken on the instructions of Intersnack, a major Largo shareholder. While it is likely that Intersnack was mentioned in the meeting, I am sure that if Mr Coyle had said something as dramatic as Mr Monk now remembers, this too would have featured in Mr Monk's follow-up email, and also in the Particulars of Claim or Reply. However, it did not. I think this is an occasion in which, in hindsight, Mr Monk has come to attribute a greater significance to a comment made than he did at the time.

iii) I reject the suggestion in Largo's defence that the meeting had taken the form of communicating a provisional conclusion to Mr Monk about which he had then been permitted to make representations. This account was put forward after the Claimant had alleged that there was some obligation of procedural fairness in relation to the decision to terminate, and bears no relationship to what actually happened. Mr Monk was presented with termination as a *fait accompli*.

iv) Largo offered some form of continuing relationship to Mr Monk, but at a significantly lower figure (something specifically referred to in Largo's post-meeting letter of 2 April 2012).

30. There are no documents concerning or even referring to Largo's internal consideration of the decision to terminate (something which I found surprising). Its timing is unclear, although as I have stated, I think that is likely that it had been taken, or at least was very much under consideration, by 4 January 2012. I deal with Largo's account of the reasons for terminating below. I accept that there was some unhappiness over the failure of the "Wholly Crunch" brand. However, I think the dominant reason for the decision to terminate was a commercial decision that Largo would not, going forward, get what they saw as value for money from Mr Monk and Mr Collins for the amounts they would have been obliged to pay them, and a decision that Largo's commercial interests were best served by relying on its own sales team rather than a commercial agent. It is noteworthy that Largo has not replaced Mr Monk with another agent.

(5) Issues as to the interpretation of the Agreement

31. There are three issues which fall to be resolved as to the construction of the Agreement and as to what terms are to be implied into it. As would be expected, there was no real dispute between the parties as to the principles which were to be applied in construing the contract, although in the usual way, each of the parties emphasised those particular parts of the body of case law setting out the relevant principles which they believe to be particularly helpful for their own arguments.

32. The relevant principles include the following:

i) It is necessary to construe the contract with reference to the objects of agreement and the whole of its terms (Chitty on Contracts 32nd ed. para. 13-065).

ii) The process of interpretation involves ascertaining the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language to mean": Lord Hoffmann in Chartbrook Ltd. v. Persimmon Homes Ltd. [2009] UKHL 38 at [14].

iii) This requires the Court to focus on the meaning of the relevant words in the "documentary, factual and commercial context", in the light of their natural and ordinary meaning, any other relevant provisions, the overall purpose of the clause and the contract, the factual matrix and commercial common sense: see now Lord Neuberger in Arnold v. Britton [2015] UKSC 36 at [15].

33. So far as the implication of terms is concerned, it is necessary to look no further than the authoritative restatement of the law by Lord Neuberger in Marks & Spencer v. BNP Paribas [2015] UKSC 72 at [18]-[21]:

"In the Privy Council case of BP Refinery (Westernport) Pty Ltd. v. President, Councillors and Ratepayers of the Shire of Hastings (1977_ 52 ALJR 20, [1977] UKPC 13, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

In Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd. [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain … eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:

"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. … I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred … ”

Sir Thomas's approach in Philips was consistent with his reasoning, as Bingham LJ in the earlier case The APJ Priti [1987] 2 Lloyd's Rep, 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in BP Refinery as extended by Sir Thomas Bingham in Philips and exemplified in The APJ Priti. First, in Equitable Life Assurance Society v. Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v. Belize Telecom Ltd. [2009] 1 WLR 1988, para. 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

(A) The parties to the Agreement

34. There is an issue as to the identity of the parties to the Agreement, although both sides are of the view that the issue is "of little practical consequence", as it was put by Mr Segal QC. In short:

    i) Mr Monk and Mr Collins contend that the only party was Mr Monk, albeit there is an alternative claim brought by Mr Collins if he is also a contracting party.

    ii) Largo contend that both Mr Monk and Mr Collins were contracting parties.

35. I have concluded that the Agreement was a single agreement concluded with Mr Monk. The Agreement is contained in a letter addressed only to Mr Monk. It provides for payment of a single Incentive Payment and Additional Incentive Payment, with the consultancy payments to both Mr Monk and Mr Collins to be deducted from that payment. There was no explanation of how this provision could operate if both Mr Monk and Mr Collins had separate and independent claims against Largo under the Agreement. Finally, the Term of Arrangement clause state that "both parties will commit to a further two years". This language contemplates two parties to the Agreement, Largo and a single counterparty.

36. Neither party contends that the Second Claimant was party to any relevant agreement and it would appear that, whatever may be the reason for its original inclusion, it remains in the action to preserve Largo's ability to seek costs against it.

(B) The scope of the Agreement

37. The next issue which arises is whether the entitlement to incentive payments under the Agreement extended to sales made to Asda in Great Britain by Largo's wholly-owned Northern Irish subsidiary, NSF.

38. The background to this issue is that, prior to the conclusion of the Agreement and without the involvement of either Mr Monk or Mr Collins, NSF had been supplying "Velvet Crunch" to Asda's 15 or 16 stores in Northern Ireland since February 2009. This followed a presentation of the product to Asda's Northern Ireland buyer in April or May 2008.

39. In April 2011, Asda listed "Velvet Crunch" in 180 of its UK stores. Those sales were fulfilled, as the sales in Northern Ireland were fulfilled, by Largo invoicing NSF for supplies of "Velvet Crunch", and NSF in turn invoicing Asda.

40. Largo contends that the sales made to Asda by NSF do not fall within the terms of the Agreement, because the sales made by Largo were sales to NSF in Northern Ireland, when the Agreement only refers to sales to Great Britain, and the Agreement does not extend to sales by NSF, but only to sales by Largo.

41. I have concluded that sales made to Asda in Great Britain did fall within the ambit of the Agreement, notwithstanding the fact that they were invoiced by Largo to NSF, its wholly-owned subsidiary, who in turn invoiced Asda.

42. I have reached this conclusion for the following reasons:

    i) It is clear that during the agency, and prior to the signing of the Agreement, Mr Monk was seeking to promote sales of "Velvet Crunch" to Asda in Great Britain, and Largo were aware of this fact.

    ii) A report from Mr Monk to Mr Coyle of 21 April 2009 referred to discussions Mr Monk had held with Asda in Great Britain, and stated that Asda had agreed to list "Velvet Crunch" at its next range review with no listing fee.

    iii) On 15 March 2010, Mr Monk sent Mr Coyle and Mr Hickey a 3 year-plan which he stated in his covering email they had discussed which included projected sales to Asda.

    iv) On 26 May 2010, Mr Hudson of Largo sent an email to Mr Collins stating that he had had Mr Coyle on the phone asking about "Velvet Crunch" for Asda.

    v) A presentation made by Mr Monk and Mr Collins on 8 September 2010 referred to the Asda account and described the account as "invoiced and run from NI". It discussed Asda, referred to various discussions which Marcus Hudson (one of Largo's Great Britain sales term) had had with the Asda buyer, and to discussions Mr Monk had had with Emma Fox and Barry Williams (other Asda personnel). This initiative was described as "on hold as agreed". The presentation also included target volumes for "Wholly Crunch" sales to Asda.

    vi) Commercial possibilities with Asda were discussed at a team meeting involving Mr Collins on 20 September 2010 and a Commercial Meeting on 7 October 2010.

43. Against this background, it would have been clear to both parties at the time the Agreement was signed that Asda was a target which would be pursued by Mr Monk and Mr Collins for the purpose of increasing sales in Great Britain of "Velvet Crunch" and "Wholly Crunch," and that sales to Asda in Great Britain would fall within the scope of the Agreement when it was agreed.

44. I do not think it makes any difference that the sales to Asda which were achieved were invoiced by Largo's Northern Ireland subsidiary rather than Largo itself:

    i) Mr Monk's evidence (which I accept) was that retailers had a preference for avoiding adding additional suppliers for the same product if they could, and that because Asda already dealt with NSF in Northern Ireland for "Velvet Crunch", they wanted sales on the listings in Great Britain to be invoiced in the same way.

ii) It is clear that some sales which Largo accept fall within the scope of the Agreement were not invoiced to the retailers by Largo, but by another subsidiary, Cornscape. This suggests that Largo did not regard the identity of the party issuing the invoice as determinative.

iii) While it would appear from the evidence of Mr McClinton that profits made from sales to Asda were captured in NSF, he acknowledged that these fell to be treated as group profits at the end of the financial year.

iv) Finally, if Largo's construction of the Agreement was correct, then it would be very easy for Largo to circumvent the incentive provisions in the Agreement by supplying retailers in Great Britain through NSF. I do not believe either party understood the Agreement or the agency to operate in this way.

45. The result is that, for the purposes of calculating its claims for damages for breach of contract, under Regulation 8 and Regulation 17, the fact that sales to Asda in Great Britain were made by NSF does not itself preclude the Claimant's claim.

46. In its closing submissions, the Claimant suggested it might also have a claim under Regulation 7 in relation to these sales. This claim was not pleaded, and although the issue of whether it needed to be pleaded was raised by the Court in opening, the suggested amendment only came forward in closing. In relation to any 2011 Regulation 7 claim:

i) There is an issue between the parties, which received only passing mention in the evidence, as to what amount would fall to be deducted by way of retainer before any 2011 commission claim for that year could be calculated.

ii) That issue was whether Largo had paid £20,000 by way of retainer in addition to the £78,000 in 2011. When this was raised by Mr Segal QC during Mr Hickey's cross-examination, Mr Brown stated that the issue would not be covered in the disclosure because it was not pleaded, and that "Largo can bottom out this point rather than asking Mr Hickey something which he does not know". However, in closing, Mr Segal QC invited the Court to proceed on the basis that there was no evidence the £20,000 had been paid, while Mr Brown opposed any application for permission to amend to advance such a claim, saying Largo had not been able in the time available to obtain clarity on what payments had been made and when.

iii) The issue of whether or not the amount of £20,000 was paid is one which would be capable of wiping out any Regulation 7 claim. In circumstances in which the claim was not pleaded, and the issue not subject to disclosure or evidence, I am not prepared to allow an attempt to introduce a Regulation 7 claim at this late stage. No explanation was advanced as to why such a claim had not been advanced before (for example in the amendments effected in April 2016).

(C) The effect of the Term of Arrangement clause

47. The Term of Arrangement clause in the Agreement provides:

"The consultancy arrangement will operate for a three year period subject to the completion of a successful review in January 2012. Assuming both parties are satisfied with the arrangement following this review, both parties will commit to a further two year consultancy period".

48. The essential difference between the parties is whether:

i) As Largo contends, the clause gave each party an unfettered right not to continue with the Agreement after 1 year; or

ii) as the Claimant contends, as a matter of construction or implication, the contract would only come to an end if (adopting the formulation in Mr Segal QC's Skeleton Argument):

a) there had been a "structured review" of [the Claimant's] performance into which [the Claimant] must be permitted a fair opportunity to put its case; and

b) an objectively reasonable judgment made in good faith by [the Defendant] that [the Claimant's] performance to date had been unsatisfactory; and

c) (adopting the formulation in the pleading) Largo had to determine it was not satisfied "inter alia by reference to [Mr Monk's] objectively quantifiable sales performance for the year 2011 against the agreed Realistic Number".

The position leaving aside the Regulations

49. Mr Segal QC places particular reliance on the fact that the Additional Incentive Payment provisions in the Agreement only apply after the first year (as these were based on sales in 2012 and 2013), and the fact that the prospects of remuneration were significantly weighted to those years rather than 2011.

50. However I regard this as, at best, a neutral factor in the construction of the "Term of Arrangement" clause. While this feature would certainly have given Mr Monk an incentive to secure some form of commitment that the Agreement would continue to 2012 and 2013, it would equally provide Largo with an incentive to have a break clause, if not satisfied with the Agreement, before the "Additional Incentive Payment" obligations kicked in. The issue for the Court is what the parties actually agreed. Mr Segal QC's argument that Largo's construction would "subvert" the object of the Agreement in providing for the Claimant's incentive arrangements seems to me to assert that which it seeks to prove.

51. Nor am I assisted by the fact that Mr Monk and Mr Coyle had been anticipating a discussion on a commission arrangement for some time and, as I have found, that Mr Coyle had indicated that some form of commission

structure would be offered some time before the actual discussions of the Agreement began. The Agreement which the parties negotiated did not provide for commission in respect of pre-2011 sales.

The contractual discretion cases

52. There are a number of cases in which contracts which give one party to the contract a discretion as to a matter which impacts the other have been held to impose obligations on the decision-maker as to the manner in which the discretion is exercised, and to require some minimum substantive content in the decision taken. In a commercial context, the principles applicable to the exercise of contractual discretions were summarised in an influential judgment by Rix LJ in Socimer International Bank Ltd. v. Standard Bank London Ltd. [2008] EWCA Civ. 116 at [60]-[68]. Rix LJ identified the context in which these principles fell to be applied as being:

"When a contract allocates only to one party a power to make decisions under the contract which may have an effect on both parties".

53. Those principles have also been applied in the context of an employment contract when considering, for example, an employer's administration of a bonus scheme (see for example Horkulak v, Cantor Fitzgerald International [2004] EWCA Civ. 1287) and, more recently, by the Supreme Court in Braganza v. BP Shipping Ltd. [2015] UKSC 17, in a judgment which recognises that the obligations applicable as a matter of contract may include obligations relating to *how* the decision is arrived at, as well as the content of the decision itself. In that case, Baroness Hale of Richmond DPSC identified the specific area of law under review as "contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts", and Baroness Hale also referred to "making decisions which affect the rights of both parties to the contract" (at [18]).

Termination clauses

54. However, it is not every decision which a party to a contract makes which can properly be characterised as a contractual discretion and to which the principles identified in Socimer and Braganza apply. Where, for example, a commercial contract gives one party a right to terminate in certain circumstances, it will not ordinarily be appropriate to subject the exercise of that right to obligations of procedural or substantive fairness akin to the public law duties which apply to the decisions of the executive. In Lomas & Ors v. JFB Firth Rixson [2012] EWCA Civ. 419 at [46], the Court of Appeal noted:

"the right to terminate is no more an exercise of a discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract".

55. At first instance ([2010] EWHC 3372 (Ch.), Briggs J. had reached the same conclusion by a different route, noting the right to terminate was "plainly to be exercised in such a way as the Non-defaulting Party considered best served its

own interests, by way of a choice between alternative remedies arising out of its counterparty's default" (at [93]).

56. In Mid-Essex Hospital Services NHS Trust v. Compass Group UK and Ireland [2013] EWCA Civ. 200 at [83], Jackson LJ noted of the contractual discretion cases that:

"[a]n important feature of the … authorities is that in each case the discretion does not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties".

57. Similarly, where a commercial contract gives one party an option to extend the contract, or as to the amount of goods to be supplied or acquired, or as to the ports or berths to or from which cargo is to be shipped, that party will not ordinarily be under any duties of the kind recognised in Braganza in relation to the exercise of that option.

58. Mr Brown referred me to other cases which, when considering commercial contracts, had held that a right to terminate was an absolute right which the entitled party could exercise solely by reference to his own interests, including TSG Building Services Plc. V. South Anglia Housing Limited [2013] EWHC 1151 (TCC) at [51] per Akenhead J.

59. One of the few decisions pointing the other way in the context of commercial contracts is MSC Mediterranean Shipping Co. SA v. Cottonex Anstalt [2015] EWHC 283 (Comm). At [97], Leggatt J. made the following observations when considering the issue of whether the innocent party had a legitimate interest in keeping a contract alive after the period when there had ceased to be a realistic prospect of the other party performing its primary obligation, and when that party's only interest in keeping the contract alive was to continue to claim liquidated damages under it:

"There is increasing recognition in the common law world of the need for good faith in contractual dealings. Further impetus has been given to this development by the unanimous judgment of the Supreme Court of Canada in Bhasin v Hrynew, 2014 SCC 71 , given on 13 November 2014, holding that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs more specific rules and doctrines. One such more specific rule which is now firmly established in English law is that, in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see e.g. Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No. 2) [1993] 1 Ll Rep 397 , 404; Paragon Finance Plc v. Nash [2002] 1 WLR 685, paras 39–41; Socimer International Bank Ltd v Standard Bank London Ltd [2008] 1 Ll Rep 558 , 575–577; British Telecommunications plc. V. Telefonica O2 UK Ltd. [2014] UKSC 42, para 37. The cases in this line of authority have all been concerned with the exercise of discretionary powers conferred by the express terms of the contract, whereas the choice whether or not to terminate the contract in response to a repudiatory breach is one which arises by operation of law. However, I cannot see why this should make any difference in principle. In each case one party to the contract has a decision to make on a matter which affects the interests of the other party to the contract whose interests are not the same. The same reason exists in each case to imply some constraint on the decision-maker's freedom to act purely in its own self-interest. The essential concern, as Rix LJ observed in the Socimer case at para 66, is that the decision-maker's power should not be abused".

60. The issue in that case was the vexed one of whether the innocent party's right to elect to *maintain* a contract after a repudiatory breach is subject to any restriction, and not whether the election to *terminate* a contract is an option in which it is "appropriate to imply some constraint on the decision-maker's freedom to act purely in its own self-interest". The decisions in Lomas and Mid-Essex do not appear to have been cited, and there was no consideration of whether the contractual discretion cases have any relevance to the issue of whether there is a limit on a right to terminate. I would respectfully doubt the general applicability of the principles developed in the contractual discretion cases to rights to terminate at law or under a contract. The decision in MSC Mediterranean Shipping Co. SA v. Cottonex Anstalt has been the subject of an appeal in which judgment is awaited, but neither party suggested that this judgment needed to be delayed until the decision of the Court of Appeal in that case had been handed-down.

There were no agreed sales targets

61. Both parties advanced a case that there was an agreed sales target, or at least an agreed level of sales by reference to which the issue of whether the first year of the Agreement was "satisfactory" was to be judged:

i) Mr Monk alleges that the figure is to be found in a document entitled "Financial Planning" which was presented at a meeting involving Mr Collins, Mr Coyle, Mr Hickey and (by telephone) Mr Monk on 8 November 2010.

ii) Largo alleges that the figure is to be found in the Example Calculations, a document attached to the Agreement.

62. Had either set of figures been intended to provide an agreed benchmark for the operation of the "Term of Arrangement" clause, I would have expected at least some reference to the figure in that clause. In fact it is clear that both figures were produced for purposes which were entirely independent of the "Term of Arrangement" clause, and it is only forensic necessity which has led to their re-characterisation now.

63. As to the context in which the respective figures came to be produced:

i) It is clear from the documents that Mr Monk had been looking to have a discussion for some time about an incentive or bonus scheme. By way of example, an email he sent to Mr Coyle on 21 April 2009 stated that he "would welcome opportunity to conclude or discuss further my proposals to you for bonuses on annual contribution and final exit value".

ii) On 15 March 2010, Mr Monk had provided Mr Coyle and Mr Hickey with a three year plan which was said to be achievable if various steps were implemented (a number of which were not, in the event, implemented). This referred to sales in Year 1 of £3.5m, Year 2 of £9.5m and Year 3 of £17.2m. However there is nothing to suggest this proposal featured in any contractual negotiations surrounding the incentive payments.

iii) Mr Monk and Mr Collins put forward suggested commission proposals on 1 and 13 July and again on 8 September 2010. However none of those proposals referred to any sales target or estimate for any of the years 2011, 2012 and 2013.

iv) A draft of what became the Agreement was produced within Largo on 30 September 2010 and sent to Mr Monk on 5 October 2010. This included the "Term of Arrangement" clause in the same terms as were finally agreed, but did not attach the Example Calculations which Largo claims formed the target relevant to the determination of satisfaction under that clause (which document had yet to be prepared). When this draft was produced and circulated to Mr Monk, the figure which Largo alleges constituted the relevant target had not been put into circulation or articulated.

v) On 5 October 2010, Mr Monk provided some comments on the draft, which included queries about how the additional incentive payment would be quantified. Mr Hickey responded to those comments that day, and in response Mr Monk replied "Thanks … that's reassuring. Will you change the wording so that it is a little clearer?" A revised version was produced on 18 October 2010 , reflecting certain comments by Mr Monk but including the Example Calculations in the same form in which it was attached to the Agreement. Both from the circumstances in which it made its appearance, and from its title, it is clear beyond argument that the document was produced to illustrate the calculation, in the light of the queries raised by Mr Monk as to its operation, and not as any form of target. I reject the evidence of Mr Hickey and, in so far as he sought to support that evidence, Mr Coyle on this issue.

vi) By 18 October 2010, the draft of the Agreement was close to its final form, in circumstances in which the figure relied upon by the Claimant as setting the target for the purposes of a review had yet to be produced or circulated. That version was sent to Mr Monk and Mr Collins by Mr Hickey on 18 October 2010.

vii) On 2 November 2010, Mr Collins informed Mr Hickey and Mr Monk that they wanted to review the proposed agreement before a meeting due to take place on 4 November (Mr Coyle responded asking what issues remained outstanding). The presentations for the meetings on 4 November are important, given the nature of the parties' arguments:

a) There was a presentation entitled "Account Plan Summary". This drew a distinction between an "Operating Plan" (for total sales of £4.81m in 2011) and an "Aspirational Plan" (for total sales of £8.024m in 2011). It explained that "Velvet Crunch" growth, particularly in the Impulse and Convenience sector, had been slower than outlined. It was explained that the plan – which I infer meant the Operational Plan - allowed "business to plan sensibly" (on issues such as manufacturing, inventory and work in progress) and explained that what I infer as the Aspirational Plan would stretch the two account managers, Mr Awan and Mr Hudson. There was nothing to suggest either plan was a relevant target for the Claimant's commission.

b) There was a presentation for a "Pre-Meet" involving Mr Collins, Mr Coyle and Mr Hickey (but not the Largo account managers). This had two elements – "the real numbers" for accounting planning (a reference to the fact that Mr Monk and Mr Collins were communicating that even the Operational Plan figure was too optimistic) and "engagement terms" (a discussion of the incentive terms for the Claimant). In the section addressing the former issue, it was indicated that "for financial planning" £3.8m was more realistic than £4.8m. In the section dealing with engagement terms, the effect of the financial terms appearing in Largo's draft of the Agreement of 18 October 2010 was analysed. Mr Monk and Mr Collins sought a reduction of the base level of sales from which commission would be calculated to £2.4m (as against the £3m in the 18 October draft). However it is clear that the discussion of the sales figure, for financial planning purposes, and the discussion of the commission arrangements, were treated as two separate topics. There is nothing to suggest that the £3.8m figure was discussed as having any form of significance so far as the operation of the terms of the Agreement was concerned.

c) There is then a note of a meeting on 4 November 2010 attended by Mr Collins, Mr Coyle, Mr Hickey, the two account managers and two other Largo personnel in which the first presentation "Account Plan Summary" but not the second "Pre-Meet" presentation was made.

viii) On 22 November 2010, Mr Collins sent Mr Hickey a spreadsheet with "our suggestion for an incentive". This referred to a "jointly stated aim" of building "a £15m business over 3 years", and proposed an incentive structure which increased (or "ratcheted") the commission percentage as sales increased above a baseline of £2.8m. Once again the document contained no reference to a target, whether of £3.8m or any other figure. Mr Hickey stated he would discuss the proposal with Mr Coyle and revert.

ix) This led to a draft dated 14 January 2011 which used a base figure of sales of £2.5m and made an adjustment to the amount of retainer which would fall to be deducted from the incentive payments made in 2011. This appears to have been discussed on 13 January 2011, and was then sent to the Claimant in its final and agreed form on 17 January 2011.

x) Finally, as I have explained above, I do not believe that Largo referred to their alleged target at the meeting on 27 January 2012 at which the Agreement was terminated. Nor did Mr Monk refer to what he now contends to be the relevant target in his email sent following that meeting on 6 February 2012. In each case, I believe that the identification of the relevant figure as a contractually significant target has come as an afterthought.

Conclusion on the "Term of Arrangement" clause (leaving aside Regulation 4)

64. In my opinion, the rights given by the "Term of Arrangement" provision here (whether characterised as a right to terminate or a right not to continue) are in the nature of absolute contractual rights rather than contractual discretions, such that the restrictions on the exercise of the right to "break" the contract for which Mr Monk contends do not arise as a matter of construction or implication. I have reached this conclusion for the following reasons:

i) The three-year period in the "Term of Arrangement" clause is subject to <u>both</u> parties being "satisfied with the arrangement". The mutuality of this clause is a distinguishing feature from the "contractual discretion" cases under which one party is allocated a power which impacts on the other.

ii) The final sentence of the "Term of Arrangement" clause – "following this review, both parties will <u>commit</u> to a further two year consultancy period" – are a strong indication that there was no commitment to the continuation of the second and third years of the Agreement when it was signed.

iii) While Mr Segal QC understandably placed great emphasis to the reference to "review" in two places in the clause, which he suggested connoted some formal decision-making process, I believe that the language, in context, means nothing more than that after one year, each party will have the opportunity to reconsider the Agreement, and, only if they are still happy with the arrangement, to commit to a further two years.

iv) The open-textured language of the clause (to which I return below), which does not identify any criteria by reference to which the issue of "satisfaction" is to be determined or any particular subject-matter about which both parties must be satisfied, itself supports the conclusion that this is an "absolute right" and not a contractual discretion. In particular I reject the suggestion that dissatisfaction has to be with the performance of the agent, if that is intended to exclude (for example) dissatisfaction with value of an agency relationship generally, or dissatisfaction (on the Claimant's part) with the commercial prospects of the product.

v) The treatment of a termination clause as involving a contractual discretion subject to Braganza duties would mean that two clauses with a commercially very similar content – a three year contract with a one year break clause, and a one year contract which could be extended to three years with the agreement of both parties – could have very different legal content. Indeed the present clause in some ways straddles that divide, because it requires a further "commitment" by both parties to years 2 and 3, rather than simply a failure to terminate a commitment which has already been given,

vi) Finally, a provision of this kind in a commercial contract (one concerning the termination of a contract after a set period or for the extension of the period of a contract) is one which would ordinarily be characterised as an absolute right rather than a discretion.

65. As I indicated, there are further difficulties with the Claimant's construction:

i) The clause contemplates that both sides were entitled to review the position in January 2012, and that both sides had to be satisfied following that review.

ii) On this basis, if the Claimant decided it did not want to commit itself to another two years (for example because it believed that the time spent promoting Largo's products might more remuneratively be spent promoting other, potentially competing, products), it would seem that there would have to be some form of structured review of the position, with Largo having an opportunity to present "its case". It is very difficult to see what this review process might comprise, and how its "rationality" would fall to be determined, in relation to the matters which might lead the Claimant to decide it did not want to continue.

iii) There is nothing in the clause which limits the grounds of dissatisfaction to sales performance. There are other reasons why either Largo or the Claimant might be dissatisfied with the operation of the arrangement, ranging from a complaint about the quality of the advice received, poor personal relations, a belief that value for money or sufficient reward were not being received, or a belief that the sales were being achieved notwithstanding rather than because of the Claimant's efforts. In these circumstances, I do not believe it is possible to imply a limitation that termination can only be on the basis of a particular level of sales.

iv) As I have explained above, I reject the argument there was an agreed level of sales by reference to which the issue of termination could (on the Claimant's interpretation) be judged.

The argument by reference to the Regulations

Regulation 4

66. If the Claimant is unable to achieve the desired construction at common law, Mr Segal QC has a further argument which rests on Regulation 4. This provides:

“**Duties of a principal to his commercial agent**

(1) In his relations with his commercial agent a principal shall act dutifully and in good faith.

(2) Without prejudice to the generality of paragraph (1), a principal shall in particular-

(a) provide his commercial agent with the necessary documentation relating to the goods concerned;

(b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify his commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

(3) A principal shall, in addition, inform his commercial agent within a reasonable period of his acceptance or refusal of, and of any non-execution by him of, a commercial transaction which the commercial agent has procured for him”.

67. Mr Segal QC relies on the obligation of good faith, referring in support of his argument as to the width of that obligation to Fergus Randolph QC and Jonathan Davey *The European Law of Commercial Agency* (3rd, 2010). The authors note the difference between the terms in which the agent’s and principal’s duties of good faith are expressed. The agent’s duty of good faith under Article 3 is one owed by the agent “[i]n performing his activities”. The principal’s duty of good faith under Reg 4 applies “[i]n his relations with his commercial agent”. The authors conclude (at page 58):

“Whatever the reason for the difference in wording, the effect could be quite dramatic. It could be argued that in keeping with the perceived need to protect commercial agents, the duties to act dutifully and in good faith placed on principals should be construed as being more onerous than those imposed on agents, at least in terms of their temporal extent … The logic of this argument would lead to a principal being fixed with a duty to act dutifully and in good faith in any pre-contractual negotiations, whilst the agent was not so fixed”.

68. Building on this analysis, Mr Segal QC argues that the obligation of good faith also extends to an obligation on the principal’s part in exercising any right of termination. In support of this argument, he relied on a comment said to have been made by Mr Coyle to Mr Monk about the “Term of Arrangement” clause during the period in which the Agreement was under negotiation. I address the issue of whether such a comment was made below.

69. There is no authority on the issue of whether Regulation 4 can qualify an express right of termination on the principal's part. A similar issue was argued by Mr Segal QC before His Honour Judge Seymour QC in Vick v. Vogle-Gapes Ltd. [2006] EWHC 1665. The Agency Agreement in that case provided:

"7.1 If in the reasonable discretion of the Principal, the Agent is failing to maximise sales opportunities within the Territory, the Principal may by one month's written notice to the Agent amend the Territory.

7.2 The Principal may by one month's written notice to the Agent amend the Market by adding or deleting specific customers or categories of customers."

70. The argument which arose concerning the impact of Regulation 4 on this clause, and His Honour Judge Seymour QC's conclusions, appear from [84] to [87] of the judgment:

"[84] The general nature of the argument of Mr. Segal was that in construing any of the provisions of the Agency Agreement, and in particular clause 7, it was necessary to have regard to the obligation of the Company in clause 4.1.2 of the Agency Agreement to act towards Mr. Vick dutifully and in good faith. In other words, any power of the Company to do some act which could have repercussions upon Mr. Vick was only to be exercised dutifully and in good faith. I do not think that Mr. Jason Coppel, who appeared on behalf of the Company, dissented from that proposition. I am not sure that, without the agreement of the parties on the point, I should have reached the same conclusion, that is to say, that all express terms of the Agency Agreement which permitted the Company to do something were to be read as subject to the obligation in clause 4.1.2, but for the reasons which I shall explain, my doubt on the point did not prove to be material in the circumstances of the present case.

[85] Mr. Segal submitted that the obligation to act towards Mr. Vick dutifully and in good faith was at least as wide as the obligation implied on the part of both an employer and an employee in a contract of employment to act towards the other with mutual trust and confidence. The content of that obligation was considered by the House of Lords in Malik v. Bank of Credit and Commerce International SA [1997] ICR 606. The formulation approved by the House of Lords was that the relevant party (in that case the employer):

"shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

[86] I accept those submissions of Mr. Segal. However, it is material to notice that, in the formulation approved by the House of Lords, a number of elements fall to be considered on the way to reaching a conclusion as to whether the obligation has, on particular facts, been breached. The first

is that whatever has been done which is said to have amounted to a breach of the obligation must have been done without reasonable and proper cause. If what was done was done reasonably and for good cause, it is not a breach. Second, what was done which was said to have been a breach must have been calculated and[1] likely either to destroy or to seriously damage the relationship of trust and confidence. It appears that what is required is deliberate, rather than inadvertent conduct, but that the conduct in question need not be targeted at the other party to the contract, as opposed to someone else …

[87] Mr. Segal submitted that an aspect of the obligation to act dutifully and in good faith towards Mr. Vick involved the need for any decisions made by the Company concerning him to be both genuine and rational. I accept that also".

71. On the facts as found by His Honour Judge Seymour QC, the issue of whether the exercise of clauses 7.1 and 7.2 was subject to the Regulation 4 duty did not arise for decision because, on the facts the Judge found, there would be no breach even if the obligations for which Mr Segal QC contended in that case were established. I note His Honour Judge Seymour QC's caution on the concession. In any event, there are material differences between the operation of a termination or break clause, and a unilateral power by one party to vary the scope of performance. In these circumstances, I do not think Vick v. Vogle-Gapes takes either party very far.

The disputed assurance as to the operation of the "Term of Arrangement" clause

72. Before returning to the legal argument, I will first resolve this disputed issue of fact as to the assurance which Mr Monk alleges was given to him by Mr Coyle about the "Term of Arrangement" clause:

i) Mr Monk gave evidence that he had a conversation with Mr Coyle about this term and that Mr Coyle "told me not to worry about it". In the Particulars of Claim, it was suggested that this was said at a meeting in Largo's board room on 18 October 2010, and the account of the conversation given was rather more detailed than the very brief reference in Mr Monk's evidence. This issue was not addressed in Mr Monk's witness statement at all.

ii) Mr Coyle denied that he made any such statement. He said if a term is put in a written contract, he intends it to be binding and relied upon, and that the clause was important to him because he would have been reluctant to bind Largo for a 3-year period.

iii) On this issue, I have concluded that Mr Monk is mistaken in his recollection – either no such statement was made, or at least nothing

[1] It was common ground before me that this should read "or", the error being in the original transcription in Malik.

which could sensibly have been understood as having any legal significance for the operation of the clause.

iv) Mr Monk is clearly an experienced businessman. I find he would have understood both the significance of the "Term of Arrangement" clause, and the need to address this issue in the written Agreement if he had any concerns about how it might operate.

v) The draft of the Agreement with the "Term of Arrangement" clause was sent to Mr Monk in the morning on 5 October 2010. He clearly read that document with some care, and an appropriate level of caution, sending back detailed comments later that afternoon. He introduced those comments by saying "Maybe I am feeling unusually paranoid today, but I am concerned about a number of items in the engagement letter and would like some clarification please!" There was no reference to the "Term of Arrangement" clause.

vi) The queries which Mr Monk did raise included queries about how the additional incentive payment would be quantified. Mr Hickey responded to those comments that day, and in response Mr Monk replied "Thanks … that's reassuring. Will you change the wording so that it is a little clearer?" This confirms my conclusion that where Mr Monk had received assurances in relation to the draft, he was astute to record them in the written agreement.

vii) In his letter to Mr Coyle on 6 February 2012, following the meeting at which the "Term of Arrangement" clause was exercised, Mr Monk made no reference to the alleged reassurance. I regard this as a surprising omission if Mr Monk had then had a recollection of the alleged assurance from Mr Coyle.

73. I now return to the legal issue of whether Regulation 4 can have the effect of imposing constraints on the principal's exercise of what, absent that Regulation, would be an "absolute right" to terminate.

The employment contract cases

74. Mr Segal QC drew an analogy between the duty of good faith owed by the principal, and the obligation of mutual trust and confidence between employer and employee, and, in that context, both parties relied on authorities which had considered the effect of that duty on the employer's right to exercise a contractual right of termination. I consider these authorities in turn.

75. Mr Segal QC referred me to the following cases:

i) <u>Aspden v. Webbs Poultry and Meat Group (Holdings) Ltd.</u> [1996] IRLR 421. In that case Mr Aspden was the beneficiary of a company health insurance scheme, the benefits of which were contingent on Mr Aspden's continuing status as an employee. There was also a general power on the company's part to dismiss Mr Aspden on notice. While Mr Aspden was on sick leave, the company gave Mr Aspden notice of dismissal. Mr Justice Sedley held that the contractual right to dismiss on notice could not be exercised while Mr Aspden was on sick leave. That conclusion rested on an implication which arose from reading the health scheme and the employment contract together, and evidence as to the company's prior practice (and Mr Aspden's knowledge of it),

ii) Jenvey v. Australia Broadcasting Corpn. [2003] ICR 79. In Jenvey, there was a redundancy situation at the employer, and the claimant would have been dismissed by reason of the redundancy. However the claimant was summarily dismissed under a contractual termination clause. Mr Jenvey argued that it was an implied term of his contract of employment that where a redundancy situation arose, the employer would not exercise the contractual right of dismissal so as to remove Mr Jenvey's contractual entitlement to redundancy benefits. Applying the approach adopted in Aspden and similar cases, Elias J. held that where the employer had resolved to make the employee redundant, it would be "contrary to the functioning of the redundancy scheme and to its purpose" to allow the right of termination to be exercised so as to defeat the entitlement to redundancy benefits.

76. Mr Segal QC relies on these terms to suggest that "where the purpose of a contractual provision … is to provide for the potential conferring of a valuable benefit on the employee, the express right to terminate the contract is to be circumscribed by the duty – at the very least, as part of the mutual duty of trust and confidence, if not by way of implied term in any event – of the employer not to exercise the right of termination in circumstances where that would frustrate the purpose of the contractual provision". However it seems to me that the decisions turn on the particular rights – either under the sickness scheme or the redundancy – of which the employee would be deprived by termination, rather than any more general proposition.

77. Mr Brown referred me to Reda v Flag Limited [2002] UKPC 38, a decision of the Privy Council on appeal from the Court of Appeal of Bermuda. That case involved a claim by two senior executives whose contracts of employment were terminable without cause at any time. The contracts were terminated, in circumstances in which the effect of that termination was to prevent them from participating in a stock option plan which was to be introduced. There was no relevant statutory framework, and accordingly the issue fell to be determined solely by reference to common law principles. The employees contended that the exercise of the right of termination was vitiated because it has been exercised for a collateral purpose.

78. The Privy Council stated at [43]:

"But in the present context there is no such thing as a "collateral" or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none. The Directors of Flag were, of course, obliged to exercise their powers as directors in good faith and for the benefit of the company. As the Court of Appeal pointed out, however, this was a duty owed to the company and not to its employees. There is no reason to doubt that, in resolving to exercise Flag's contractual right to terminate the appellants' contracts without cause and before a stock option plan had been established, the Directors were loyally seeking to further the interests of Flag as they saw them, and Flag's shareholders implicitly approved the action that they took on its behalf."

79. It was also argued that the right of termination had been exercised in breach of the employer's implied obligation of trust and confidence. The Privy Council observed of this argument at [45]:

> "In common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in Johnson v Unisys it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification".

80. The decision in Aspden, relied upon by Mr Segal QC here, was referred to but distinguished as a case involving internally inconsistent provisions in the contract of employment, and a situation in which both parties had understood the income insurance scheme could only work if the employee remained employed for the duration of his incapacity (at [49]).

81. Finally, Mr Brown referred me to the decision of the House of Lords in Johnson v. Unisys Ltd. [2003] 1 AC 518. This is one of a number of cases which have considered whether an employer can be liable for breach of the mutual duty of trust and confidence not because of a decision to terminate the contract of employment at all, but because of the manner in which he does so. The answer to that question has been held to be no, because to recognise such a claim would cut across the statutory scheme created by Parliament for unfair dismissal cases, which represented Parliament's response to the issues created by the decision of the House of Lords in Addis v. Gramophone Co. Ltd. [1909] A.C. 488. Absent that issue, there was clearly some judicial sympathy for the view that the implied term of trust and confidence could so extend (for example on the part of Lord Steyn at [24]).

82. However, the case does not establish, even in the employment context, that (absent the issue of consistency with the statutory scheme), the implied term of mutual trust and confidence might qualify not merely the *manner* in which the employer can exercise the termination clause, but whether he is entitled to exercise it at all. Lord Steyn does not go this far at [24], and Lord Hoffmann's judgment at [42]-[43] is positively against such a suggestion. I note Lord Bingham and Lord Millett expressed their agreement with Lord Hoffmann's opinion.

83. In conclusion, I do not believe that the employment cases support the general proposition that a contractual right to terminate employment would, absent the issues raised by the potential conflict with the statutory scheme for unfair dismissal, be qualified by the implied term of mutual trust and confidence so far as concerns the fact (rather than manner) of exercise of the right of termination.

84. In any event, some caution is required as to the completeness of the analogy between a contract of employment and a contract of commercial agency. The field of employment law is heavily regulated by statute and has developed its own particular body of principle, heavily influenced by considerations of employee protection which have an event greater impetus than those applicable to what Staughton LJ once referred to as the "down-trodden race" of commercial agents who are the beneficiaries of the protection afforded by the Regulations (Page v. Combined Shipping and Trading Co. Ltd. [1997] 3 All ER 656 at 660). In addition, through Regulations 8 and 17, the Regulations provide protection for the interests of the commercial agent on termination in a manner which has no counterpart in the field of employment law.

85. It is also significant that the "Term of Arrangement" clause provides a break clause at a single point in time (after 1 year and before particular contractual provisions which would apply in years 2 and 3 kick-in). To that extent, it is materially different from the continuing power of termination on reasonable notice in most employment contracts. This particular feature of the "Term of Arrangement" clause would make the implication of the qualifying duty of good faith in its exercise for which Mr Segal QC contends even more difficult.

86. For these reasons, I conclude that the employment law authorities cited to me do not support the conclusion that Regulation 4 qualifies the power not to continue with the Agreement given in the "Term of Arrangement" clause.

Conclusion on the "Term of Arrangement" clause (taking account of Regulation 4)

87. I have concluded that Regulation 4 does not require, or justify, a different conclusion as to the construction and effect of the "Term of Arrangement" clause to what which I have reached independently of Regulation 4:

i) While it is not relevant to my decision, I have some difficulty with the suggestion in Randolph and Davey that Regulation 4 may have the effect of imposing pre-contractual duties on the principal but not on the agent. This would involve the putative principal and agent having different duties in their pre-contractual dealings with each other. Further, Regulation 4 seems to pre-suppose the relationship of principal and agent already existing (referring to the principal's relations "with his commercial agent"), whereas in the pre-contractual context, no such relationship exists, and it may never come into existence. While not decisive, as these are only exemplary, the particular duties identified in Regulation 4 are all duties which only arise during the currency of an agency relationship.

ii) I think that there is a material difference between the principal's dealings with the agent for the purposes of performing the ongoing agency agreement, and a clause which defines the duration of the agency relationship. I see real difficulty in applying the duty of good faith to the exercise of rights of termination where the principal and agent are no longer engaged in what may be characterised as a joint endeavour, but considering whether that joint endeavour should continue.

iii) The argument would seem to involve an imbalance between the obligations of principal and agent in relation to the operation of a mutual termination right such as that in issue here, given that the agent's duty of good faith only applies "in performing his activities".

iv) The argument would attach very different legal consequences to clauses in agency contracts with a very similar commercial effect (i.e. between a clause which gave a right of termination after 1 year, failing which the contract would continue for 2 more years, and a clause automatically ending the agency relationship after 1 year, but contemplating that the parties could agree to extend it for a further 2 years).

v) Regulations 15 and 16 specifically address the issue of termination, and impose certain limitations, without any suggestion that those rights, or the rights of the principal, are qualified by Regulation 4.

vi) In circumstances in which Regulations 8 and 17 provide protection for the agent in the event of termination, it seems improbable that Regulation 4 is intended to provide a further level of protection in relation to the exercise of clauses terminating the agency relationship.

vii) I have real difficulty in seeing how a criterion of "good faith" falls to be applied to the exercise of a right to terminate the relationship which carries with it the agent's accompanying rights under Regulations 8 and 17, absent the exercise of rights with an intent to injure which is the characteristic of many civilian systems which recognise the concept of "abuse of rights".

88. As I explain below, while Largo's case as to its reasons for termination has been obscure and unsatisfactory, it is clear that the decision was taken principally because Largo did not think it would get value for money in continuing the agency. It was certainly not taken from any animus against Mr Monk and Mr Collins or desire to harm them.

(6) Was the termination of the Agreement unlawful?

89. On the conclusion I have reached, the termination of the Agreement on 27 January 2012 was lawful because the "Term of Arrangement" clause gave each of Largo and the Claimant an unfettered right not to commit themselves to a further two years.

90. So far as the factual issues as to the circumstances or reasons for the termination are concerned, my conclusions are as follows:

i) Largo did "review" the Agreement, in the sense that there was internal consideration of whether or not to exercise the "Term of Arrangement" clause, and a decision taken to do so on the basis of that internal consideration. I accept that this involved seeking input from Mr Awan, and that he did not offer a favourable assessment of the value being provided by the agency.

ii) At no stage did Largo invite Mr Monk or Mr Collins for input into their internal consideration, or provide them with a meaningful opportunity to persuade Largo to change its mind.

iii) Largo took its decision not from a desire to damage the Claimant, but for reasons of its own commercial interest, in that it believed that there was insufficient value for Largo in continuing the Agreement for another two years as against terminating it.

iv) Largo's decision as to its commercial interests was not the result of a single factor, but the product of looking at various issues: sales performance, Largo's assessment of how far Mr Monk and Mr Collins had continued and would continue to contribute to that sales performance, and a decision that the future contribution which Mr Monk and Mr Collins might make to Largo's business did not justify, in commercial terms, the amounts which might have to be paid to them.

v) I reject Largo's evidence that the dominant factor was the failure to achieve the figures in the Example Calculations or any particular target, or a belief that the 2011 figures for "Velvet Crunch" were unsatisfactory in themselves. The 2011 sales figures were higher than the £3.8m "realistic target" communicated by Mr Monk and Mr Collins to Largo in November 2010, and at the same level as the "Operational Plan" figure of £4.81m discussed on the same occasion. Mr Hickey accepted that at the time he had regarded the £4.81m target as "optimistic". Mr Coyle accepted that achieving £3.8m in 2011 "would be reasonable" and that achieving the £4.81m figure in 2011 would be a pretty decent target to hit. The sales figures in 2011 were objectively satisfactory, although no doubt Largo would have been happier if they had been higher.

vi) However Largo took the view that the level of sales to date, and the contribution of Mr Monk and Mr Collins to further sales going forward, did not justify committing Largo to a further two years of the Agreement.

vii) In the aftermath of the termination, Largo have pointed to other issues which they say justified termination, including a concern about the fall in sales of "Velvet Crunch" sales to Tesco (as recorded in Mr Richardson's memorandum of 4 November 2011), poor relations between Mr Hudson and Mr Collins which it was said had led to the former's departure, and the failure of "Wholly Crunch". I accept that the last of these factors did lead to some loss of confidence on Largo's part in Mr Monk and Mr Collins, but as I have stated, it was a cold-blooded assessment of value for money rather than other factors which was the driving factor behind the decision. I do not believe the other factors mentioned by Largo and referred to in this sub-paragraph played any significant part.

viii) Both in April 2012, in its Defence and at trial, Largo has dissembled as to the real reasons for the termination, perhaps because it feared that a statement of the unvarnished and hard-nosed commercial considerations which had led to the decision might appear unattractive. It did itself no favours in doing so.

(7) The quantum of any breach of contract claim

91. In view of the conclusions I have reached, the issue of the amount of damages which the Claimant would have recovered for breach of contract does not arise. However, I heard arguments on it, and in these circumstances I set out my findings on the issues of fact.

92. In so far as the Claimant's breach of contract claims are premised on the procedure adopted in arriving at the decision to terminate, rather than the grounds for the decision, it is accepted that any breach would have caused no loss.

93. If I had found that Largo was not entitled to terminate the Agreement but was obliged to continue it for its second and third year, then the best evidence of the loss which the Claimant had suffered would be those commissions it would have earned, based on those sales achieved during 2012 and 2013, together with whatever additional incentive payments would have been obtained on the basis of those sales in fact achieved in 2014, 2015 and 2016. For the reasons I have set out above, this would have included sales made to Asda in Great Britain by NSF. I reject the suggestion that the amount of this damages claim can be affected by Largo's decision, from January 2014, to hand over responsibility for effecting sales of "Velvet Crunch" in Great Britain to KP. This unilateral act of Largo after what (on the hypothesis currently under consideration) would be an unlawful termination of the Agreement could not affect the amount the Claimant would be entitled to recover as damages for that unlawful breach of contract.

94. I do not know whether additional incentive payments would have been payable on the basis of the sales figures achieved in 2014, 2015 and projected to be achieved in 2016 and, if so, how much. Both parties have suggested that I leave it to them to perform a calculation based on my findings, with short further submissions on paper or at a short hearing if necessary. I am content to follow this course.

95. There is then the issue of whether the Claimant can claim further loss on the basis that sales during 2012, 2013 and (presumably) 2014, 2015 and 2016 would have been larger had Mr Monk and Mr Collins remained in place.

96. Had the Claimant established a breach of contract, the burden of establishing a significant prospect of such additional sales would have rested on the Claimant.

97. There was very little in the way of evidence, beyond generalised assertion, as to what additional listings would or might reasonably have been obtained, or how it is said that additional sales might have been achieved through retailers with whom listings had already been obtained. In closing, Mr Segal QC relied on two budgets:

    i) A budget circulated by Mr Hickey on 6 October 2011, which had a plan for 20% growth for "Velvet Crunch" for both 2013 and 2014, on what was described as an "under promise over deliver" basis which Mr Hickey described as a target put in place with a view to over-achieving.

    ii) A budget discussed at a UK Commercial meeting on 15 December 2011, projecting an 18.5% growth in 2012 for "Velvet Crunch" and which was once again described by Mr Hickey as a "low figure".

98. However the evidence before me did not establish that any failure to achieve or exceed these budgets was due to the termination of the Agreement (as opposed to other factors which would have operated regardless of the agency). For example, it is clear that 2012 predictions of the success of "Wholly Crunch" proved to be misplaced for reasons wholly unconnected with the termination of the Agreement.

99. Mr Monk had been in place from mid-2008, and in the course of 2011 only two additional listings had been achieved (Poundland and Asda) in which, as I explain below, I conclude that Mr Monk and Mr Collins had not played the major part. I am not able to find on the evidence that Largo's Great Britain sales would have been higher than those actually achieved had the Agreement continued.

100. That leaves two further issues.

101. First, the Claimant will have to give credit for the costs which would have been incurred in performing the agency if it had continued for the following two years:

    i) This issue was relatively under-explored in the evidence before me, the main focus being on the issue of costs for the purposes of identifying the value of the agency when assessing Regulation 17 compensation.

    ii) There is, however, an important difference between the two approaches, in that an allowance for costs saved in a damages claim considers the issue of marginal costs saved where there are fixed costs which will be incurred anyway, whereas for the purposes of valuing an agency under Regulation 17, a "marginal-cost" based approach is not appropriate (<u>Lonsdale v. Howard & Hallam Ltd.</u> [2007] 1 WLR 2055 at [29]).

    iii) There was very limited evidence as to the variable costs relating to the Claimant's performance of the agency. Doing the best I can, I find these to be 24% of the gross income: comprising 4% for travel, hotel and entertaining cost (for reasons which I explain below) and 20% for salary costs (taking the 10% figure put forward by Mr Holland in relation to Mr Collins' time, and assuming the same for Mr Monk). These figures are further discussed below. This 24% figure is likely to overstate the variable as opposed to fixed cost element, but the Claimant has not adduced sufficient evidence to enable me to reach a factual finding on any lower figure.

102. Second, where a party claims damages for a loss of a future income stream, that claim will ordinarily fall to be discounted for accelerated receipt (see e.g. Mitsui OSK Lines v. Salgaocar Mining Ltd. [2015] EWHC 565 (Comm) at [56]). The only evidence before me on this issue came from Ms Hotston Moore, which was that an appropriate rate of discount was 3.5% per year. In the absence of any other evidence, this is the rate I have adopted which would apply to the net loss of income from 2012 to 2016.

103. Finally, I should mention that Mr Brown sought to raise an argument on an alleged failure to mitigate on the basis that Mr Monk should have secured a replacement agency client. This argument was not pleaded or pursued in the cross-examination of Mr Monk, and I held that it was not open to Largo to pursue this issue in its closing submissions.

104. The parties are asked to apply the findings set out above for the purposes of arriving at the figure of damages recoverable if I had accepted the Claimant's case that the failure to continue the Agreement beyond January 2012 was a breach of contract.

(8) The claim to Regulation 8 Commission

105. Regulation 8 provides:

> "Subject to regulation 9 below, a commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if—
>
> (a) the transaction is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
>
> (b) in accordance with the conditions mentioned in regulation 7 above, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

The scope of Regulation 8

106. It is helpful to approach this question by first considering Regulation 7. This contemplates three scenarios in which a commercial agent is entitled to commission on transactions concluded within the period of the agency contract:

i) Where the transaction has been concluded with a third party "as a result of" the agent's actions (Regulation 7(1)(a)).

ii) Where the transaction is concluded with a third party whom the agent has previously acquired as a customer for transactions of this kind (in effect repeat orders from a customer originally acquired by the agent: see Bowstead & Reynolds, on Agency (20th) para. 11-030) (Regulation 7(1)(b)).

iii) Where the transaction was concluded with customers or in a territory with whom the agent has an exclusive right to deal (Regulation 7(2)).

107. It should be noted that the Regulation 7(2) entitlement does not depend on any causal connection between the agent's activity and the transaction. The entitlement to commission provided by the Agreement was of this kind.

108. Regulation 8 sets out the agent's entitlement to commission on transactions which are entered into after the period of the agency contract. It does not extend to all of the rights to commission given by Regulation 7. Rather:

i) There is a right to commission if two conditions are met: the transaction is mainly attributable to the efforts of the agent during the period of the agency contract; and the transaction was entered into within a reasonable period of termination. This bears some similarity to the entitlement under Regulation 7(1)(a), although the Regulation 8 wording "mainly attributable to" differs from the Regulation 7(1)(a) wording "as a result of".

ii) There is a right to commission under any of the bases in Regulation 7 where the order of the third party reached the principal before the agency contract terminated (but, presumably, had not been accepted by that date such that the Regulation 7 limitation to "commercial transactions <u>concluded</u> during the period covered by the agency contract" is not satisfied).

109. There are a small number of legal issues which arise in relation to Regulation 8(a):

i) First, does it apply to transactions which, had they fallen within the period of the agency contract, would have been Regulation 7(1)(b) commissions (i.e. repeat orders)? I should add that it seems clear beyond argument that Regulation 8(a) does not apply to commissions covered by Regulation 7(2).

ii) Second, is the test of "mainly attributable" intended to mean something different from "as a result of", and, in any event, what does the test of "mainly attributable" require?

110. As to the first question:

i) Regulation 8(a) mirrors the focus in Regulation 7(1)(a) on the agent's contribution to the specific transaction. Regulation 7(1)(b) draws a distinction between the position where the agent "originates" the transaction, and where the agent "originates" the customer. Regulation

8(a) does not extend to the latter as an independent basis of claiming commission.

ii) Regulation 8 gives the former agent an entitlement to commission in respect of transactions concluded during the period when a replacement agent may be acting, with the replacement agent having no entitlement to commission under Regulation 7 on transactions for which a former agent is entitled to commission under Regulation 8: Regulation 9 (subject to those cases where it is equitable for the commission to be shared). This makes it all the more unlikely that the mere fact that the former agent had originated a customer who placed repeat orders would entitle him to the commission on those orders at the expense of the replacement agent.

iii) However the test of "mainly attributable" requires a focus on the type of contribution which the agent is expected to make, inter alia for the purpose of allocating commission between successive agents, rather than weighing agency against non-agency contributions to the obtaining of sales. Where, for example, the agent making a claim under Regulation 8(a) was selling a strong product, I do not think it can be said of post-agency sales that they are mainly attributable to the (continuing) quality of the product and therefore cannot be mainly attributable to the pre-termination efforts of the agent.

iv) This has a particular significance in this case because the key service which the Claimant was to perform was in the initial stages, to secure the first listing of the products with multiple retailers, allowing Largo's account managers to manage the relationship with the retailers on a day-to-day basis thereafter. I do not think the fact that Largo's account managers continued to manage the relationships after termination as they had before is <u>of itself</u> sufficient to prevent post-termination sales from being "mainly attributable" to the Claimant's pre-termination efforts. In particular this was not a case in which Largo appointed a replacement agent, who was providing an "agency" contribution to post-transaction sales.

111. In this respect I gratefully adopt the approach taken by Davies J. in <u>Tigana Limited v. Decoro Limited.</u> [2003] EWHC 23 (QB) at [59] to [60]:

"59. It seems to me that Mr Coleman's role was intended to be primarily introductory — that was the main purpose for which he had been retained as agent. To a considerable extent the agency was, if I may put it this way, "front loaded": that is, dependent on his activities at the outset (although also, of course, it was intended that he bring in yet more customers thereafter). Of course an important part of his role was thereafter also to maintain regular liaison with customers (and, not least, secure repeat orders) and assist in after sales service: but that too was an aspect of cementing the relationship created by the initial introduction …

60 As it seems to me, but for Mr Coleman's efforts at the end of 1998 and during 1999 in introducing customers Decoro would have had no

customer base. It is noticeable that in January 2000 Decoro was able to obtain substantial orders (from customers introduced by Mr Coleman) when it had no agent at all; and even when Mr Feltham-White started work for Decoro in February 2000 his initial activities were solely to service customers introduced by Mr Coleman. He was not in a position to achieve any new introductions until October 2000 (when there was the High Point fair at that time) and even during 2001 a very significant amount of Decoro's business still derived from customers who had been introduced by Mr Coleman. It is of some note that at that time Mr Feltham-White's experience had been entirely as a technical consultant: he simply did not have the general knowledge and experience of the retail customer side of the furniture industry, or the wide trade connections, which Mr Coleman had. It was Mr Coleman who, by his introductions, enabled Decoro to break into the UK market: and his efforts were, in my judgment, not significantly less causative of the conclusion of transactions in 2000 with customers introduced by him than they had been in 1999".

112. As to the second question:

i) For the same reason (as well as because of the obvious difference in terminology used), I conclude that the words "mainly attributable" in Regulation 8(a) impose a more exacting causal test than the words "as a result of" in Regulation 7(1)(a), that higher causal test reflecting the fact that the operation of Regulation 8(a) would deprive the replacement agent of all or part of his commission for a transaction concluded in the period of its agency.

ii) I was referred to the judgment of Davies J. in Tigana Ltd. v. Decoro Ltd. [2003] EWHC 23 (QB) at [54]:

"It is also clear that the phrase `mainly attributable' connotes a causative link between the efforts of the commercial agent and the conclusion of the transaction (albeit after the agency contract has terminated). One might perhaps see an analogy with the familiar English phrase `effective cause': but it is perhaps better not to gloss the words actually used in Regulation 8(a)".

iii) A similar analogy is drawn, in similarly qualified terms, in relation to the "as a result of" wording in Regulation 7.1(a) in Bowstead & Reynolds at para. 11-029.

iv) I conclude that the words "mainly attributable" impose a heightened causation requirement beyond simply being an effective cause, to reflect the use of the qualifier "mainly" and the consequences of Regulation 8(a) on the replacement agent's right to commission.

What sales are mainly attributable to the Claimants' efforts?

113. At trial, the Claimant's Regulation 8 claim was brought in relation to three customers:

i) Tesco.

ii) Asda.

iii) Poundland.

Tesco

114. It is clear that Mr Monk played an important part in securing the listing of “Velvet Crunch” and “Wholly Crunch” with Tesco, using Mr Monk’s close relationship with the Commercial Director of Packaged Foods at Tesco UK, Mr Andrew Yaxley.

115. Largo had been looking to develop its relationship with Tesco beyond “own label” products, with Mr Hudson asking Mr Tavoukdjian of Tesco on 25 March 2008 what Largo could do to become a more significant supplier of Tesco. It is clear that one of the reasons Largo retained Mr Monk in the first place was to achieve a break-through with major multiples in Great Britain which Largo had not been able to achieve on its own.

116. Mr Monk was able to achieve that break-through because of his relationship with Mr Tavoukdjian’s boss, Mr Yaxley. I accept Mr Monk’s evidence that he presented “Velvet Crunch” to Mr Yaxley on 18 and 19 April 2008, and it is clear from an email of 21 April 2008 that samples were sent to Mr Yaxley following that meeting. Mr Monk gave Mr Yaxley a gentle prod to follow up with Mr Tavoukdjian on 19 June 2008. The result of this interaction was a presentation by Marcus Hudson to Eric Tavoukdjian in August 2008 at which Tesco’s listing of “Velvet Crunch” was confirmed.

117. I am satisfied that this listing was mainly attributable to Mr Monk’s efforts. A later email from Mr Monk to Mr Yaxley’s successor referred to Mr Monk persuading Mr Yaxley to list “Velvet Crunch” notwithstanding initial scepticism on Mr Yaxley’s part, and I conclude that this is a fair summary of the position. Mr Monk continued to use his contacts with Tesco to assist Largo – for example encouraging Mr Yaxley to help with an off-the-shelf promotion in an email of 5 December 2008 (which led to Mr Yaxley’s response “another favour you owe me!”). Mr Monk was in touch with Mr Yaxley so far as the branding of the product was concerned in July 2009, and he was in contact with Tesco, including Mr Yaxley, when technical issues arose with “Wholly Crunch” in February 2010. Mr Monk also had connections with Mr Yaxley’s successor, John Scouller, and was in contact with him about Largo shortly after his appointment in July 2010. He also promoted Largo to Ashley Hicks (another Tesco executive), including “Wholly Crunch”, and was instrumental in persuading Tesco to list that brand notwithstanding poor early market reaction. The listing was confirmed on 25 January 2011. Mr Monk’s promotional efforts continued during 2011 – for example at a series of meetings with key Tesco personnel as recorded in an email to Mr Hickey and Mr Coyle on 30 June 2011.

118. This is not to say that Mr Hudson, and Mr Awan, did not play an important role, but Mr Monk had opened a door which Largo’s sales team had not been

able to open themselves. Largo clearly regarded Mr Monk's efforts as influential, or else it is difficult to see on what basis they were willing to enter into the Agreement with him in 2010 and early 2011.

119. In these circumstances, I am satisfied that there were sales to Tesco of "Velvet Crunch" and "Wholly Crunch" following the termination of the Agreement which were "mainly attributable" to Mr Monk's pre-termination efforts. I conclude that there is a strong parallel with the contribution described by Davies J. in Tigana Ltd. v. Decoro Ltd. at [58]-[59], on which Mr Segal QC understandably placed considerable reliance.

120. I address the issue of the "reasonable period" in relation to such sales below.

Asda

121. I turn now to Asda. It is clear that Mr Monk did seek to introduce "Velvet Crunch" to Emma Fox, the Commercial Director of Asda, on 12 January 2009. It is apparent from the contents of that email that Mr Monk did not know Ms Fox, but that he did know other Asda personnel – Darren Blackhurst, Nick Scrase and Andy Adcock. That email sought to arrange a meeting, which appears to have taken place by 21 April 2009, because on that date Mr Monk informed Mr Coyle that Asda had agreed to list "Velvet Crunch" at its next range review.

122. However no such listing took place for another two years. In contrast to Tesco, there is very little documentary evidence of interaction between Mr Monk and Asda concerning "Velvet Crunch", and none with the Asda contacts he mentioned in his first email to Emma Fox. When seeking to present another Largo product, popcorn, to Asda on 2 November 2009, Mr Monk made no mention of any prior decision by Asda to support "Velvet Crunch".

123. Mr Hudson and Mr Coyle presented "Velvet Crunch" to Asda in Great Britain on 21 September 2010 in a meeting in which neither Mr Monk nor Mr Collins appear to have played any part. I regard it as significant that Mr Monk only appears to have become aware of Asda's decision to list "Velvet Crunch" in Great Britain after the first sales had been achieved on 25 March 2011. The terms in which Mr Monk referred to this listing in his email to Mr Coyle and Mr Hickey on 14 April 2011 – "Heard about Asda taking Velvet Crunch into mainland. If you have accepted order suggest we monitor availability going forward" – suggest he was an observer of this event, rather than a central participant in it.

124. In these circumstances, I conclude that the listing of "Velvet Crunch" with Asda in Great Britain was not mainly attributable to the pre-termination efforts of Mr Monk, and that the claim for Regulation 8 commission in relation to sales by Largo to Asda fails.

Poundland

125. Poundland operates a large number of stores in the "impulse and convenience" sector, and typically sells products at a lower price than the major

supermarkets. For this reason, it is referred to as a discounter. Poundland was not a retailer with whom either Mr Monk or Mr Collins had any particular contacts.

126. The initial listing commitment from Poundland was achieved by Asif Awan through an approach in late May 2009, in which neither Mr Monk nor Mr Collins were involved. Mr Awan reported that listing internally within Largo on 5 June 2011, noting that it was initially a listing for a 6-pack offering, but it would be necessary to list in a 5-pack format which would ensure this did not "impact current listings of the 6 pack with other retailers".

127. Mr Awan reported the initial orders on 8 June 2011, together with the 5-pack proposal. Mr Collins clearly attributed the listing to Mr Awan's efforts ("he has done a cracking job") although he suggested the 5-pack idea was his own. This was disputed by Mr Awan, but in any event I accept Mr Hickey's evidence that the proposal to replace a 6-pack product with a 5-pack product was a standard means of resolving potential conflicts between the interests of different customers selling into different sectors of the market. In any event, I do not believe the issue of 6-pack or 5-pack is sufficiently important on its own to have the effect that the Poundland sales are "mainly attributable" to Mr Collins' efforts.

128. I accept that Mr Collins had input into the consideration by Largo about possible costings of the 5-pack product, although Mr Awan was also closely involved in those issues, and much closer to the detail of them. The documentary evidence of Mr Collins' involvement suggest a rather high-level input. Once again I do not think it can fairly be said that sales to Poundland were "mainly attributable" to Mr Collins' input.

129. Mr Segal QC also relied on what he described as Mr Collins' role in leading the "critical meeting" in September 2011, and in the "obviously tricky negotiations" between 19 September 2011 and December 2011. I conclude that Mr Segal QC has overstated the significance of these events, and Mr Collins' part in them:

i) "Velvet Crunch" had been on sale in Poundland from 5 July 2011, and Poundland were clearly of the view that there was "a huge opportunity" for "Velvet Crunch" at Poundland (as Mr Broadhurst of Poundland put it in an email to Mr Collins and Mr Awan after the meeting).

ii) The detailed work for the meeting on 19 September 2011, and the follow-up, was performed by Mr Awan with some input from Mr Collins. By way of example, Mr Awan clearly drafted the terms of the agreement, and Mr Collins' review of it comprised the comment "looks fine to me … I'm sure Jo will find a problem!!??"

iii) I accept that there was direct communication between Mr Collins and Ms Wrate of Poundland, including regarding concerns expressed by Ms Wrate about how terms with other discounters compared with those offered to Poundland (as referred to in Mr Collins' email of 18

November 2011). However Mr Awan was also closely involved in those issues (as seen, for example, in his email of 22 November 2011).

iv) Mr Collins did not attend the meeting with Poundland on 18 January 2012 at which the 5-pack listing was confirmed.

130. In summary, I do not believe the initial agreement by Poundland to list "Velvet Crunch" was mainly attributable to Mr Collins' efforts. It was, rather, the result of good work by Mr Awan for which Mr Collins rightly congratulated him at the time. While I accept Mr Collins had valuable input in moving the relationship forward over the following 6 months, together with Mr Awan, I do not believe the significance of this contribution was such that subsequent sales to Poundland could properly be described as "mainly attributable" to Mr Collins' efforts. As set out above, the subsequent work by Mr Awan and others did not have the effect that Mr Monk's initial listing at Tesco ceased to be the key cause of subsequent sales for some time thereafter. This is equally true of the work done by Mr Collins after Mr Awan had secured the initial Poundland listing.

What is a reasonable period?

131. As Davis J noted in Tigana at [63]-[64], "ordinarily, the lapse of time in any given case will, sooner or later, be likely to result in transactions ceasing to be `mainly attributable' to the efforts of the original agent". Davis J. also noted that the "reasonable period" requirement imposes an additional limit on Regulation 8 claims, and is not simply a sub-set of the issue of whether the sales are "mainly attributable" to the agent's efforts.

132. I was referred to findings as to what constituted a "reasonable period" in other cases, but ultimately this is an issue which must be determined by reference to the particular context before the Court.

133. Mr Segal QC argued for a reasonable period of 12 months, relying on evidence from Mr Monk and Mr Collins that listings were not reviewed more frequently than every 12 months unless sales were particularly poor. Mr Brown argued for a period of 1 to 3 months, on the basis of evidence from Mr Awan that reviews of listings were carried out every 1-3 months.

134. I accept the evidence of Mr Monk and Mr Collins that for a product selling well like "Velvet Crunch", a review would take place no more frequently than every 12 months. However, it does not follow that a reasonable period is 12 months from 27 January 2012. First, the listing with Tesco had been achieved by August 2008, and so there is no basis for supposing that the next annual review at Tesco would not take place until January 2013. Second, it was the evidence of Mr Monk and Mr Collins that supermarkets required close attention after listings had been secured to maintain the relationship. In all the circumstances, I conclude a reasonable period would be the first 9 months of 2012, and that all sales to Tesco in Great Britain during this period were mainly attributable to Mr Monk's efforts. According to Ms Hotston Moore's report, these amount to £1,857,000, and therefore the Regulation 8 commission amounts to £74,280.

The effect of the base sales provision

135. The entitlement to commission during the period of the Agreement was on sales over base sales of £2.5m, with a guaranteed consultancy fees of £78,000 a year which would be deducted from commission.

136. A claim under Regulation 8 will relate to a period in which no consultancy fees are payable, and an issue has arisen in these circumstances as to how the £2.5m base sales requirement falls to be applied.

137. Ms Hotston Moore proposed the approach of pro-rating the £2.5m figure for annual sales to the period chosen as the "reasonable period". While initially going along with this approach, Mr Segal QC argued in closing that it was not appropriate to take account of the base figure at all, and I conclude that he is correct:

i) First, I agree with Mr Segal QC that Regulation 8 gives the agent a free-standing entitlement to commission on sales achieved within a reasonable period which were mainly attributable to its efforts. Applying the "base sales" requirement would prevent the agent receiving commission in respect of some or all of those sales.

ii) Second, I do not think the "base sales" requirement can fairly be applied independently of the consultancy fee provisions of the Agreement, which (in effect) provide the remuneration for the base sales. It is common ground that the consultancy fee provisions (which take effect as a guarantee of a certain remuneration which falls to be deducted from the incentive payment) cannot be applied under Regulation 8. In these circumstances, it would be inappropriate to apply the "base sales" provision.

iii) Third, the parties accepted that it was conceptually possible for different accounts to be subject different reasonable periods. It is impossible to see how the £2.5m base sales threshold could be applied in those circumstances.

138. I did not understand the Claimant to argue that any claim for additional incentive payments could arise in relation to Regulation 8. The additional incentive payment provisions, which would involve looking at total sales over a period running to 2016, are not capable of application to those specific commission claims on specific transactions falling within Regulation 8.

Conclusion on the Regulation 8 claim

139. Accordingly, I hold that the Regulation 8 claim succeeds in respect of sales to Tesco in Great Britain in the first 9 months of 2012, without any further deduction, but not otherwise. The amount of the Regulation 8 entitlement is £74,280.

(9) The claim to Regulation 17 Compensation

140. Regulation 17 provides:

“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] [1] 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".

The approach to calculating Regulation 17 compensation

141. The proper approach when valuing a Regulation 17 compensation claim has been authoritatively determined by the House of Lords in Lonsdale v. Howard & Hallam Ltd. [2007] UKHL 32. Lord Hoffmann noted:

i) The French jurisprudence from which Article 17 was derived regarded the agent as having had a share in the goodwill of the principal's business which he had helped to create: [9].

ii) However the process of working out the value of that goodwill was too complicated to provide a basis for quantifying the Regulation 17 entitlement, and so the agent is compensated for the loss he suffers by being deprived of the agency business: [10].

iii) That involves placing a value on the agency business. For the purpose of performing that valuation it was "necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract": [12].

iv) Subject to this, there is "no reason to make any other assumptions contrary to what was the position in the real world at the date of termination": [13].

Is it relevant to take account of the 3 year period of the agency and Largo's desire to terminate the agency?

142. Mr Brown argued that two of the "real world" assumptions which had to be made in the present case were (a) that, but for the termination after 1 year, the agency had only two years to run and (b) that (as demonstrated by the termination) Largo was not satisfied with the agency.

143. I reject these arguments, which appear to me to me to be contrary to established authority:

i) In every circumstance in which a Regulation 17 calculation is performed, the agency contract will in fact have come to an end, such that in the "real world" the agent would have no unexpired agency to sell to a hypothetical purchaser. Nonetheless, as Lord Hoffmann makes clear, the assumption is made for the purpose of valuing the agency that the agency continues. Were any other approach adopted, the valuation of the agency business could not serve its function as a proxy for the value which the agent has lost, and which the principal has been able to acquire for itself, by the termination of the agency.

ii) Mr Brown appeared to accept that this was the position where an indefinite contract of agency was terminated by reasonable notice, or where a fixed term contract of agency terminated by effluxion of time, but he argued that a different course followed where a fixed term agency was terminated by notice prior to the point when it would have terminated by effluxion of time. However, this argument involves drawing unsupportable differences in outcome between very similar factual positions. In any event, the fact that an agency contract was for a fixed term would not mean it would definitely have ended after its fixed term, because it would be open to both parties either to renew it, or to carry on performing it such that it would be converted into an agency contract for an indefinite period under Regulation 14.

iii) For the same reason, the fact that Largo did not want to continue the agency, and in that sense was dissatisfied with it, cannot be a factor which reduces the value either of the agent's contribution or the business it has lost. Save where the Regulation 18(b)(ii) applies, Regulation 17 compensation will almost invariably be determined in circumstances in which the principal does not want to continue with the agency.

144. Mr Brown relied on the decision in McQuillan v. McCormick [2010] EWHC 1112 (QB) at [167], in which His Honour Judge Behrens took account of the risk that the supplier of products to the principal might terminate that supply in assessing Regulation 17 compensation. However, that is fundamentally different from making assumptions as to the termination of the agency contract itself. The risk that the principal might be unable to source the goods which the agent was retained to sell is clearly a "real world" event which must be factored into valuing the agency, just as the risk that the principal might cease business would need to be factored in (Lonsdale at [23]). However, that is very different from the factor which Mr Brown seeks to bring into play in this case. I note that His Honour Judge Waksman QC distinguished McQuillan for the same reason in The Software Incubator Limited v. Computer Associates UK Limited [2016] EWHC 1587 (QB) at [166].

145. I am fortified in the conclusion I have reached by the conclusion of Flaux J. faced with what I regard as a similar argument in ARSM Ltd. v. Typhoo Tea Ltd. [2016] WHC 486 (Comm) at [99]-[100]:

"99 One of the other points taken by Mr Hall is far more controversial. He says that any valuation should take account of the 12-month notice period in the agency agreement, which was another reason why he took a multiplier as low as 1 or 2. As he said in cross-examination:

"Again, I am taking a commercial view, putting myself in the position of advising a client, and in that situation if there is a possibility of termination in the foreseeable future there is a possibility that the purchaser might not be able to operate the agency sustainably, and those are contingencies that I would advise the client to build into the valuation."

100 In his submissions, Mr Thomas QC placed great emphasis on this point, saying that, in the real world, any valuation would take account of the fact that the agency was terminable after 12 months. However, I agree with Mr Segal QC that this is a heterodox approach. As is clear from para 12 of Lord Hoffmann's judgment in Lonsdale quoted above: "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", in other words the valuation for the purpose of the regulation is on the basis that the agency continues, with the purchaser performing the agency agreement in accordance with its terms, and the principal not invoking any termination or notice provision. Even if this point were not absolutely clear from Lonsdale , what is essentially the same argument was rejected by the Court of Appeal in an earlier case on the Regulations, Page v. Combined Shipping & Trading [1997] 3 All ER 656: see per Staughton LJ at p 660D-H. Accordingly, in my judgment, the notice period is to be disregarded in valuing the agency and the assumption should be made that, in the absence of external evidence of matters, such as financial difficulty or a trade in terminal decline, the agency would have continued".

146. That does not mean that the agency should be valued on the basis that it would continue indefinitely (and I note that Mr Justice Flaux in ARSM used a multiplier of 4, and so clearly was not assuming an agency of indefinite duration for the purposes of his valuation). In this regard I do not detect any difference in approach between Mr Justice Flaux and that of His Honour Judge Waksman QC in The Software Incubator v. Computer Associates UK Limited [2016] EWHC 1587 (QB). In the latter case, which concerned a 12 month renewable contract terminable on 3 months' notice, the Judge expressly rejected the argument that the valuation should assume that the agency would end after 12 months (at [151(2)] and [159(1)]), and adopted a 4 year period for the purposes of a discounted cash-flow valuation. The fixed term period of an agency, or the principal's desire to terminate it, are not themselves factors which reduce the compensation recoverable for loss of the agency, but the valuation which a hypothetical purchaser would ascribe to an agency will inevitably reflect the range of uncertainties inherent in the acquisition of such a business.

The level of sale to be assumed post-termination

The evidence of the experts

147. The Claimant's expert, Mr Robert Holland of James Cowper Kreston, gave evidence that the figure which a hypothetical purchaser would have used to value the agency was to be derived as follows:

i) He took the actual sales figures for 2011, 2012 and 2013. He described these as conservative because they did not include any additional sales which would have resulted if the agency had not been terminated. As I have stated, I am unable to conclude on the evidence that there would in fact have been any such increase, and I am not persuaded that any hypothetical purchaser would have assumed such an increase for the purpose of valuing the agency, still less that it would have been willing to pay a seller of the agency for what would, on this assumption, be the consequences of its own additional sales effort post-purchase.

ii) Applying the 4% commission to those sales, and deducting the monthly payments, he arrived at total payments in 2011, 2012 and 2013 of £170,640.

iii) Mr Holland then considered the provisions in the Agreement for payment of an additional incentive payment. These provided:

> "An additional incentive payment will be made of 3% of the average incremental sales in excess of the annualised, net branded sales of £2.5m for the 2012 and 2013 years. The additional incentive payment would be paid in three equal instalments in 2014, 2015 and 2016. The additional payment will be adjusted in proportion to sales in the event that the average, increased sales rate is not maintained in each of these years ….
>
> In all of the above arrangements, the incentive payments will not exceed a maximum of £1.3m over the projected six year period".

iv) Assuming that 2013 sales had been maintained during 2014 and 2015, he calculated that a further £116,610 would be earned producing total incentive and additional incentive payments of £287,250.

v) Mr Holland divided that figure by 6 to arrive at £47,785.

vi) He then concluded that the relevant figure which a hypothetical purchaser would use to arrive at a value lay between the guaranteed £78,000 a year, and £125,875 (the latter being £78,000 plus £47,785).

vii) For the purpose of arriving at his best estimate, he used the mid-point.

viii) In the Joint Memorandum, Ms Hotston Moore had expressed her disagreement with the view that a hypothetical purchaser would place any value on the possibility of receiving additional incentive payments.

ix) Mr Holland referred again to his figure of £125,875 for the gross annual earnings which he said a hypothetical purchaser would have assumed, but accepted "this latter figure may, however, need to be discounted to reflect the inherent uncertainty involved and the possibilities of compromise during a negotiation".

148. Largo's expert, Ms Hotston Moore, used the 2012 and 2013 sales figures. Including sales through NSF, her figures are £157,384 for 2012 and £153,589 for 2013. However, her evidence is that in arriving at a figure for earnings, a

hypothetical purchaser would place great weight on sales in 2009, 2010 and 2011, as well as projected earnings in 2012 and 2013, applying a weighting of 1:2:3:2:1. Ms Hotston Moore's figures are not directly comparable with Mr Holland's, because she applies the weighting at the net rather than gross stage, but the effect of her approach would be significantly to discount the gross earnings assumed.

The Claimant's argument in closing

149. In his closing submissions, Mr Segal QC for the Claimant invited the Court to conclude that his own expert had seriously underestimated the maintainable sales which a hypothetical purchaser would have assumed for the purpose of arriving at the valuation.

150. Mr Segal QC's approach involved taking the retainer of £78,000 and the incentive payment of £79,360, and adding to that another £118,020 which it is said would have been accrued from an additional incentive payment of £118,020 to produce 2012 earnings of £275,380. The end result of this approach was to arrive at a figure for the value of the agency of £1,799,420. This is to be compared with Mr Holland's valuation of between £470,000 and £756,000, with a best estimate of £613,000. The suggestion, therefore, is that the true valuation was nearly 3 times Mr Holland's best estimate.

151. I have concluded that it not open to Mr Segal QC to run such an argument in closing and that it fails on the evidence before the Court in any event:

i) It is unsupported by expert evidence, and is inconsistent with the evidence of both experts. Ms Hotston Moore expressed the view that a hypothetical purchaser would not take account of the possibility of additional incentive payments, and Mr Holland placed the upper end of his range at £125,857, was of the view that that figure might have to be reduced to reflect uncertainty, and his own best valuation was based on a figure significantly below that.

ii) It seems to me that the exercise in valuation involves not simply considering the component parts of a valuation in isolation, but standing back and considering the outcome. Not only was there no expert evidence that the end-product of Mr Segal QC's analysis in closing would pass any "sense test", but Mr Brown was deprived of the chance of exploring this issue with Mr Holland and Ms Hotston Moore.

iii) It treats the additional incentive payment as payment which a hypothetical purchaser would have added to the projected 2012 figure, and then subjected to the multiplier. However the Agreement appears to envisage a single, rather than repeat, Additional Incentive Payment, to be paid in three instalments over 3 years. Due to the late stage at which this point was deployed, this issue was not explored.

iv) On a gross basis, ignoring costs which fell to be deducted, Mr Segal QC's approach assumes maintainable gross earnings over the period 2011 to 2016 of £1,652,280 against the contractual limit of £1.3m for the same period, Once again, the late stage at which the point was taken left this issue unexplored in submission or evidence.

Conclusion on the gross earnings figure

152. My conclusions are as follows:

i) A hypothetical purchaser would attach significance both to the 2011 figures, as the most recent, and the projected 2012 figures, having regard to the upwards direction of travel.

ii) In circumstances in which profits were moving upwards, I am not persuaded that a hypothetical purchaser would apply a 1:2:3:2:1 weighting going back to 2009, or that the lower sales in 2009 and 2010 would have influenced a hypothetical purchaser to any significant degree.

iii) As both experts were prepared to treat the actual 2012 figures as the best evidence of the figures which would have been projected on 27 January 2012, I shall adopt the same course. Lord Hoffmann in Lonsdale at [39] noted that subsequent events may provide evidence of what the parties were likely to have expected to happen.

iv) I accept Ms Hotston Moore's evidence that a hypothetical purchaser would not factor the possibility of an additional incentive payment into the calculations. I have reached this conclusion because of the additional uncertainty as to whether such a payment would arise, the period of time before it did arise, and the fact that the issue of whether or not profits were maintained at the requisite levels would depend to a significant extent on the hypothetical purchaser's own efforts after purchase.

v) Averaging the 2011 and projected 2012 figures produces gross earnings of £125,520, a figure which is at the upper-end of Mr Holland's range and which he said would fall to be discounted for uncertainty. Given the upward trend in profit, I conclude that a hypothetical purchaser would not make a further deduction. I therefore conclude that the appropriate gross earnings to assume are £125,520 per year.

153. I note that in The Software Incubator Limited v. Computer Associates UK Limited [2016] EWHC 1587 (QB), His Honour Judge Waksman QC made an adjustment to the maintainable profit to allow for the effect of taxation. I received no argument on whether any adjustment should be made to this figure to allow for the effects of taxation and accordingly have made no such adjustment.

Costs of the agency

154. There are three issues relating to the costs of the agency.

155. First, there is the issue of non-salary costs:

i) In Lonsdale at [29], Lord Hoffmann noted:

> "In the case of an agent who has more than one agency, the costs must be fairly attributable to each. He cannot simply say … that the marginal cost of the … agency was little or nothing because he had to see the same customers and go the same exhibitions for [the other agencies]".

ii) Ms Hotston Moore derived a figure of 9.06% from Food Investors LLP's 2011 accounts. Food Investors LLP is an entity operating in the same market place as the Claimant, in which Mr Monk is also a partner.

iii) Mr Holland used a figure of 4% derived from IVB's 2011-2012 accounts. Although this is described in the Joint Statement as a marginal cost approach, it in fact takes the percentage of total costs to total earnings and applies the same percentage to the Largo commissions. I do not believe that involves using a marginal cost figure in the sense in which Lord Hoffmann used the term. IVB is the entity through which the agency was conducted.

iv) It seems to me that IVB provides a more appropriate source from which to derive the overhead percentage, and I note that Ms Hotston Moore accepts that it is a reasonable basis to calculate the expenses.

v) Accordingly I conclude a rate of 4% for non-salary expenses is appropriate.

156. The second issue concerns what percentage of Mr Collins' salary should be allocated to the Largo account (it being common ground that some percentage should be deducted):

i) Mr Collins estimated that 5% of his costs were attributable to Largo, although he did not keep time sheets. At the time of the 2011 Agreement, he was working on 19 clients, and it is not clear how far the 5% figure derived from that figure.

ii) Mr Holland, the Claimant's expert, described 5% as "an extremely low percentage" and suggested a figure of 10% on the basis that it was half-way between 5% and the percentage which Mr Collins' costs bore to the total turnover of IVB, namely 16.8%. In his cross-examination, he justified this figure by reference to the marginal cost of an additional agency, an approach which I do not think is compatible with Lord Hoffmann's judgment in Lonsdale.

iii) Ms Hotston Moore was of the view that taking a half-way point between the two figures is not appropriate. Her evidence is that the 16.8% figure is the most appropriate.

iv) It seems to me that the 16.8% figure derived from IVB's accounts is the most appropriate figure to use, having an identifiable source and being the same source used to derive the non-salary costs. I do not feel able to place significant reliance on Mr Collins' 5% estimate, for which no supporting reasoning is given, or on Mr Holland's 10% which he sought to justify in cross-examination by reference to marginal additional cost considerations.

v) Whilst it is course possible that the time required for different agencies might not be proportionate to their profitability, I believe the ratio provides a fair basis for allocating Mr Collins' salary, particularly in circumstances in which the proportion of time spent on Largo is likely to have varied according to prevailing circumstances. I would note that the resultant figure – 16.8% of £104,222 is £17,209.29 – is very substantially less than the annual retainer of £30,000 paid by Largo in respect of Mr Collins.

157. That leaves the final issue of whether a deduction should be made for a notional salary to Mr Monk (who was not in fact paid a salary, but derived his income from drawings):

i) Largo argue that such a deduction should be made, on the basis that if the agency was acquired by an individual or entity who did not intend to perform Mr Monk's role themselves, they would be required to employ someone who did.

ii) The Claimant argues, in response, that it should be assumed that the purchaser of the agency would be someone similar to Mr Monk, who would himself perform Mr Monk's role without paying someone else to do it.

iii) There is no determining authority on this issue, although there are references to it in some of the authorities. In <u>Nigel Fryer Joinery Services Limited v. Ian Firth Hardware Limited</u> [2008] EWHC 767 (Ch) at [59], Patten J. held that "if sold to a company rather than an individual, the income figure would have to be reduced to take account of salary".

iv) In <u>Alan Ramsay Sales & Marketing Limited</u> [2016] EWHC 486 (Comm), the commercial agency in question was "run and largely owned" by Mr Alan Ramsay, who had had a 15-year background working for Cadbury Typhoo / Premier Brands before setting up his agency acting for a number of principals with food products. In that case, Flaux J made an allowance for the costs which a hypothetical purchaser would have had to pay to hire a replacement for Mr Ramsay (Mr Ramsay having drawn his remuneration from the company by way of dividends). Flaux J. held it was appropriate to allow for the costs of a senior sales manager.

v) In <u>The Software Incubator Limited v. Computer Associates UK Limited</u> [2016] EWHC 1587 (QB), the agency was owned and operated by Mr Scott Dainty. Both experts proceeded on the basis that the costs of the agency included the cost of employing a professional to run the agency.

vi) The argument that the same business may have different objective values depending on whether the purchaser intends to employ himself or not is not immediately attractive, not least because a purchaser who did employ himself would suffer the opportunity cost of not being able to undertake other remunerative activity during the relevant time. Equally I do not accept, as Mr Segal QC suggested, that the valuation of an agency can depend on whether the business of the agency is conducted through a limited company (as in ARSM and The Software Incubator) or by the agent in person (as here).

vii) Further, if an agency was only viable on the assumption that the purchaser worked for it without salary, its value is likely to be very low (see for example the approach adopted by Judge Harris QC at first instance in Lonsdale and approved by Lord Hoffmann at [34], and the comment of Patten J. in Nigel Fryer at [60])).

viii) Accordingly I accept Largo's contention that a further salary cost needs to be deducted. I conclude that the salary equivalent would be that of, in effect, another Mr Collins, and I make the same assumption (16.8%) as to his salary.

158. On this basis, I conclude that the appropriate ratio of costs is 37.6%, with the result that net maintainable earnings are (with rounding) £78,000.

The multiplier

159. It was the evidence of Mr Holland that the appropriate multiplier was 7 derived as follows:

i) It was said that Mr Coyle had told Mr Monk that a multiple of 10 for Largo's EBITDA was appropriate to value Largo.

ii) Mr Holland stated "if the Court were to find this were the case" he would regard a multiple of 7-8 to be appropriate, to reflect the agency's low size compared with Largo.

iii) Mr Holland relied on a London Business School risk measurement service report to suggest that assessments of relative market risk – or beta – in the food sector were low.

iv) Based on his broad experience across all sectors, he would expect to see a multiple of 6, which he increased to 7 given the low beta for this sector.

160. Unfortunately, Ms Hotston Moore did not provide an opinion in her report as to the multiplier which would apply if (as I have held) Largo was wrong in its interpretation of Lonsdale when considering the relevance of the fact that,

absent termination, there were two years for the agency to run before the fixed term expired. The first occasion on which such evidence was offered was in Ms Hotston Moore's re-examination, when a multiplier of 2.5 to 3 was put forward. I allowed Mr Segal QC to cross-examine further on this late evidence. However the late appearance of this evidence meant that it had not been considered by Mr Holland or put to him in cross-examination, and the evidence itself was very brief. It was, at least on the limited opportunity available, difficult to reconcile this figure with the 1.75 multiplier which Ms Hotston Moore had used when assuming a finite 2 year agency. In these circumstances, I did not feel able to place reliance on the specific figure put forward by Ms Hotston Moore, although I have taken account the issues which she viewed as being relevant to the multiplier a hypothetical purchaser would use, as these were properly explored during the expert evidence.

161. Turning, therefore, to Mr Holland's evidence:

i) I believe that his reliance on the alleged multiplier of 10 for Largo is unsound, not simply because of reasons of scale (the factor Mr Holland did adjust for, although the difference in scale between Largo and this agency is vast indeed), but because of the very different nature of Largo's business. It has an "own label" as well as branded business, it has a very strong presence in the Irish market (to which the agency did not apply) and was a business with substantial assets. This leads me to conclude that Mr Holland's starting point is too high.

ii) There were clearly significant uncertainties surrounding the agency. While "Velvet Crunch" was a successful product, "Wholly Crunch" had failed spectacularly by the end of 2011, such that the agency, at the date of valuation, was for a single product agency. I accept Ms Hotston Moore's evidence that this is a significant risk factor, particularly in what is clearly a very competitive market.

iii) I regard the economic conditions (as to the effect of which I heard conflicting evidence) as a neutral factor.

iv) To a significant extent, Mr Monk's business relies on the very personal contacts which he had with individuals at senior level in the multiples in Great Britain. No purchaser of the agency could realistically hope to achieve connections of the same quality through a hand-over process, while Mr Monk retained those contacts to use himself for other customers.

v) In Lonsdale, Lord Hoffmann considered the position where the agent is able to transfer the good will he has created to other customers at [37]-[38]:

> "[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."

vi) Mr Holland made it clear that he had approached his valuation on the basis that the Claimant used "quite an unusual methodology" of "actually approaching very senior members of an organisation and actually engaging with those in a longer term relationship", a factor which he had relied upon as reducing the risk of products being delisted. He states in his report:

"I understand that Mr Monk's approach was developing relationships with very senior executives within the multiples, and that he was less concerned with the category buyers who, in my experience, are changed regularly. This potentially enables a deeper and more long-term relationship to be developed".

vii) In this context, Mr Holland confirmed that he had valued the agency on the assumption that there would be a non-competition clause, suggesting that without such a clause "then nothing has any value anywhere". This led Mr Brown to suggest that the agency had no value at all unless it was possible to assume a sale with a non-compete clause, which Lord Hoffmann had held could not be assumed.

viii) Mr Segal QC for the Claimant objected to this issue being relied upon, in circumstances in which the issue had not been explored with the Claimant's witnesses. However it only became apparent during Mr Holland's cross-examination that he had produced his valuation on the basis of a "non-competition" clause, notwithstanding the clear statement in Lonsdale that this should not be done, and it was clearly an issue which Mr Holland believed was relevant to how a hypothetical purchaser would value the company, and highly relevant to the way in which Mr Holland had valued the company.

ix) I reject the submission that the agency had no value, which goes too far. However I believe a hypothetical purchaser of this agency would recognise that a key tool of the agency for managing risk – those high level contacts – would substantially remain with Mr Monk rather than pass with the agency. This could be important in addressing any issues which might arise in relation to the agency so far as existing listings were concerned, as well as leaving the new agency exposed to competition from Mr Monk in relation to other agencies. Accordingly, I think some adjustment to Mr Holland's multiplier is appropriate to reflect his use of an impermissible assumption, and to reflect the significance which he had attached to Mr Monk's high level contacts in valuing the business.

x) This was a small agency and it is likely to have been of interest only to an individual or small business. I think this is a relevant factor in identifying the appropriate multiplier, and it is factor which is likely to have had a downwards pressure on the multiplier. I note that Mr Justice Flaux in ARSM v. Typhoo Tea Ltd. [2016] EWHC 486 (Comm) at [98] reached a similar conclusion, noting that a similar statement by Judge Harris QC in Lonsdale had been endorsed by the House of Lords.

xi) Finally, I note that in Lonsdale at [13], Lord Hoffmann expressed the view that "as one is placing a present value upon future income, one must discount future earnings by an appropriate rate of interest". Mr Brown asks me to adopt a similar course here. However, the future nature of the income stream is a factor which might be reflected by a number of different approaches. This could include a discounting of the final amount by an appropriate interest rate, or it could be reflected in the multiplier chosen. I have adopted the latter course because I believe that it is likely to be implicit in the multiplier a hypothetical purchaser would pay for the business that a present value was being paid for a future income stream.

162. Taking all of these factors into account, I believe that the appropriate multiplier for this agency is 4.

Conclusion

163. Subject to one further point, this produces Regulation 17 compensation of £312,000. That further issues involves the relationship between the Regulation 8 claim and the Regulation 17 claim.

164. This issue was the subject of agreement between the parties in Tigana Ltd. v. Decoro Ltd. [2003] EWHC 23 (QB) at [87.3], where Mr Justice Davies recorded and endorsed the parties' agreement that:

> "The amount of commission awarded under reg8(a) is in this particular case (although not necessarily in all cases, as each of them expressly stated by way of qualification) a matter to be taken into account in deciding what compensation, if any, should be awarded under reg.17. Although Mr White did not accept this in his opening submissions, he did in his closing submissions; and in any case, in the circumstances of this particular case and given the nature of this particular agency, (and including the point that repeat orders

would feature significantly) I am in no doubt that it is a factor that should be taken into account. Otherwise there might be an unfair element of potential double counting in favour of Tigana".

165. I was told by Mr Segal QC that this approach had not been followed in other cases, but none were cited to me. In The Software Incubator Limited v. Computer Associates UK Limited [2016] EWHC 1587 (QB) at [181], His Honour Judge Waksman QC suggested it would be a question of fact in each case whether the Regulation 8 claim impacted the amount which a hypothetical purchaser would pay for an agency. On the facts of that case, in which the Regulation 8 commission claim was worth well under £10,000, and the Regulation 17 claim was valued at £475,000, it was held that no credit was required.

166. I agree with His Honour Judge Waksman QC that this is an issue which will depend on the facts of each case. Approached from first principles, a potential purchaser acquiring the agency would be acquiring an income-stream from the date of purchase. To the extent that any significant part of that income stream in the first year would be payable to the seller and not to the purchaser, I would expect the purchaser to allow for that in the purchase price. In this case, the Regulation 8 sales to Tesco in Great Britain formed a major part of the agency, with sales to Tesco being a significant part of the sales pipeline which any hypothetical purchaser would be acquiring. The fact that commission of £74,280 on those sales would go to Mr Monk would clearly impact the amount a hypothetical purchaser would pay for the agency to some degree. However, I do not accept that a "pound for pound" reduction is appropriate. I believe a reduction of about half the amount - £37,000 – would fairly reflect the fact that a significant part of the commission in the first year of any purchase would have been payable to Mr Monk under Regulation 8. This reduces the Regulation 17 compensation to £275,000.

167. I am conscious that the compensation I have calculated is significantly lower than the £1,799,420 claimed by the Claimant in closing, and the £613,000 put forward as the best estimate in Mr Holland's report. However, the total recovery under Regulations 8 and 17 is higher than the amount which Mr Monk and Mr Collins put forward themselves on 6 February 2012 of £300,000 as "a fair reflection of the benefit we have brought to Largo and its shareholders through our work".

168. Particularly in circumstances in which, in this jurisdiction at least, there is not in fact a market for the sale of commercial agencies, it is important to "sense check" the resultant calculation. The experience which Mr Holland brought to bear for the purposes of the opinion he offered was (unavoidably) not experience of actual sale transactions of commercial agencies, but of other Regulation 17 cases in which he had been involved. The absence of any real market benchmarks runs the risk of an echo-chamber effect in which agency valuations become mutually supportive. In this case, Mr Monk and Mr Collins had 19 agency contracts when the Agreement was terminated. The claim attributing £613,000 or £1.8m value to this one agency was one which required close analysis and has proved to be too high when subjected to that analysis. The Regulation exists to protect the value of the business which the

agent has lost by termination. However unrealistic awards of compensation will not serve the longer term interests of commercial agents as a group, but simply deter principals from retaining them.

(10) Conclusion

169. For these reasons:

i) Mr Monk's claim for damages for breach of contract fails.

ii) Mr Monk's claim under Regulation 8 succeeds to the extent of sales made to Tesco in Great Britain for the first 9 months of 2012 in the amount of £74,280.

iii) Mr Monk's claim under Regulation 17 succeeds in the amount of £275,000.

170. I will hear the parties on any consequential issues which arise from this judgment.