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Termination of agency

Termination by act of the parties
Termination by operation of law
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The effects of termination

INTRODUCTION

In this final chapter on the law of agency, the various methods by which an agency relationship can be terminated will be discussed. It is important to note at the outset that the termination of the agent's authority and the termination of the agency agreement are two separate issues and, as will be seen, the termination of one may not automatically result in the termination of the other (although in many cases, it will). Consequently, it is vital to understand the effects that can arise from a termination of agency, especially as, in certain cases, the right to terminate is not accompanied by the privilege to terminate, meaning that a wrongful termination (e.g. in breach of contract) may result in the non-terminating party being awarded a remedy. Where the agent is a commercial agent, additional rights, rules, and safeguards apply, notably the commercial agent's right to compensation or an indemnity.

Numerous methods exist by which the authority of an agent can be terminated, but they can be loosely organized into two distinct categories:

1. termination by an act of the parties; or
2. termination by operation of the law.

Figure 9.1 sets out the various methods of termination that can occur under these two categories.

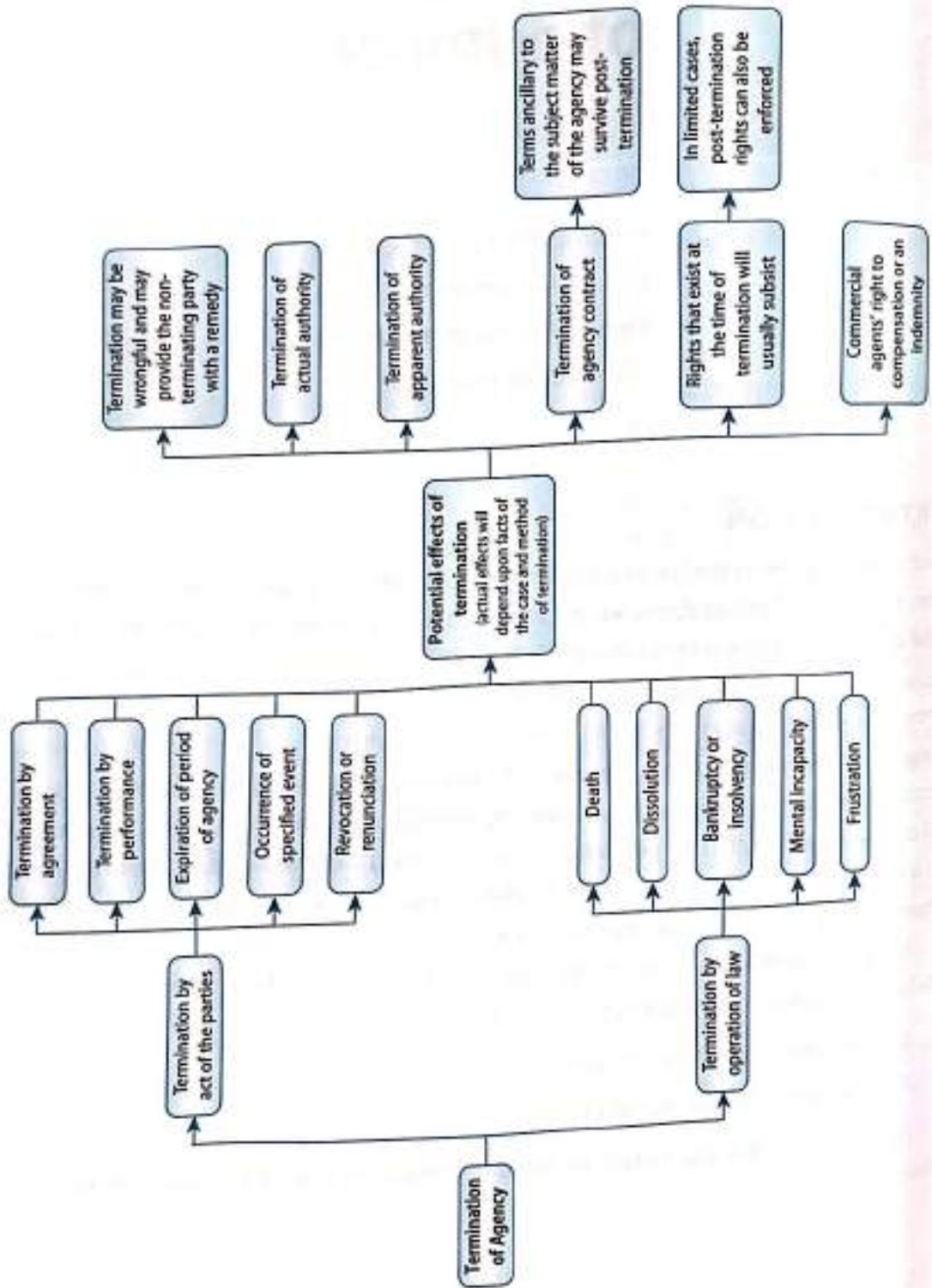


FIGURE 9.1 Termination of agency

Termination by act of the parties

An agent's authority may be terminated by the act of one or both of the parties. It should be noted that, whilst the acts discussed in this section will usually terminate the agent's actual authority, the facts of the case might lead the court to conclude that the agent still has apparent authority to act on behalf of the principal. Termination by an act of the parties can arise in a number of different ways.

Termination by agreement

Like any other contract, a contract of agency can be terminated upon the agreement of the principal and agent. Termination by agreement will also terminate the actual authority of the agent.


Termination by performance

The majority of terminations occur through performance. Once the agent fully performs the particular task he was appointed to undertake, the agency agreement and the agent's actual authority will terminate.¹

Expiration of period of agency

The agency agreement might specify that the agent's appointment will be for a fixed period only. In such a case, the agency agreement and the agent's actual authority will terminate upon the expiration of the fixed period.² A notable exception to this occurs in the case of commercial agencies. Where a commercial agent is contractually appointed for a fixed period and the contract continues to be performed by both parties following the expiration of that period, then the agency contract shall not terminate and shall instead be converted into a contract of indefinite duration.³ The significance of this will be seen when the notice periods required to terminate a commercial agency are discussed.

In certain cases, a particular practice or trade custom might impose a particular expiry date on an agency agreement. In such cases, the expiration of that date will cause the agency agreement and the agent's actual authority to terminate, as the following case demonstrates.

 The notice periods required to terminate a commercial agency are discussed at pp 187-8



Dickenson v Lilwal (1815) 1 Stark 128

FACTS: On 30 June, Lilwal (the principal) authorized a broker, Grainger (the agent), to sell a quantity of butter. On 6 July, Grainger, without any intermediate communication with Lilwal, sold a quantity of butter to Dickenson. Lilwal refused to go ahead with the sale, on the ground that Grainger was not authorized to make it. Dickenson sued Lilwal.

1. See e.g. *Blackburn v Scholes* (1810) 2 Camp 341; *Gillow & Co v Lord Aberdare* (1892) 9 TLR 12; *Bell v Balls* [1897] 1 Ch 663 (Ch).

2. *Danby v Coutts & Co* (1885) 29 ChD 550 (Ch).

3. Commercial Agents (Council Directive) Regulations 1993, reg 14.

HELD: Lord Ellenborough stated that Lilwal was able to prove that 'according to the established practice and usage of the trade, the authority of the broker (as between himself and his principal) to sell, expires with the day on which the authority is given'.⁴ Accordingly, the agency agreement and Grainger's actual authority terminated at the end of 30 June, and so Dickenson's action failed.

Occurrence of a specified event

The agency agreement might specify that, upon the occurrence of a particular event, the agency agreement will terminate. In such a case, the agreement and the agent's actual authority will terminate upon the specified event's occurrence. It has also been suggested that the agreement will also terminate upon the occurrence of an event that would lead the agent to 'reasonably infer that the principal does not or would not wish the authority to continue'.⁵

Revocation and renunciation

As noted earlier, an agency agreement can be terminated upon the agreement of the principal and agent, but what if, as in the example below, only one party wishes to end the agreement? Can a principal or agent terminate an agency agreement without the other's consent?

Eg

COMCORP LTD

ComCorp engages Bruce to act as its agent. An agency agreement is drawn up which states that Bruce will act as ComCorp's agent for a period of one year, with both parties having an option to renew the agreement. After six months, Bruce's actions have significantly increased ComCorp's customer base, but Bruce informs ComCorp that, with immediate effect, he will no longer act as its agent. ComCorp states that Bruce must remain as its agent until the contract period expires and, if he refuses, ComCorp will obtain an order for specific performance requiring him to continue to act as ComCorp's agent.

As a contract of agency is one for personal services, the courts have indicated that they will not compel performance via an order for specific performance.⁶ It follows from this that, unless the agency is irrevocable (discussed at p 183), the principal may revoke the authority of the agent at any time, and the agent may renounce the authority granted to him by the principal at any time. The effect of revocation/renunciation is to terminate the agency agreement and the actual authority of the agent but, depending on the facts, the agent may continue to have apparent authority until such time as the third party has notice of the revocation/renunciation. However, whilst the parties may have the power to revoke/renounce the agent's authority, they 'may not have the liberty to exercise that power',⁷ meaning that the revocation/

4. (1815) 1 Stark 128, 130.


5. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [10-002].

6. *Chincock v Sainsbury* (1860) 30 LJ Ch 409.

7. Francis Reynolds, 'When is an Agent's Authority Irrevocable?' in Ross Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press 1997) 259.

renunciation may constitute a breach of contract (e.g. where a fixed-term contract of agency is revoked/renounced before the fixed period has expired, as occurred in the ComCorp example).

The revoking/renouncing party must provide the other party with notice of the revocation/renunciation.⁸ If the agency contract does not specify a period of notice, then reasonable notice must be provided, with the facts of the case determining what is reasonable. Where the agent is also an employee of the principal, then the minimum notice periods laid down by s 86(1) of the Employment Rights Act 1996 will apply. Where the agent is a commercial agent, the minimum notice periods established by reg 15(2) of the Commercial Agents (Council Directive) Regulations 1993 will apply.

 Regulation 15(2) of the 1993 Regulations is discussed at p 188

Irrevocable agencies

The right to revoke is not absolute, as both case law and statute provide that certain relationships of agency are irrevocable. In such cases, the death,⁹ dissolution, mental incapacity, bankruptcy, or insolvency¹⁰ of the principal will not generally terminate the agent's authority. The principal will be unable to revoke the agent's authority, unless the agent consents to the revocation.¹¹ Where the agent does not provide such consent, then any attempt to terminate the agent's authority will be ineffective and will be likely to amount to a breach of contract.

Statute can provide that certain agencies are irrevocable, with two notable examples occurring in relation to the granting of powers of attorney:

1. Where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power (the agent), or the performance of an obligation owed to the donee, then so long as the donee has that interest or the obligation remains unchanged, the power shall not be revoked by the donor (the principal) without the consent of the donee, or by the death, incapacity, or bankruptcy of the donor or, if the donor is a body corporate, by its winding up or dissolution.¹²
2. Any lasting power of attorney created under the Mental Capacity Act 2005, and any enduring power of attorney created under the now repealed Enduring Powers of Attorney Act 1985, cannot be revoked due to the subsequent mental incapacity of the donor (the principal).¹³

The common law also provides for a number of irrevocable agencies. First, where the agent's authority is granted by deed, or for valuable consideration, for the purpose of securing or protecting an interest of the agent, then that authority cannot be revoked as long as the interest continues to exist, unless the agent consents to the revocation. It should be noted that the interest must be independent of the agency—it follows that protecting the agent's ability to earn remuneration or commission from the agency will not render that agency irrevocable. The following case provides an example of an agency agreement that was coupled with an interest that rendered the agency irrevocable.

8. *Re Oriental Bank Corp, ex p Guillemin* (1885) LR 28 ChD 634 (Ch).

9. *Lepard v Vernon* (1813) 2 V&B 51.

10. *Alley v Hotson* (1815) 4 Camp 325.

11. Accordingly, it could be argued that to describe such agencies as 'irrevocable' is misleading, as the agency can be revoked providing that the agent consents.

12. Powers of Attorney Act 1971, s 4(1).

13. Mental Capacity Act 2005, s 13 and Sch 4, para 1.

**Gausson v Morton (1830) 10 B&C 731**

FACTS: J.L. (the principal) owed Forster (the agent) £231. J.L. granted Forster a power of attorney, which allowed Forster to sell certain pieces of property owned by J.L. Forster could then keep the proceeds of the sale to satisfy the debt owed by J.L. Forster sold the property for £105 and received £20 from the purchaser by way of deposit. J.L. then purported to revoke the power of attorney.

HELD: The revocation was invalid as the agency was irrevocable. Lord Tenterden CJ stated that this case did not involve:

a simple authority to sell and surrender the premises, but an authority coupled with an interest; for Forster was to apply the proceeds in liquidation of a debt due to himself . . . and there are several cases in which it has been held, that such an authority cannot be revoked.¹⁴

Second, where, in the course of an agency relationship, the agent becomes liable to a third party, and the principal is liable to indemnify the agent for such liability, then the principal cannot revoke the agent's authority without the agent's consent. If this were not the case, a principal could avoid indemnifying the agent by simply revoking the agent's authority. The following case provides an example of this form of irrevocable agency.

**Read v Anderson (1883–84) LR 13 QBD 779 (CA)**

FACTS: Anderson (the principal) instructed Read (the agent) to place a number of bets on his behalf. Although the bets were placed on Anderson's behalf, Read was instructed to place them in his own name, which he did. The result was that, according to trade custom, Read became personally liable to the bookmakers for the bets placed. Read placed a number of losing bets on Anderson's behalf, and sought to obtain an indemnity from Anderson for the amounts wagered. Anderson refused to indemnify Read and stated that Read's authority had been revoked. Read initiated proceedings to recover the indemnity.

HELD: Read's claim succeeded and Anderson was required to indemnify Read for the bets placed. Bowen LJ stated that '[i]t will not be denied that if a principal employs an agent to do something which by law involves the agent in a legal liability, the principal cannot draw back and leave the agent to bear the liability at his own expense'.¹⁵ Whilst Anderson was not liable in law to indemnify Read (because at the time gambling debts were not enforceable), the Court stated that Read would have suffered significant damage to his reputation if he did not make good on a lost bet. Accordingly, Read 'placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted . . . to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken'.¹⁶

COMMENT: Although *Read v Anderson* and similar cases are discussed alongside cases of irrevocable authority, it has been argued that they are not really cases involving irrevocable authority as they do not concern the agent's authority to bind his principal to a third party. Instead, it has been argued that such cases are an example of the rule that the right to compensation or an indemnity does not extend to unauthorized acts of an agent¹⁷—a view that appears to have been judicially accepted.¹⁸

14. (1830) 10 B&C 731, 734.

15. (1883–84) LR 13 QBD 779 (CA) 783.

16. *ibid.*

17. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [10-010].

18. See e.g. *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] EWCA Civ 453, [2009] 1 CLC 553 [59] (Moore-Bick LJ).

Termination by operation of law

Unfortunate events may befall the principal or agent—one of them may die, or become mentally incapacitated or insolvent or, in the case of a body corporate, it may be dissolved. What effect do such events have upon the agent's authority? In such cases, the operation of law will usually terminate the agency agreement, irrespective of whether the parties desire the agreement to continue. Termination by operation of law can occur in several ways.

Death

The death of either the principal or agent will terminate the agency relationship, irrespective of whether the surviving party had notice of the other's death.¹⁹ Where the principal dies, the actual authority of the agent will cease (unless it is irrevocable), and it is likely that his apparent authority will end too,²⁰ meaning that the agent may also be liable for breach of authority or breach of warranty of authority if he continues to act.²¹ As the following case demonstrates, the agent will also lose the right to any compensation or commission that he was entitled to for acts that occurred after the principal's death.



Campanari v Woodburn (1854) 15 CB 400

FACTS: Campanari (the agent) agreed to sell a painting belonging to Woodburn (the principal), in return for which Campanari would receive £100. Woodburn died and the painting was subsequently sold, at a time when Campanari was not aware of Woodburn's death. The sale was confirmed by the administratrix of Woodburn's estate, but she refused to pay Campanari the £100. Campanari initiated proceedings.

HELD: The death of the principal terminated the contract of agency and '[t]he contract, after the death of the intestate, was not and could not be confirmed according to its terms'.²² Accordingly, Campanari was not entitled to the £100.

Dissolution

The mere cessation of the agent's business will not, in itself, automatically result in the termination of a contract of agency.²³ Whether this also applies to cessation of the principal's business is unclear, although authorities indicate that the agency relationship will not be automatically terminated unless it renders the principal unable to perform its obligations.²⁴ What is clear is that, where the principal or agent is a


19. *Blades v Free* (1828) 2 B&C 167. 20. *Watson v King* (1815) 4 Camp 272.

21. *Yonge v Toynbee* [1910] 1 KB 215 (CA). It has been suggested (see e.g. Raphael Powell, *The Law of Agency* (2nd edn, Pitman 1961) 389) that such liability could be avoided via a term in the agency contract, but no case law authority exists for this view.

22. (1854) 15 CB 400, 408 (Williams J).

23. *Triffit Nurseries v Salads Etcetera Ltd* [2000] BCC 98 (Ch), affirmed [2001] BCC 457 (CA).

24. *ibid.*

 The principal's ability to deprive his agent of the opportunity to earn commission is discussed at p 133

partnership, limited liability partnership, or company, and it is wound up or dissolved, or where a sole proprietorship ceases to carry on business, the contract of agency will be terminated.²⁵ In order to recover damages, the agent will need to prove that either the principal's action in dissolving the business amounts to breach of an express term, or the contract contained an implied term providing that the principal would not deprive the agent of the opportunity to earn his commission. The courts are extremely reluctant to imply such a term.

Bankruptcy and insolvency

Generally, the bankruptcy/insolvency of the principal terminates the agency relationship²⁶ (unless the agency is irrevocable) and revokes the agent's authority. The bankruptcy/insolvency of the agent does not terminate the relationship, unless it prevents him acting as an agent, or renders him unfit to perform his duties.²⁷

Mental incapacity

In this context, a court will assess a person's mental capacity by asking was the person 'at the time the act was done of sufficient capacity to understand the nature of the act?'²⁸ Where the answer is no, the person will lack mental capacity. Where an agent becomes mentally incapacitated, then the agent's authority will be terminated on the ground of lack of competence.

Where a principal becomes mentally incapacitated, the agency agreement will be terminated, as will the actual authority of the agent (providing that the authority was not irrevocable),²⁹ irrespective of whether the agent knew of the incapacity.³⁰ Such a result could be extremely harsh on any third parties who contracted with the principal through an agent, but are unaware of the principal's subsequent incapacity. A measure of protection has been afforded to third parties in two ways. First, the principal can ratify the agreement if he reacquires mental capacity. Second, as the following case demonstrates, an agent's apparent authority may continue even after the principal becomes mentally incapacitated.



***Drew v Nunn* (1879) 4 QBD 661 (CA)**

FACTS: Mr Nunn (the principal) had given his wife (the agent) authority to deal with Drew, and held her out as his agent. Mr Nunn became insane and, whilst his insanity continued, Mrs Nunn ordered goods from Drew. Drew was unaware of Mr Nunn's insanity. Mr Nunn reacquired his sanity, and refused to pay for the goods. Drew initiated proceedings and Mr Nunn contended that Mrs Nunn's authority automatically terminated when he became insane.

25. *Pacific and General Insurance Co Ltd v Hazell* [1997] BCC 400 (QB).

26. *Elliott v Turquand* (1881) 7 App Cas 79 (PC).

27. *McCall v Australian Meat Co Ltd* (1870) 19 WR 188.

28. *Boughton v Knight* (1872-75) LR 3 P&D 64, 72 (Sir James Hannen).

29. *Drew v Nunn* (1879) 4 QBD 661 (CA).

30. *Yonge v Toynbee* [1910] 1 KB 215 (CA).

HELD: The Court held that Mrs Nunn continued to have apparent authority to deal with Drew and so Drew was entitled to recover the cost of the goods. Brett LJ stated:

The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife: he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her bona fide, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.³¹

COMMENT: The decision has been criticized, principally on the ground that it seems to state that, in order for apparent authority to cease, the mentally incapacitated principal must inform any relevant third parties of the agent's lack of authority. Despite this, the rule that apparent authority can continue until such time as the third party becomes aware of the principal's mental incapacity remains good law. In *Drew*, it was even suggested *obiter* that the rule could apply to cases where the principal dies and the third party is unaware of the death.³²

Frustration

A contract of agency can be frustrated in the same manner as an ordinary contract. Thus, the agency relationship will be terminated where the subject matter of the agency was destroyed,³³ or where a subsequent event causes performance to become impossible, unlawful,³⁴ or radically different from what the parties originally contemplated.³⁵

Termination of commercial agencies

The Commercial Agents (Council Directive) Regulations 1993 establish additional rules regarding the termination of commercial agency agreements.

Termination by notice

As noted earlier, either party can terminate the agency agreement by providing notice, and the 1993 Regulations preserve this rule in relation to commercial agency contracts that are concluded for an indefinite period.³⁶ The Regulations go further and provide

31. (1879) 4 QBD 661 (CA) 667–8.

32. *ibid* 668 (Brett LJ): 'Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss, which may have occurred through acting upon that representation.'

33. *Rhodes v Forwood* (1876) LR 1 App Cas 256 (HL).

34. *Marshall v Glanvill* [1917] 2 KB 87 (KB).

35. *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL).

36. Commercial Agents (Council Directive) Regulations 1993, reg 15(1). Regulation 15(5) provides that this includes fixed-term agency contracts that have been converted into agency contracts for an indefinite period by virtue of reg 14 (see p 137). It also provides that the earlier fixed period will also be taken into account when determining the notice period.

for minimum periods of notice based on the length of the contract of agency, with reg 15(2) providing that:



Commercial Agents (Council Directive) Regulations 1993, reg 15(2)

The period of notice shall be—

- (a) 1 month for the first year of the contract;
 - (b) 2 months for the second year commenced;
 - (c) 3 months for the third year commenced and for subsequent years;
- and the parties may not agree on any shorter period of notice.

As these are the minimum notice periods, it follows that the parties cannot agree on shorter notice periods, but can agree on longer notice periods if they so wish. Where the parties do agree on longer periods, then 'the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent'.³⁷ Neither the Regulations nor the parent Directive specify the appropriate remedy for breach of reg 15, and it is therefore likely that the courts will resort to domestic principles of law to determine the appropriate cause of action and remedies³⁸—in practice, this will allow the innocent party to seek damages for breach of contract, but the termination will appear to remain valid.

Immediate termination

Where reg 16 applies, the minimum notice periods discussed earlier will not apply and either party will be able to terminate the agency agreement immediately. Regulation 16 states that:



Commercial Agents (Council Directive) Regulations 1993, reg 16

These Regulations shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract—

- (a) because of the failure of one party to carry out all or part of his obligations under that contract; or
- (b) where exceptional circumstances arise.

Paragraph (a) is clearly referring to a breach of contract, although of course termination would only be valid if the breach was repudiatory.³⁹ It has been argued that

37. *ibid* reg 15(3).

38. See the Scottish case of *Roy v Mr Peariman Ltd* 1999 SC 459 (Court of Session) 466 (Lord Hamilton).

39. In *Crane v Sky-In-Home Service Ltd* [2007] EWHC 66 (Ch), [2007] 2 All ER (Comm) 599 [84], Briggs J states that, as regards the 'enactment or rule of law' referred to by paragraph (a) of reg 16, '[t]he obvious candidate in English law is the doctrine of repudiatory breach'.

paragraph (a) could also refer to the doctrine of frustration, but the more common belief is that frustration is covered by paragraph (b). The Regulations do not, unfortunately, provide any guidance as to what exceptional circumstances would give rise to the right to immediately terminate the agency agreement.

The effects of termination

The termination of an agent's authority can have a significant impact upon not only the agent, but also the principal and third parties. The effects of termination will depend upon the facts of the case, the type of agent, and the method of termination.

Effect on agent's authority

Generally, the termination of the agency relationship will also terminate the agent's actual authority. Where the principal revokes the agent's authority, then the agent's actual authority will not cease until such time as the agent receives notice of the revocation.⁴⁰ Even after the agent has received notice, he may still be able to act on behalf of his principal if he has apparent authority and the third party does not have notice of the revocation of the agent's actual authority.



Trueman v Loder (1840) 11 Ad&E 589⁴¹

FACTS: Loder (the principal), who was based in St Petersburg, conducted business in London through Higginbotham (the agent), and this was well known amongst the business community. Loder informed Higginbotham that their relationship of agency was terminated. Subsequently, Higginbotham contracted with Trueman to sell a quantity of tallow, with the contract indicating that Higginbotham was acting on behalf of Loder (although this was an error and the agent intended to contract on his own account). Trueman never received the tallow and initiated proceedings against Loder for non-delivery of the goods.

HELD: As Trueman was unaware that the agent's authority had been revoked, Loder remained liable for Higginbotham's acts and so was liable for the non-delivery of the goods.

Where the agency ends due to the death, insolvency, bankruptcy, or mental incapacity of the principal, then the effects on the agent's authority will differ. Where the principal dies, the agency relationship and the agent's actual authority are terminated immediately (irrespective of whether the agent had notice of the principal's death),⁴² and it is likely that the agent's apparent authority is also terminated.⁴³ It has been argued that similar reasoning should apply in cases where the principal becomes insolvent or bankrupt.⁴⁴ Where the principal becomes mentally incapacitated, the

40. *Re Oriental Bank Corp, ex p Guillemin* (1885) LR 28 ChD 634 (Ch).

41. See also *Curlew v Birkbeck* (1863) 3 F&F 894.

42. *Blades v Free* (1828) 2 B&C 167. 43. *Watson v King* (1815) 4 Camp 272.

44. Peter G Watts, *Bowstead & Reynolds on Agency* (19th edn, Sweet & Maxwell 2010) [10-021].

agency agreement will be immediately terminated, as will the actual authority of the agent, irrespective of whether the agent knew of the incapacity.⁴⁵ The agent's apparent authority may, however, continue following the principal's incapacity.⁴⁶

Effect on contract of agency

Can certain terms within a contract of agency survive the termination of the agent's authority? As the following case demonstrates, the answer is yes.



***Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 (QB)**

FACTS: Orion acted as agent for Yasuda. A term of the agency contract stated that Yasuda had the right to inspect Orion's books and records. On several occasions, Yasuda sought to inspect the books, but was not permitted to do so on the ground that the books contained confidential information concerning other businesses that Orion was acting on behalf of. Yasuda contended that this amounted to a repudiatory breach and so it terminated the agency agreement. It then sought a declaration from the court granting it access to the records, as the books contained information relating to current business it had obtained through Orion's efforts. Orion contended that the term allowing access to the books ceased to have any effect when Yasuda terminated the agreement.

HELD: Colman J, referring to an earlier case⁴⁷ involving an arbitration clause, stated that:

the survival of the arbitration clause in the face of an accepted repudiation is attributable to its having a contractual function ancillary to the subject matter of the contract, namely the resolution of disputes as to the parties' rights and obligations attributable to pre-existing events. There is, however, nothing in the speeches to suggest that an arbitration clause is the only kind of ancillary provision which could survive the acceptance of a repudiation.⁴⁸

Relying on this, Colman J held that the obligation to inspect the books was ancillary to the subject matter of the agency agreement, and could therefore survive the termination of the agreement.

COMMENT: As discussed at p 130, this case also provides authority for the contention that certain duties of the agent can survive the termination of the agency agreement.

Right to remuneration, compensation, and commission

The general rule is that, upon the termination of the agent's authority, any rights that existed at the time of the termination will subsist. So, for example, if an agent is entitled to compensation, remuneration, or commission for acts undertaken prior to termination, then this entitlement will survive the termination of the agreement. Following the termination, no new rights can generally be vested, meaning that the agent cannot usually claim for future remuneration, compensation, or commission lost as a result of the termination, as the following case demonstrates.

45. *Yonge v Toynbee* [1910] 1 KB 215 (CA).

46. *Drew v Nunn* (1879) 4 QBD 661 (CA).

47. *Heyman v Darwins Ltd* [1942] AC 356 (HL).

48. [1995] QB 174 (QB) 190.



Rhodes v Forwood (1876) LR 1 App Cas 256 (HL)

FACTS: Forwood (the agent) was appointed as the sole broker for the sale of coal from a colliery in Liverpool that belonged to Rhodes (the principal). The agreement provided that it would last for seven years, or as long as Rhodes continued to conduct business in Liverpool. After four years, Rhodes sold the colliery and the agreement was terminated. Forwood sought damages for the loss of future commission, arguing that there was an implied term that Rhodes would send coal to Liverpool to be sold by Forwood.

HELD: The action failed. Rhodes had not contracted, expressly or impliedly, to keep Forwood supplied with coal and therefore he was not liable to compensate Forwood for the commission lost due to the colliery's closure and the resulting termination of the agency agreement.

In the following case, however, the Court of Appeal distinguished *Rhodes* and held the principal liable to pay damages for commission lost due to the termination of the agency.



Turner v Goldsmith [1891] 1 QB 544 (CA)

FACTS: A shirt manufacturer, Goldsmith (the principal), expressly agreed to employ a travelling salesman, Turner (the agent), for five years. After only two years, Goldsmith's factory was destroyed by fire and the business was not resumed. Turner commenced legal proceedings for loss of commission.

HELD: The Court distinguished *Rhodes* and awarded Turner substantial damages. In failing to send Turner a reasonable amount of clothing to sell, Goldsmith had breached the implied term not to deprive Turner of the opportunity to earn commission.

COMMENT: On what basis was *Rhodes* distinguished? In *Rhodes*, it was a term of the contract that the agent would be supplied with coal from the defendant's colliery. Conversely, in *Turner*, there was no term in the contract providing that the principal would supply the agent with clothing from the destroyed factory. The principal in *Turner* might have had other sources with which to supply the agent. Therefore, whether an agent can obtain compensation for monies lost due to the termination will depend very much on the construction of the contract—but one could question whether the distinction is significant enough to sustain such a different approach.

If the termination amounts to a breach of contract, then the innocent party may seek compensation for the breach. Where the agency is gratuitous, then damages for breach cannot be sought for obvious reasons, and the principal can terminate the agent's authority without facing any contractual liability, although the agent may be afforded a remedy under the law of restitution.

Where the agent is also an employee, he might also be entitled to compensation for wrongful or unfair dismissal. Where the agent is a commercial agent, then special rules apply which govern the agent's right to compensation or an indemnity, which are discussed next.

Effects of termination of commercial agencies

Additional safeguards and rights are provided in cases involving commercial agencies, with the most significant being the commercial agent's right to compensation or an indemnity.

Right to compensation or an indemnity

Regulation 17 provides commercial agents with the right to compensation or an indemnity for damage sustained due to the termination of the agency contract. It is worth noting at the outset the conflict that led to reg 17 covering both compensation and indemnities. When the Directive that led to the 1993 Regulations was being discussed, a significant conflict arose between the French and German approaches to the issue. France advocated that the agent should be able to obtain compensation, whereas the German approach was based on the agent obtaining an indemnity. This conflict was resolved by allowing Member States to choose whether to allow the agent to obtain compensation and/or an indemnity, and the UK decided to provide for both. As will be seen, when the calculation of compensation is discussed, the conflict inherent in reg 17 has also come to affect the development of domestic law.

Before the extent of this right is discussed, it is important to explain what forms of termination are covered by reg 17, but, unfortunately, the Regulations do not provide much guidance, aside from stating that the right to compensation or an indemnity will apply where the agency contract is terminated due to the death of the commercial agent.⁴⁹ Although not stated by the Regulations, it is clear that the termination by the principal of an agency contract of indefinite duration will constitute a termination for the purposes of reg 17 on the ground that the objective of the Regulations' parent Directive 'plainly requires it'.⁵⁰ Where the contract is for a fixed period, or the contract provides that it will terminate upon the agent reaching a certain age, it would be assumed that the right contained in reg 17 will not apply because 'the agent has taken on a fixed period contract and in doing so might be expected to have calculated whether or not he would receive adequate recompense for his outlay'.⁵¹ However, this is not the case and in *Tigana Ltd v Decoro Ltd*,⁵² Davis J stated that the word 'termination' simply meant 'the coming to an end'⁵³—a view that has since been affirmed by the Court of Appeal.⁵⁴ Accordingly, the expiry of a fixed period agency contract will constitute a termination for the purposes of reg 17, unless it is subsequently renewed.⁵⁵

To understand why the Regulations provide commercial agents with the right to compensation or an indemnity, consider the following example:

Eg**COMCORP LTD**

ComCorp wishes to expand its customer sales base and engages Manjot (the agent) to canvass potential customers and provide their details to ComCorp. In return for this, Manjot will be paid commission for each sale made. Manjot provides ComCorp with a list of potential new customers, whereupon ComCorp terminates the agency agreement and negotiates directly with these potential customers, thereby purporting to deny Manjot the commission he claims to be entitled to.

49. Commercial Agents (Council Directive) Regulations 1993, reg 17(8).

50. Peter G Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) [11-042].

51. *ibid* [11-043]. 52. [2003] EWHC 23 (QB), [2003] ECC 23. 53. *ibid* [75].

54. *Light v Ty Europe Ltd* [2003] EWCA Civ 1238, [2004] 1 Lloyd's Rep 693.

55. *Moore v Pirella PTA Ltd* [1998] CLC 992 (QB).

To prevent principals taking advantage of their commercial agents in this way, the Regulations provide commercial agents with the right to compensation or an indemnity upon termination of the agency agreement. In effect, principals have to buy their way out of the agency agreement. Regulation 17(2) provides that the commercial agent shall be entitled to compensation rather than an indemnity, unless the agency contract states otherwise. Accordingly, the agent's right to compensation will be discussed first, with reg 17(6) providing that:



Commercial Agents (Council Directive) Regulations 1993, reg 17(6)

... 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.

In order to understand the operation of reg 17(6), two questions need to be answered. The first question is what types of 'damage' are compensatable under reg 17(6). A partial answer to this question can be found in reg 17(7), which states that:

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.

The use of the word 'particularly' would indicate that reg 17(7) does not provide an exhaustive list of the types of damage that are compensatable, and the High Court has confirmed that reg 17(7) 'does not delimit the kind of loss for which compensation may be awarded'.⁵⁶ Accordingly, it appears that compensation will be available for other types of damage, providing that the commercial agent can establish a causal link between the termination and the damage sustained.

The second question is how compensation under reg 17 is calculated. As noted earlier, the concept of providing an agent with compensation upon termination of agency derived from French law. The question that arose was whether UK law should follow the French approach to calculating compensation, or whether it could devise its own approach. Earlier cases⁵⁷ adopted the French approach on the ground that 'the primary purpose of the Directive is the harmonisation of community law by requiring all member states to introduce rights and duties similar to those already subsisting in at least two of the member states of the Community'.⁵⁸

56. *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB), [2003] ECC 23 [96] (Davis J).

57. See e.g. *King v Tinnock Ltd* [2001] ECC 6 (Court of Session), *Ingmar GB Ltd v Eaton Leonard Inc* [2001] CLC 1825 (QB).

58. *Moore v Piretta PTA Ltd* [1998] CLC 992 (QB) 994 (John Mitting QC, sitting as Deputy High Court judge). The judge was referring to Germany (from where the indemnity provisions derived) and France (from where the compensation principles derived).

Later cases⁵⁹ moved away from the French approach and stated that the UK was free to devise its own method of calculating compensation, a view that has since been confirmed by the Court of Justice when it stated:

It must be observed that although the system established by article 17 of the Directive is mandatory and prescribes a framework . . . it does not give any detailed indications as regards the method of calculation of the indemnity for termination of contract . . . Therefore . . . within the framework prescribed by article 17(2) of the Directive, the Member States enjoy a margin of discretion which they may exercise.⁶⁰

It has now been settled by the House of Lords that 'the method of calculation is a matter for each Member State to decide',⁶¹ and so the UK is free to devise its own method of calculating compensation. Whilst such an approach will afford considerable flexibility, it has been argued that such an approach 'raises wider questions as to the effectiveness of this Directive as a tool for harmonisation of European private law'.⁶² Nevertheless, that law is (for the time being) settled and so the question to ask is what method of calculation have the UK courts devised?



Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd [2007] UKHL 32

FACTS: Lonsdale acted as a commercial agent for Howard & Hallam Ltd ('H&H'). H&H manufactured shoes, which Lonsdale then sold to retailers on H&H's behalf. Sales declined sharply—in 1997/98, Lonsdale earned almost £17,000 in commission, but by 2002/03, this had fallen to £9,621. H&H ceased trading and terminated Lonsdale's agency by providing reasonable notice. H&H paid Lonsdale £7,500 in compensation under reg 17(6), but Lonsdale contended that he was entitled to £19,670 (this figure being based on the French method of calculating compensation). Lonsdale initiated proceedings against H&H.

HELD: The House held that it was not bound to adopt the French approach (as discussed earlier), but could devise its own method of calculation. Lord Hoffmann stated that compensation should be calculated based on a valuation of the agency business, and approved Bowers J's statement that 'one is valuing the agency and its connections that have been established by the agent at the time of or immediately before termination, and it is really a question of compensating for the notional value of that agency in the open market'.⁶³ For this purpose, the courts would assume that the agency would continue and would therefore

59. See e.g. *Barrett McKenzie & Co Ltd v Escada (UK) Ltd* [2001] EuLR 567 (QB); *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB), [2003] ECC 23.

60. Case C-465/04 *Honeyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-02879, paras 34–36.

61. *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 1 WLR 2055, [17] (Lord Hoffmann).

62. Séverine Saintier, 'Final Guidelines on Compensation of Commercial Agents' (2008) 124 LQR 31, 37. The European Commission's Action Plan on *A More Coherent European Contract Law* (Com (2003) 68 final) [18] also criticized the Directive for having 'two different legislative approaches in one and the same directive'.

63. *Barrett McKenzie & Co Ltd v Escada (UK) Ltd* [2001] EU LR 567 (QB) 575, approved by Lord Hoffmann at [2007] UKHL 32, [2007] 1 WLR 2055 [28], although he did raise concern about the use of the word 'notional' and stated that '[a]ll that is notional is the assumption that the agency was available to be bought and sold at the relevant date'.

also need to value 'the income stream which the agency would have generated'.⁶⁴ Lord Hoffmann also stated that where a business is failing (as was the case here), the value of the agency and, consequently, the value of the compensation should be reduced. Accordingly, Lonsdale received £5,000 compensation.

COMMENT: The House's decision in *Lonsdale* has proven controversial and has been criticized on several grounds. First, it has been argued that the case will have significant cost implications, as expert evidence may be required to obtain an accurate valuation. In many cases, the claims involved might not justify the expense of obtaining a valuation. Lord Hoffmann himself expressed concern regarding such costs, but countered the criticism by stating that 'once it is firmly understood that the compensation is for the loss of the value of the agency, relatively few cases will go to court'.⁶⁵ Second, it has been argued that reducing compensation based on the failings of the business 'blurs the distinction between compensation and indemnity'⁶⁶ (as discussed in the next section, if a principal goes out of business, no indemnity will be payable) and that '[l]egal advisors on both sides may struggle to understand why aspects of indemnity now apply to compensation'.⁶⁷ Finally, it has been contended that the valuation method advocated by Lord Hoffmann is based on assumptions that are not accurate in practice, namely that a market for the buying and selling of commercial agencies exists, which can be used as the basis of a valuation. In fact, no such market exists because usually '[c]ommercial agencies are not assignable by the agent because they are by their nature personal to the agent'.⁶⁸ It follows that any valuation will be extremely speculative.

See Séverine Saintier, 'Final Guidelines on Compensation of Commercial Agents' (2008) 124 LQR 31

Where the agency contract provides that the commercial agent is entitled to an indemnity, then the key provision is reg 17(3), which provides that:



Commercial Agents (Council Directive) Regulations 1993, reg 17(3)

... 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.

It is clear from reg 17(3)(a) that the primary purpose of the indemnity is to allow the agent to recover a sum in return for the increase of business that the principal enjoys (and may continue to enjoy) due to the agent's efforts. It follows from this that 'if the

64. [2007] UKHL 32, [2007] 1 WLR 2055 [12] (Lord Hoffmann).

65. *ibid* [35] (Lord Hoffmann).

66. Séverine Saintier, 'Final Guidelines on Compensation of Commercial Agents' (2008) 124 LQR 31, 36.

67. Laura Macgregor, 'Compensation for Commercial Agents: An End to Plucking Figures from the Air?' (2008) 12 Edin LR 86, 92.

68. Andrew McGee, 'Termination of a Commercial Agency: The Agent's Rights' [2011] 8 JBL 782, 792.

principal went out of business and therefore derived no benefit from the customers introduced by the agent, no indemnity will be payable.⁶⁹ Where an indemnity is payable, then the amount is limited to:

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.⁷⁰

The payment of an indemnity will not prevent the commercial agent from seeking damages.⁷¹ So, for example, where, in breach of contract, the principal terminates the agency contract, then the agent could seek an indemnity for the business generated by his activities, and damages for the principal's breach of contract.

In four situations, the commercial agent's right to compensation or an indemnity will be lost:

1. If, within one year of the agency contract being terminated, the commercial agent has not notified the principal that he intends to pursue his entitlement to compensation or an indemnity, then the right to compensation or an indemnity will be lost.⁷²
2. Where the principal has terminated the contract of agency because of an act attributable to the agent that would justify the immediate termination of the agency contract under reg 16, then the right to compensation or an indemnity will be lost.⁷³ In relation to this situation, the expiration of an agency contract due to the passing of time (e.g. where a fixed-term contract has expired) will not prevent the agent from obtaining compensation or an indemnity,⁷⁴ as the contract has not been terminated by the principal, nor was termination due to the act of the agent.
3. Where the agency contract is terminated by the commercial agent, then the right to compensation or an indemnity will be lost, unless the termination is justified (a) by circumstances attributable to the principal; or (b) on the grounds of age, infirmity, or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities.⁷⁵
4. Where the commercial agent, with the agreement of his principal, assigns his rights and duties under the agency contract to another person, then the commercial agent's right to compensation or an indemnity will be lost.⁷⁶

Finally, it should be noted that neither party can derogate from the provisions of regs 17 or 18 to the detriment of the commercial agent before the contract of agency expires.⁷⁷ From this, it follows that the parties can agree terms that are more favourable to the commercial agent if they so choose.

Restraint of trade

Where an agreement seeks to impose upon a commercial agent a restraint of trade clause, then it will be subject to a number of general contractual common law rules which are unaffected by the Regulations.⁷⁸ Regulation 20(1) imposes two additional

69. *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 1 WLR 2055 [20] (Lord Hoffmann).

70. Commercial Agents (Council Directive) Regulations 1993, reg 17(4).

71. *ibid* reg 17(5).

72. *ibid* reg 17(9).

73. *ibid* reg 18(a).

74. *Cooper v Pure Fishing (UK) Ltd* [2004] EWCA Civ 375, [2004] 2 Lloyd's Rep 518 [15] (Tuckey LJ).

75. Commercial Agents (Council Directive) Regulations 1993, reg 18(b).

76. *ibid* reg 18(c).

77. *ibid* reg 19.

78. *ibid* reg 20(3).

requirements by providing that a restraint of trade clause will be valid only if and to the extent that:

- (a) it is concluded in writing; and
- (b) it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.

It is contended that reg 20(1) adds little to the common law. The requirement for the contract to be in writing is new but, in practice, restraint of trade clauses are almost always found in writing, usually within the terms of the agency contract itself. It has also been argued that the requirements found in (b) are 'broadly in accord with the common law rules'.⁷⁹ Further, it has been contended that the limitation imposed by reg 20(2), namely that a restraint of trade clause will not be valid for more than two years after the termination of the agency contract, may also be covered under the common law requirement of reasonableness.⁸⁰

CONCLUSION

The law relating to the termination of an agent's authority can be complex, due to the variety of methods of termination that exist. Some methods of termination are consensual, but many are not. Some methods will terminate the agency agreement and the agent's authority, while others will not. Some can be exercised without fear of legal reproach, but others will result in the terminating party committing some form of legal wrong. It is, however, vital that the parties to an agency agreement understand not only how the authority of an agent can be terminated, but also the potential effects that can arise from a termination.

This concludes the discussion of the law of agency. The next part of this text will focus on the law relating to the sale of goods, but there can be a significant overlap between the two areas of law, notably in cases where the principal appoints an agent to effect a contract of sale. In such a case, the validity of the agreement or the liability of the parties may be a matter for the law of agency and the law relating to the sale of goods.

PRACTICE QUESTIONS

1. Define the following terms:
 - irrevocable agency;
 - renunciation;
 - dissolution;
 - indemnity;
 - restraint of trade clause.
2. 'The decision of the House of Lords in *Lonsdale v Howard & Hallam Ltd* has had a detrimental impact upon the harmonisation of law in relation to commercial agents, and has blurred the distinction between compensation and an indemnity.'
Do you agree with this quote? Provide reasons for your answers.

79. Peter G Watts, *Bowstead & Reynolds on Agency* (19th edn, Sweet & Maxwell 2010) [11-056].

80. *ibid.*