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Insights

TO INTRODUCE OR NOT TO INTRODUCE, THAT IS THE QUESTION?

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SUMMARY

Recent case law has highlighted various challenges in structuring payment provisions for referral arrangements, such as introduction, intermediary, brokerage and 'finder's fee' agreements. Together, these provide useful guidance for those dealing with these types of contract, in particular, how pitfalls relating to payment may be avoided.

WHAT WE ARE SEEING

Introducer arrangements underpin commercial relationships in a variety of industries such as sport, media, finance and property. With introductions made by intermediaries potentially leading to lucrative business and investment opportunities, a valid introduction is therefore a valuable asset. As a result, we are seeing beneficiaries of introductions taking a particular interest in ensuring that commission will only become payable on valid introductions and in specific circumstances. Introducers however, will want to make sure that where possible, whatever value they add, a commission is payable.

DEVELOPMENTS AND THE DIRECTION OF TRAVEL

A recent judgment in 2023 illustrates the risks for introducers, where the contractual trigger event for payment is defined very narrowly. The court held that, in the absence of an express contractual term specifying a *range* of introduction fees payable on sale of a property - or even a mechanism that could be used to determine what commission should be payable if the sale price specified in the contract for the property was not met - the introducer would receive **no** commission at all. This was in spite of the fact that, in the end, the property was only sold at a slightly lower price than the price at which the commission would have been payable. The Supreme Court determined that the introducer was only entitled to payment if the very specific sale price that the parties had agreed to trigger payment was reached. The case stands as a salutary reminder for all parties to ensure they cater for a range of potential eventualities within the payment model (by ratcheting the commission payment, for example).

Another 2023 decision on the structure of commission-based payments considered how payment should be calculated when it was determined that there was in fact no concluded agreement between the parties. The Court had to consider that if there was no binding written contract, whether there was an implied contractual term or other (equitable) basis on which commission (or another sum) was payable. The nature of commission arrangements, and likelihood of these services being provided in the early - and often urgent - stages of a project, creates a risk that express terms are not documented; for introducers especially, having express terms agreed before introductions are made is important for ensuring compensation is received for any benefit that introductions have brought. Having to rely on equitable arguments to support a restitutionary claim for unjust enrichment introduces considerable uncertainty and significant potential for disputes.

Looking further back, another case considered whether a particular introduction met the contractual criteria required to trigger a commission payment. Whilst this case was fact-specific and the background played a crucial part in the Court's decision, it confirms that if the drafting of the agreement is ambiguous, the court is likely to require the introduction be an 'effective cause' behind the beneficiary's decision to contract with the third party to trigger the payment of commission. This places the onus on the 'introducing party' to show proof of a causative element and that agreed thresholds have been met. Thorough and clear drafting that considers all scenarios for a commission payment will avoid a Court having to weigh in on this.

IMPACT

These decisions illustrate that what is documented or agreed between the parties is fundamental; it is very unwise to rely on the courts implying a term into your contract if the mechanism for agreeing these types of payment is not documented. Given the importance of the express terms used, here are some issues to consider when drafting such agreements.

DRAFTING TIPS

- Be specific in drafting the definition of an "introduction" or "referral". We often see a restriction that the introduction cannot be to anyone who has previously provided goods/services to the 'customer'. The nature of 'previously provided goods/services' should be defined to ensure it is clear which third parties will be inside or outside the scope of a fee-bearing introduction.

- Parties should clearly set out the role the introducer or intermediary will need to play in the introduction. Should this be a mere introductory meeting or email, for example, or will they need to negotiate or provide some other value-add? Consider including the mechanism for receiving the introduction. This is to ensure that an intended introduction is not made through the wrong channel, is ignored, and a subsequent referral by another intermediary is made for the same introduction.

- The trigger point for payment of a commission should be carefully considered and clearly set out. Likewise, carve-outs should be addressed, as the beneficiary of an introduction may not consider it appropriate to pay a commission to an intermediary until the relevant introduction has resulted in a signed contract, or until specific commercial results have been achieved. Aside from the drafting, it is best practice to tell the introducer/intermediary as soon as possible if you do not believe the introduction triggers payment of a commission.
- When remuneration is to be based on achievement, clear metrics should be documented, for example whether the payment is binary depending on whether the target is triggered, or scaled where the commercial benefit has been achieved in part.
- How long should the introduction be open for? It might be necessary to introduce a longstop date for the relevant 'introduced' contract to be entered into, or commercial results achieved, to ensure that if negotiations break down but then subsequently return some time later in an unrelated context, it is clear whether or not the introducer should still be paid a commission for that contract/commercial result.
- A commission share arrangement may be advantageous where there are multiple introducers/intermediaries, or where there is a primary introducer who is allowed to bring introductions in via third parties. This could incentivise intermediaries to collaborate, and therefore maximise opportunities. Such consideration would likely circumvent issues of duplicate introductions – it would also be worth considering a short window in which duplicate introductions can be made.
- Be clear on what payments are due if the referral arrangement is terminated, for example should the introducer be paid for business concluded after the date of termination. This is likely to depend on the role that the introducer has played.
- Please note that these tips do not relate to situations where there are specific rules for calculating commission that is due, such as commercial agency.

RELATED CAPABILITIES

- Commercial Transactions

MEET THE TEAM

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