Case No: A2/2012/0107

Neutral Citation Number: [2012] EWCA Civ 1400
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SIR RAYMOND JACK sitting as a Judge of the High Court
Case No: HQ10X04075

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2012

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE HUGHES
and
MR JUSTICE BEAN

- -

Between :

	CROCS EUROPE BV	**Appellant**
	- and -	
	CRAIG LEE ANDERSON & Anor trading as SPECTRUM AGENCIES (a partnership)	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

MR FERGUS RANDOLPH QC and MR MAX SCHAEFER (instructed by Field Fisher Waterhouse LLP) for the Appellant

MR OLIVER SEGAL QC (instructed by Morgan Cole LLP) for the Respondent

Hearing date: 4th July 2012

- -

Judgment**Lord Justice Mummery:**

Introductory

1.This case is about the termination of a commercial agent's contract by the principal. Was

termination justified by the agent's breach?

2. The damages claim brought by the agent against the principal, Crocs Europe BV (the defendant), is for summarily terminating a commercial agency contract on 3 July 2008. The agent was Spectrum Agencies (the claimant), a firm, which was the appointed agent in the UK for the sale of the defendant's successful footwear brand "Crocs."

3. The appeal by the defendant is against the judge's ruling, after a five day trial on liability, in favour of the claimant. He held that the claimant's breach was not sufficiently serious to be repudiatory. General points arise on the appeal as to (a) an agent's duties under the Commercial Agents (Council Directive) Regulations 1993 (the Regulations) and under the general law; and (b) the circumstances in which the principal is entitled to treat the agent's breach of duty under the Regulations and under the general law as repudiatory.

4. The defendant appeals on the ground that the judge was wrong to hold that it was not entitled to treat the contract as terminated. The judge should have held that the claimant had repudiated the contract by acting in breach of (a) a condition implied into the contract by the operation of the Regulations; (b) the statutory duty of good faith embodied in the Regulations; and (c) the fiduciary duty of loyalty owed by the claimant to the defendant under the general law. Alternatively, the judge should have held that, in all the circumstances of the case, the claimant's breach of contract was sufficiently serious to amount to a repudiatory breach.

5. The dispute arose when one of the claimant's employees posted comments about the defendant on an internet website. The posting is described in the proceedings as "the Crawl". The claimant says that the Crawl was light hearted, a "joke" based on a typical working day of the defendant's customer services team and the claimant's battle to get service from the defendant. The defendant says that the Crawl was "highly derogatory" and was repudiatory conduct on the claimant's part. The claimant's response is that that was an over reaction to a "joke item" of short duration, limited dissemination and certainly not serious enough to be a repudiation. The claimant's theory is that the defendant was on the look out for a way of ridding itself of the contract without having to pay to the claimant substantial compensation on termination.

6. This appeal is from the order dated 16 December 2011 by which judgment was entered for the claimant on liability, with damages to be assessed. The judge refused permission to appeal. Permission was granted by the Rt Hon Sir Scott Baker on 23 February 2012.

7. The judge decided three main points. Only one point is appealed: that the defendant was not entitled to terminate the contract on the grounds of a repudiatory breach.

More background facts

8.In 2005 the defendant appointed the claimant as UK agent for its distinctive footwear. The judge held that the claimant fell within the Regulations as a self-employed commercial agent with continuing authority to negotiate.

9.On 19 June 2008 an employee of the claimant, helped by others, composed and posted the Crawl on a website. It consisted of written film credits rolling up on the screen. The sequence written by him and colleagues was headed "That's a Croc!! Of Shite!! SPECTRUMS WAR OF LIGHT VS DARK." The judge found that the Crawl was a joke about the claimant's battle to get service from the defendant. The claimant was concerned about the defendant's poor responses to orders. The joke was put into "a Star Wars context." The judge found that the Crawl's content about the defendant's failures to respond to orders was common knowledge. In his view that was important when estimating what damage the Crawl might do to the defendant.

10.The defendant says that the comments disparaged the products which it had appointed the claimant to sell. A link to the Crawl was emailed to other employees of the claimant and to third parties, including some customers of the defendant in the UK and distributors in other markets. Four of them were long-standing retailers of the defendant. The judge found that the defendant initially saw the Crawl as something which might be used as a negotiating weapon rather than as a serious breach of the claimant's duty. The defendant took no steps to have the Crawl removed from the website. That reflected on whether it saw it as something likely to cause real damage to it. The whole website, which the claimant says could not be accessed by any internet user via a search engine, was removed on or before 22 June 2008 for reasons unconnected with the case.

11.On 24 June 2008 the defendant's solicitors wrote to the claimant saying that the Crawl amounted to a fundamental breach of the duties of good faith owed to the defendant. The letter referred to the harm that it would cause to the business in the UK. The judge observed in his judgment that no evidence was called about any harm caused to the defendant. The right to terminate was reserved. The defendant's solicitors contended that posting the Crawl on the internet and forwarding the link to third parties amounted to a repudiatory breach of the claimant's core duty as an agent. The defendant subsequently sought to rely, as support for its case on repudiatory breach, on the claimant's failure to comply with its request for an explanation, for details of the recipients of the Crawl and for an assurance that it would not make further disparaging comments.

12.On 3 July 2008 the defendant's solicitors wrote to the claimant terminating the agency contract. The claimant began proceedings claiming compensation against the defendant under regulation 17, which provides for compensation or indemnification for a commercial agent whose contract is terminated. The claim is estimated by the claimant to be in the region of £12.8m to £16m. The defendant strongly disputes the figures and asserts that the claimant

is not entitled to any compensation under regulation 17 for termination of the commercial agency, because the defendant was entitled to treat the agency contract as at an end this not giving rise to a claim against it under regulation 17.

The law

The Regulations

13. Under the Regulations a commercial agent is entitled to compensation at the end of the agency contract. In order to determine whether the claimant is so entitled it is necessary to examine the detailed provisions in the Regulations.

14. Regulation 3 (1) ("Duties of a commercial agent to his principal") provides that, in performing his activities, a commercial agent must look after the interests of his principal and act dutifully and in good faith. The defendant challenges the correctness of the judge's comment that that is no different to the common law position.

15. Under regulation 3(2) a commercial agent must (a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of; (b) communicate to his principal all the necessary information available to him; and (c) comply with reasonable instructions given by his principal. Regulation 4 provides for the duties owed by a principal to his commercial agent. Regulation 5 provides that the parties may not derogate from regulations 3 and 4.

16. On the appeal the defendant contends that the good faith duty in regulation 3 implies a "condition" into the agency contract and that a breach of that condition is always repudiatory: it is not just a statutory duty giving rise to a right to terminate only if the breach is sufficiently serious.

17. The defendant's alternative case under regulation 3 is that, even if there is no implied condition, a breach of the statutory duty in the Regulations itself gives rise to an automatic right to terminate the contract.

18. At this point I note that the Regulations do not spell out any specific implied conditions. Nor do they specify the particular consequences that flow from a breach of the Regulations. Instead, regulation 5 (2) provides that the law applicable to the contract shall govern the consequences of breach of the rights and obligations under regulations 3 and 4. That means that the general principles of English contract law relating to termination by breach apply.

19. Regulation 18 ("Grounds for excluding payment of indemnity under regulation 17") provides

that no indemnity or compensation shall be payable to the commercial agent under regulation 17 where the principal has terminated the agency contract because of default attributable to the commercial agent, which would justify immediate termination of the agency contract pursuant to regulation 16. That is clearly another reference to general contractual principles of termination by breach.

20. The same comment applies to regulation 16 itself ("Savings with regard to immediate termination") which provides that:-

> "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) [not relevant]"

21. As Elias J observed in *Bell Electric Ltd v. Aweco Appliance Systems Gmbh & Co KG* [2002] EWHC 872 (QB) ; [2002] CLC 1246 at [54] an agency contract is not terminated "pursuant to regulation 16." That regulation operates to preserve existing common law rules permitting immediate termination because of the failure of the defaulting party to carry out his obligations under the contract.

Fiduciary duties

22. Alternatively to its case under regulation 3, the defendant relies on breaches of the duties of loyalty owed by an agent to a principal under the general law. As long as they do not derogate from the duty in regulation 3, those general duties co-exist with the Regulations. The defendant contends that it necessarily follows from the fiduciary character of the duties under the general law that immediate and summary termination of an agency contract, like the case of an employment contract, is justified by a breach of duty which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Such a breach goes to the root of the contractual relationship and evinces an intention by the contract-breaker no longer to be bound by the contract or to perform it.

23. However, at this point I note from the discussion in Bowstead & Reynolds on Agency (19th ed) of Article 60(2) at 7-049, that although a breach of fiduciary duty by an agent may go to the root of the contract so as, for example, to deprive the agent of the right to remuneration, it is not always the case. The question is one of the application of the law as

to the discharge of contract by breach. See also the discussion of the relationship between commercial agent and principal at 11-022. Reference is made to breaches remediable by actions for damages or proprietary claims or injunctions and to the fact that "sometimes a breach will entitle the principal to terminate the contract." In that case the answer to the question whether or not a breach is repudiatory depends, in general, on an objective assessment of all the surrounding circumstances.

24. There is no dispute that the relationship of principal and agent is a fiduciary one; that an agent owes a duty of loyalty to his principal, and that a single act of an agent may be of so serious a nature as to be incompatible with the continuance of the principal/agent relationship. However, it also clear law that not every duty owed by a fiduciary is a fiduciary duty and no authority cited supports the defendant's radical proposition that *any* breach of the fiduciary duty of loyalty necessarily and automatically results in the repudiation of the agency contract. Breaches of fiduciary duty, like breaches of other kinds of duty, may have different consequences and give rise to different remedies depending on an objective assessment of the effect of all the circumstances surrounding the breach.

25. I shall return to the application of these general legal principles in the later discussion of the submissions.

Judgment

26. On the issues of liability in the first part of the split trial the judge decided four points: [2011] EWHC 3386 (QB). Three of them are no longer live. I only mention them to show the way in which the defendant has contested the claim.

27. The first point was that the contract was originally with the parent company, Crocs Inc. at a time when it had no proper organisation in Europe. There was a hiatus while the defendant was set up. The claimant was informed that the defendant would be the principal in its place and the parties proceeded on that basis. The judge, who found that intentions of the parties were clear, held that the agency contract was with the defendant.

28. The second point was that the claimant had a continuing authority to negotiate and was a commercial agent within the meaning of the Regulations.

29. The third and decisive point was that, although the posting of the Crawl was a breach of contract, it was not a repudiatory breach entitling the defendant to treat the contract as terminated. The judge said that whether the disparagement in the Crawl was sufficiently serious to entitle the defendant to terminate the agency without notice depended upon the nature of the disparagement and the circumstances in which it occurred. The judge gave his decision in succinct terms:-

> "42. My conclusion here is that it was a breach of Spectrum's duty to BV to put the crawl onto the website, but that the seriousness of that breach fell a long way short of the seriousness required to entitle BV to terminate the agency. A reasonable person would not conclude that it showed an intention on the part of Spectrum not to fulfil the contract. The main factors in my reaching that conclusion are that the crawl was obviously intended to be humorous (and its scatology sounds worse in a court than in the world of the web); that its circulation was very limited, and to persons who would see the joke; that it was very unlikely that a retailer (or any other person seriously interested in Crocs) would see it unless they had the link; and that the situation at BV which was the subject of the crawl's Star Wars humour was well known to Crocs retailers."

30. The fourth point was that, if there was a right to terminate, the claimant would have been deprived of a right to compensation by regulation 18. This is not disputed.

31. The appeal thus turns on whether or not the judge was wrong to hold in [42] that there was no repudiatory breach by the claimant.

Defendant's submissions

32. The defendant submits that the appeal should be allowed and the claims dismissed.

33. First, the judge was wrong to hold that breach of the duty in regulation 3 only entitles the principal to determine the agency contract, if it is sufficiently serious. It is argued that no test of sufficient seriousness should be applied. The defendant was entitled to determine the contract for breach of duty under regulation 3, even if that breach is not serious, as that regulation operated to imply a condition into the contract any breach of which entitled the defendant to terminate the agreement. *Bunge Corporation v. Tradax Export SA* [1981] 1 WLR 711 at 715 is cited in support of the general principles on which the condition argument is based. Though not expressed as a condition it is submitted that the duty under regulation 3 should be read and construed as a condition with all the practical advantages of certainty, so that failure to perform the duty, irrespective of the gravity of the breach, entitles the other party to elect to put an end to the contract. The breach of a condition could not be trivial or less than serious enough to justify termination.

34. The defendant also drew an analogy with a contract of marine insurance which, as provided by s.17 of the Marine Insurance Act 1906, is a contract of the "utmost good faith" and, if that is not observed, the contract may be avoided by the other party.

35. By analogy with the duty of trust and confidence at the heart of the employment relationship, it is contended that the duties imposed on an agent by regulation 3 are fundamental and non-

derogable. A breach of the duty of good faith goes to the root of the contract entitling the innocent principal to decide whether or not to terminate. Damages for breach of the condition implied in it and the duties imposed by the Regulations would be unquantifiable and inadequate. It would be productive of commercial uncertainty, if an innocent principal had to continue to accept a disloyal agent. Such a situation would lead to litigation with its uncertain outcomes and delays. The innocent principal should be in a position to know his rights when the breach of contract occurs.

36. The implied "condition" point was not put in quite that way in the court below where the argument rested on analogy with the position in employment law as laid down in *Malik v. BCCI SA* [1998] AC 20 at 45F and 47G in relation to the implied term of mutual trust and confidence. An agent, like an employee, was under a duty not to act in a manner which, objectively considered, was calculated or likely to destroy or seriously damage the relationship of trust and confidence. A breach of that duty went to the root of the fiduciary relationship and its obligations to act dutifully and in good faith, if it evinced an intention no longer to be bound by the contract. See also *Woods v. WM Car Services (Peterborough) Ltd* [1981] ICR 666 at 672A; (CA) [1982] ICR 693 at 698D-H and *Vick v. Vogle-Gapes Ltd* [2006] EWHC 1665 (TCC) at [85] relying on the analogy with *Malik*.

37. A similar submission is made on the effect of a breach of fiduciary duty under the general law. The defendant says that the judge failed to consider the serious consequences of the agent's breach of the distinguishing core duty of single-minded loyalty and good faith recognised in cases such as *Bristol & West Building Society v. Mothew* [1998] Ch 1 at 18; *Boston Deep Sea Fishing and Ice Company v. Ansell* (1888) 39 Ch D 339 at 362-3 (even an isolated case of a breach of confidence and good faith may justify dismissal of an employee); *Imageview Management Ltd v. Jack* [2009] EWCA Civ 63 (breach of fiduciary duty by taking a secret commission so that agent had to account for commission and forfeit right to fees and was liable to repay fees already paid); and *Ranson v. Customer Systems PLC* [2012] EWCA Civ 841 at [40] and [41] saying that the scope and content of the duty of trust and confidence in employment is a matter of contract, not of the law of fiduciary obligations, and that, even though the same label is applied, the duty of loyalty of an employee, which is determined by the contract, is not the same as the single-minded duty of loyalty owed by a fiduciary.

38. The legal position was the same under the alternative submission that regulation 3 created a statutory duty. The argument is that any breach of that duty necessarily went to the root of the agency contract and repudiated it, regardless of the circumstances in the particular case.

39. If neither the breach of regulation 3, as an implied condition or as a statutory duty, nor of fiduciary duty automatically entitled the defendant to terminate, it was submitted that the claimant's conduct was, in any case, sufficiently serious to be repudiatory. The Crawl disparaged to the world at large the defendant and its goods, which the claimant had contracted to promote as agent.

40. As many as eight particular aspects of the claimant's breach were relied on as relevant to the seriousness of the breach: the meaning and language of the Crawl; the fact that it was described by the claimant as "the truth"; the fact that the Crawl was made available to the world by posting on a publicly available website; the claimant's emailing a direct link to the Crawl to the defendant's existing customers; the fact that the link could be forwarded to others; the absence of control by the claimant over who would see the Crawl, so that they had no idea who had in fact done so; the failure of the claimant to comply with the defendant's reasonable instructions to assure it that it would not repeat its derogatory behaviour; and the fact that the duty breached by the claimant was a fiduciary duty which, "in practically every case", automatically entitles the principal to terminate. See *Keppel.v. Wheeler* [1927] 1 KB 577 at 592 where it was also stated that there may well be breaches of duty by an agent which do not go to the whole contract and which would not, for example, prevent him from recovering his remuneration.

41. The defendant also says that judge's formulation of the serious breach issue was wrong in law for several reasons: he took account of events that occurred after the breach; he relied on what he found were the claimant's intentions; he relied on what he found was the claimant's subjective assessment of the Crawl's seriousness; and he refused to take into account the claimant's failure to give an assurance that it would not repeat its derogatory behaviour.

42. Finally, the judge erred in several respects in his application of the test of seriousness: he failed to give any or sufficient weight to various factors; the facts on which he relied were found in error; and he wrongly or excessively relied on them. For example, it was irrelevant that the Crawl was obviously intended to be humorous. The evidence was that it was not known how many people had seen it. It was incorrect to say that it was limited to people who would see the joke or that it was unlikely that a retailer would see the Crawl. The defendant's shoes were a tremendous popular success and the judge should have taken into account the risk of any potential customer of the defendant seeing the Crawl.

43. In brief, whichever analysis is applied, the critical point is that the claimant's breach consisted in it doing the very opposite of what the agency contract was intended to achieve for the defendant.

Discussion and conclusions

Condition point

44. There are insuperable difficulties in the defendant's argument on implied condition, quite apart from the fact that it only surfaced on the appeal.

45. Regulation 3 it is not expressed as, or to be, or to create a condition of the contract the breach of

which will automatically terminate the agency contract. Regulation 3 does no more than set out the relevant obligations of the agent. There is no basis for holding that it goes further and implies them as fundamental conditions into the agency contract so that breach of them would always be repudiatory.

Statutory duties

46. A similar difficulty arises on the alleged effect of breach of statutory duties. The Regulations do not spell out that, as a specific consequence of breach, the agency contract is, or may be, terminated. On the contrary, regulation 5(2) makes that implication impossible by expressly providing that the consequence of the breach of the regulation is a matter for the law governing the contract. Termination by breach is to be determined by the general principles of the governing law of contract.

Fiduciary duties

47. The general principles of fiduciary law do not support the defendant's submissions of automatic termination of the contract by breach of fiduciary duty. The fiduciary character of the contractual relationship is clearly relevant, but it is subject to the qualification that (a) not all duties owed within a fiduciary relationship, such as agency, are properly classified as fiduciary duties (the duty to obey instructions and the duty of skill and care being examples of non-fiduciary duties); and (b) not all breaches of duty owed by a fiduciary and properly classified as fiduciary (the duty of fidelity and loyalty being the prime example of a fiduciary duty) either automatically or necessarily repudiate the contract.

48. The fiduciary duties are not formulated in terms that produce the same outcome in the case of every breach. Breaches of fiduciary duty are capable of producing other consequences and remedial outcomes than simple termination of the fiduciary relationship. The remedial consequences of the breaches of duty depend not only on the nature of the duty owed but also on the factual circumstances in which the particular breach occurred and the intentions of the parties, as expressed or inferred, in relation to the contract. It would be an odd principle that separated the consequences of and available remedies for the breach from the surrounding circumstances of the particular case.

49. The analogy with employee's duties does not assist the defendant. There are cases in which an isolated act of misconduct does not justify termination of the contract by summary dismissal. See *Laws v. London Chronicle (Indicator Newspapers)Ltd* [1959] 1WLR 698 (a single act of disobedience was not repudiation of an essential condition of the contract of service so as to justify dismissal); *Wilson v. Racher* [1974] ICR 428 (use of obscene language on a solitary occasion was not incompatible with continuance of the employment relationship and did not justify summary dismissal); *Hutchings v. Coinseed Ltd* [1998] IRLR 190 (going to work for a competitor without breach of duty of confidence or good

faith not necessarily repudiatory breach); cf *Gledhill v. Bentley Designs (UK) Ltd* [2011] 1 Lloyd's LR Vol 1 270 (contents and tone of personally abusive comments by agent in voicemail and on mobile phone to managing director of principal a repudiatory breach damaging relationship of trust and confidence, which entitled the principal to terminate with immediate effect) and *Briscoe v. Lubrizol Ltd* [2002] IRLR 607 at [113] (failure to return to work or to attend as instructed to discuss long term absence, coupled with absence of current medical report, undermined trust and confidence inherent in a contract of employment).

50. In my view, the correct question for the judge to decide was indeed the one that he in fact addressed: how serious, in all the circumstances, was the claimant's conduct in connection with the Crawl? He concluded that it was not serious enough to be a repudiatory breach. On an appeal this court can only overturn that answer, if it is clearly shown to be wrong. That is obviously difficult to do, unless the judge misdirected himself in law, or there was no evidence to support his conclusion. In its attack on the judge's conclusion the defendant has to undertake the difficult task of persuading this court to overturn what is essentially a factual assessment.

51. In my judgment, the evidence available was sufficient to support the judge's assessment that the breach was not as serious as the defendant contended and to support his conclusion that the conduct of the claimant did not justify summary termination by reason of acceptance of a repudiatory breach. The criticisms of the various points relied on by the judge overstate the seriousness of the undoubted breach. The Crawl did not in terms disparage the goods to any one. It referred to the inability of the defendant to meet delivery obligations, a state of affairs that was well known. The style of the Crawl was obviously jokey, though not everyone might see the joke and though the defendant was not amused. The circulation of the Crawl was limited and temporary. The website was soon shut down for other reasons and the Crawl was removed. The failure to give the requested assurance was not serious, if what the claimant had done was not in fact a serious breach. There was no evidence of harm suffered by the defendant.

52. In my judgment, the disparagement of the defendant in the Crawl was, as the judge held, a breach of contract, but it was not a breach (whether of regulation 3 or of the fiduciary duty under the general law) that went to the root of the agency relationship arising from the contract. It was more in the nature of a one-off incident that did not involve bad faith on the part of the claimant, was not shown to involve a real risk of harm to the defendant by dissemination to the world at large and did not, when viewed objectively, evince an intention to abandon or to refuse to perform the commercial agency contract.

Result

53. I would dismiss the appeal. I am not persuaded by the defendant's far fetched propositions of contract and fiduciary law that the judge was wrong to hold the defendant liable to the

claimant for breach of contract by summarily terminating the agency agreement in circumstances where the breach relied upon was not sufficiently serious to be repudiatory.

54.I have read in draft the judgment of Bean J on regulation 3, the authorities cited by way of analogy on the contractual obligations owed by an employee to an employer and the *Tradax* case. I agree with his reasons for dismissing the appeal and, in particular, for rejecting (a) the contention that regulation 3(1) is a condition of the contract between a commercial agent and his principal and (b) the submission that the judge was wrong in holding that the claimant's breach was not sufficiently serious to entitle the defendant to treat the contract as terminated.

Mr Justice Bean **:**

55. Regulation 3 of the Commercial Agents (Council Directive) Regulations 1993 provides:-

> "(1) In performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith.
>
> (2) In particular, a commercial agent must: –
>
> a) Make proper efforts to negotiate, and, where appropriate, conclude the transactions he is instructed to take care of;
>
> b) Communicate to this principal all the necessary information available to him;
>
> c) Comply with reasonable instructions given by his principal."

56. This formulation of the obligations of a commercial agent does not seem to me to be materially different from the obligations owed by an employee (other than a director) to his employer. If Mr Anderson and Mr Albrecht had been employed by Spectrum BV I doubt whether their implied obligations would have differed in substance from those contained in the regulation. Indeed, Mr Randolph QC relied on employment cases in support of his argument. He submitted that Regulation 3(1) is "at least as wide" as what he described as the *Malik* term, that is to say the implied term of every contract of employment described by Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693 and approved by the House of Lords in *Malik and Mahmud v BCCI* [1998] AC 20. Giving the judgment of the Employment Appeal Tribunal in *Woods*, Browne-Wilkinson J said:-

> "In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. (670G)

> … In our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such an employer has therefore breached the implied term. Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract: see *Courtaulds Northern Textile Ltd v Andrew* [1979] IRLR 84"

57. The phrase "likely to destroy or seriously damage the relationship of confidence or trust" used in *Woods* was a direct quotation from the decision of the Employment Appeal Tribunal in *Courtaulds v Andrew,* where the EAT said they were applying the law as laid down by this court in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. In that case, which to this day is the leading authority on the subject, this court held that constructive dismissal occurs "if the employer is guilty of conduct which is a significant breach going to the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract."

58. The test laid down in *Woods* and approved in *Malik* is no more than the application to employment contracts of classic principles of general contract law. If party A conducts himself in a way which, viewed objectively, is likely to destroy or seriously damage the contractual relationship, that amounts to a repudiation of the contract which party B can accept and thus terminate the relationship. The legal test is easily stated. In most cases, including the present one, the more difficult question is whether in the particular case party A's conduct viewed objectively *was* likely to destroy or seriously damage the relationship. That, as the Court of Appeal held in *Woods* ([1982] ICR 693), is a question of fact for the tribunal or trial judge. Although *Woods* was a constructive dismissal claim heard by an industrial tribunal, the emphasis placed by Lord Denning MR on the line of authority in "cases in the old days about wrongful dismissal" (697A-698C), whether tried before the Second World War with a jury or thereafter by judge alone, shows that this principle applies just as much to trials in the High Court or a county court as it does to decisions of employment tribunals. And, as Etherton LJ said in *Eminence Property Developments Ltd v Heaney* [2011] 2 All ER (Comm) 223 at [62]:-

> "… whether or not there has been a repudiatory breach is highly fact-sensitive. That is why comparison with other cases is of limited value. "

59. Mr Randolph argues that the Regulation 3 duty, like the *Malik* term, is a single one and as a matter of law is a condition. Since the judge found that there had been a breach of Regulation 3 it followed that his clients were entitled to treat the contract as repudiated. As with pregnancy, he says, a party is either in breach of Regulation 3 or not. There is no

such thing as a trivial breach. Thus, the judge having found a breach of Regulation 3, he was bound to find that it was repudiatory.

60. In many years of involvement with employment law I have rarely encountered the labels "condition" and "warranty". Most obligations in an employment contract are, to use the classification set out in *Hong Kong Fir Shipping Co Ltd Kawasaki Kisen-Kaisha Ltd* [1962] 2 QB 26, innominate terms. The duty not to be dishonest is an obvious exception. But it is not easy to think of others.

61. Mr Randolph referred to *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711, in which the House of Lords held that the court requires precise compliance with stipulations as to time in commercial contracts. The appellants sought to argue that a breach of the buyer's obligation to give at least 15 days' notice of probable readiness of the vessel might be "inconsequential" and that therefore the obligation was an innominate term. Lord Wilberforce said:-

> "This argument, in my opinion, is based upon a dangerous misunderstanding, or misapplication, of what was decided and said in *Hong Kong Fir*. That case was concerned with an obligation of seaworthiness, breaches of which had occurred during the course of the voyage. The decision of the Court of Appeal was that this obligation was not a condition, a breach of which entitled the charterer to repudiate. It was pointed out that, as could be seen in advance the breaches, which might occur of it, were various. They might be extremely trivial, the omission of a nail; they might be extremely grave, a serious defect in the hull or in the machinery; they might be of serious but not fatal gravity, incompetence or incapacity of the crew. The decision, and the judgments of the Court of Appeal, drew from these facts the inescapable conclusion that it was impossible to ascribe to the obligation, in advance, the character of a condition.
>
> Diplock LJ then generalised this particular consequence into the analysis which has since become classical. The fundamental fallacy of the appellant's argument lies in attempting to apply this analysis to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole.
>
> The test suggested by the appellants was a different one. One must consider, they said, the breach actually committed and then decide

> whether that default would deprive the party not in default of substantially the whole benefit of the contract. They invoked even certain passages in the judgment of Diplock LJ in *Hong Kong Fir* to support it. One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so."

62. I do not consider that this case assists Mr Randolph at all. If one is looking for guidance from shipping law to classify the Regulation 3 obligations of a commercial agent, or the corresponding duties of an employee, they are surely analogous with the seaworthiness obligation rather than with a time clause. The obligation of seaworthiness, according to Lord Wilberforce, is not a condition of the contract because a breach may vary from extremely trivial (the omission of a nail) to extremely grave (a serious defect in the hull). If Mr Anderson or Mr Albrecht had been 10 minutes late for a meeting with an important client, they would not have been acting in the interests of their principal; but it could not sensibly be said that by being a few minutes late on one occasion they demonstrated an intention to abandon their contractual obligations. Time is not of the essence in an employment contract as it is in a shipping contract, and there is no reason why it should be of the essence in a commercial agency contract either. Similarly, if a commercial agent fails in some minor respect to "communicate to his principal all the necessary information available to him" as it is his duty to do pursuant to Regulation 3(2)(b), this could hardly be described as repudiatory behaviour. Later in his speech in *Bunge v Tradax*, Lord Wilberforce reminds us that "the courts should not be too ready to interpret contractual clauses as conditions". I cannot accept the argument that Regulation 3(1) is a condition of the contract between a commercial agent and his principal.

63. As to Mr Randolph's alternative argument that the regulation 3 duty is a fiduciary one, I agree that this also fails for the reasons given by Mummery LJ.

64. Sir Raymond Jack found the respondents in breach of their duties under regulation 3 but that the breach was not sufficiently serious to entitle the appellants to treat the contract as terminated. The breach was in my view quite close to the borderline, and it may be that a finding by the judge that it was repudiatory could not have been challenged successfully in this court. But the judge's finding that it was not repudiatory was properly open to him as the tribunal of fact, and this court should not interfere with it. I would dismiss the appeal.

Lord Justice Hughes:

65. I agree with both judgments.