

## THE HIGH COURT

[2004 No.18545 P]

BETWEEN

MICHAEL KENNY

PLAINTIFF

AND  
IRELAND ROC LIMITED

DEFENDANT

Judgment of Mr.Justice Clarke delivered 8th July, 2005.

**1. Introduction**

1.1 These proceedings concern the business relationship between the parties which lasted for a significant number of years during which time the plaintiff ("Mr.Kenny") ran a series of petrol stations trading under the Esso banner.Esso Ireland Limited ("Esso") is wholly owned by the Exxon Mobil Corporation of New York, USA.The defendant ("IROC") is a wholly owned subsidiary of Esso Ireland Limited.It should also be noted that the defendant was formerly known as Artane Service Station Limited.Esso operates in the retail market through a network of dealer owned, dealer operated and company owned service stations.The majority (53 out of 70) of the company owned service stations are operated by IROC on a tenancy agreement from Esso paying a market rent.IROC, since the late 1980s, has appointed independent contractors to operate each service station under its control.

1.2 Mr.Kenny was originally an employee of IROC having commenced his employment in May 1983.Mr.Kenny operated a number of different service stations as such employee but, of particular relevance to this case, changed in the later 1980s from being an employee to being an independent contractor.That arrangement arose out of a general re-organisation of the way in which IROC conducted its business.As a result of negotiations, all site managers (including Mr.Kenny) were made redundant on 30th September, 1987 and immediately thereafter became self employed independent contractors as and from 1st October, 1987.It does not appear that there was a significant alteration in the duties actually carried out immediately before and immediately after that change.Mr.Kenny initially commenced managing the IROC's Beechwood Service Station from that date as an independent contractor.Thereafter as and from 1st January, 1989 and with the agreement of IROC Mr.Kenny swapped stations and gave up his contract to manage the Beechwood Service Station in return for assuming a similar contract in respect of both the Abbey Service Station and the Dorset Service Station.In or around that time it is common case that IROC became involved in a major re-development of the Martello Service Station at Strand Road in Sandymount.Mr.Kenny was approached by IROC's then area manager, John Gleeson, to run the Martello site and Mr.Kenny took over as a similar self employed independent contractor from the opening of the Martello Service Station on 1st May, 1989 although, it would appear, the formal agency agreement was not signed until 1st March, 1990.

1.3 That arrangement continued until the 5th October, 2004 when, as a result of the expiry of the notice contained in a written notice of termination of the agreement served by IROC on Mr.Kenny on 7th July, 2004, the business relationship between the parties came to an end.It is not contested in these proceedings that the relationship between the parties was validly terminated by that notice.

**2. The Proceedings**

2.1 The plaintiff commenced these proceedings on 12th August, 2004.The proceedings were entered in the Commercial List pursuant to Order 63A of the Rules of the Superior Courts by Order dated 18th October, 2004.In his statement of claim Mr.Kenny asserts that the nature of the contractual arrangements between himself and IROC was such that he was a commercial agent of IROC for the purposes of Council Directive 86/563/EC and the relevant Irish implementing Regulations.On that basis he has claimed, under various heads, compensation which is applicable to such commercial agents in the event of the termination of the relevant agency.In its defence IROC has, *inter alia*, denied that Mr.Kenny is such a commercial agent.In those circumstances the parties agreed and the court has directed that the following preliminary issue be tried:-

"Was the plaintiff a commercial agent of the defendant pursuant to Council Directive 86/563/EC on the coordination of the laws of member states related to self employed commercial agents and the provisions of the European Communities (Commercial Agents) Regulations 1994 and 1997 from 1st January, 1994 to 5th October, 2004, or at anytime during that period".

**3. The Legislative Framework**

3.1 **Council Directive 86/563/EC** ("The Directive").For the purposes of these proceedings the following provisions of the directive appear to be relevant:-

"Article 1.2: for the purposes of this directive "commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called "the principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal.

Article 1.3: a commercial agent shall be understood within the meaning of this directive as not including in particular:- a person who, in his capacity as an officer is empowered to enter into commitments binding on a company or association,

- a partner who is lawfully authorised to enter into commitments binding on his partners,
- a receiver, a receiver and manager and liquidator or a trustee in bankruptcy

Article 2.2: each of the member states shall have the right to provide that the directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that member state.

3.2 The Directive goes on to make a variety of provisions which, while potentially relevant to determining the entitlements of persons established to be commercial agents, are not directly relevant to this preliminary issue.IROC places some reliance on Article 4(3) which provides that "A Principal must, in addition, inform the Commercial Agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the Commercial Agent has procured for his Principal."

3.3 Effect was given to the Directive in Ireland by the European Communities (Commercial Agents) Regulations 1994 ("the 1994 Regulations"). Article 2(1) of those regulations defines "commercial agent" in exactly the same terms as those specified in the Directive, including the exclusions referred to above, and certain other exclusions contained in the Directive concerning unpaid commercial agents and commercial agents operating on commodity exchanges or in the commodity market.

3.4 It should be noted that Ireland did not avail of the opportunity to exclude from the operation of the Directive commercial agents who might be considered secondary. As it is material to a consideration of certain United Kingdom authority cited it should, at this stage, be noted that a different view was taken in that jurisdiction so that the definition of commercial agent that operates within the United Kingdom is more restrictive than that which operates in Ireland.

3.5 The 1994 Regulations were amended by the European Communities (Commercial Agents) Regulations 1997 but not in any manner which affects this preliminary issue.

3.6 It is as against that legislative background that it is necessary to consider whether the plaintiff was a commercial agent as defined.

#### 4. The Case Law

4.1 The only decision of the courts in this jurisdiction which considered the meaning of the term commercial agent as defined is *Cooney & Company and Another v. Murphy Brewery Sales Limited* (Unreported, High Court, Costello P, 30th July, 1997). The matter that came before the court on that occasion was an application for an interlocutory injunction. The agreement between the parties in that case was described by Costello P. at p.2 as "an agency agreement by which (the contractor) entered into arrangements for the distribution of the products, namely draught beer and lager, the products of Heineken and of Murphy Stout". The relevant agreement came to an end in circumstances where Murphy Brewery indicated that it did not intend renewing same as of the date of expiry. In the proceedings one of the issues was as to the applicability of the Directive to the contract concerned in that, as is pointed out at p.4 of the judgment, if the Directive applied to the contract then the three months notice which was given would be appropriate notice in accordance with the terms of the directive.

4.2 In relation to that question Costello P. said:-

"Whether or not the EEC directive applies depends on whether or not the plaintiffs are to be regarded as commercial agents within the meaning of the directive. I have no doubt but that they are. It is perfectly clear that they are commercial agents, and the error of the argument to the contrary lies in the suggestion that the word "negotiation" means in some way to bargain or hassle so as to endeavour to reach some sort of arrangement between the agent and the proposed customer in relation to the purchase by the proposed customer of the products. In my view the term commercial agent is perfectly clear. It has been interpreted by the Competition Authority as referring to the parties to an agreement such as the one that I am considering today".

4.3 The reference to the views of the Competition Authority would appear to be a reference to the determination of the Competition Authority in relation to a proceeding under s.4 of the Competition Act 1991 on the application of Murphy Brewery Ireland Limited (notification number CA/428/92). As is clear from that determination of the Competition Authority both of the plaintiffs in *Cooney & Company* were (amongst others) parties to an agreement between Murphy Brewery and its distributors whereby each distributor (including those plaintiffs) was appointed exclusive sales agent of Murphy's draught Heineken lager and Murphy Stout within a specified territory. While the precise terms of the arrangements between the parties in *Cooney & Company* (which Costello P. found constituted the distributors as commercial agents within the meaning of the Directive) are not set out in great detail in the judgment, the decision of the Competition Authority specifies those arrangements more fully. A summary of the terms of the agreement is to be found at para.5 of the decision of the Competition Authority and indicates that the following were the principal provisions of the distribution agreement:-

"The agent was made exclusive sales agents of the products in the territory outlined in a map. All enquiries received by Murphy Brewery from the territory are to be referred to the agent, and the agent may be given rights in the territory for any new draught products. The agent will not seek customers or promote products outside the territory, nor stock the products in any branch or distribution warehouse outside the territory. The agent is required to accept all orders from customers within the territory for the products; to collect the produce from Murphy's Breweries premises at the agents expense; to collect cash payments from certain customers; to support the sale of the products in order to achieve any sales targets agreed; to keep proper books and records and allow their inspection; and not to accept orders from customers who Murphy Brewery has given notice are not to be supplied. Advertising and other expenditure must be authorised by Murphy Brewery, but the agents must spend a minimum sum each year on advertising and promotion. The agent is to be paid a fixed cash commission for each keg of the product sold. The commission is to be adjusted each year by reference to movements in transport costs calculated by reference to Consumer Price Commodity Group Indices. The agreement may not be assigned without consent. No brand or identification may be changed or defaced in any way. Title in the products is retained at all times by Murphy Brewery and the products at all times remain the property of Murphy Brewery. The agent is also authorised to accept orders and to deliver products to customers on foot of accepted orders. Murphy Brewery agrees to actively promote the products by placing at least one sales representative and one dispense service mechanic in the territory. Murphy Brewery agrees to honour all contracts for the sale of products and to deal with all after sales enquiries".

4.4 The decision of Costello P. in *Cooney & Company* related to an application for an interlocutory injunction which was refused, on the basis, *inter alia*, that the plaintiffs in that case had failed to establish a fair question to be tried. As part of its assessment of the plaintiffs' case it was found by the court that the arrangements were such as to render the plaintiffs as commercial agents so that the notice given was appropriate. However it should be noted that the court went on to indicate that even if it was wrong in respect of its view of the directive it would nonetheless have found that the notice given was sufficient for the purposes of common law. It would not be correct, therefore, to say that Costello P. necessarily concluded that there was not a fair issue to be tried in relation to the question of whether arrangements of the type indicated above constituted the contractor as a commercial agent within the meaning of the directive. That being said, the judgment is nonetheless in clear and unequivocal terms and I must necessarily treat it as being a determination of this Court to the effect that a contract of the type so described does constitute the contractor a commercial agent.

4.5 The term "commercial agent" within the meaning of the Directive has been the subject of some limited comment in the European Court of Justice. In *Bellone v. Yokohama Spa* (C215/187, 1988, ECR, section 1, 2191) in the course of his opinion Advocate General Cosmos stated (at p.1-2201):-

"According to Article 1(2) of the Directive all that it is required for a person to be considered to a commercial agent and thus able to benefit from the protection guaranteed by the Directive, is that the three necessary and sufficient (substantive) conditions laid down therein are met namely: that he is (a) a self employed intermediary; (b) that the contractual relationship is of a continuing character; and (c) that he exercises, on behalf of and in the name of the principal, an activity which may consist either simply in being an intermediary for the sale or purchase of goods or in both acting as intermediary and concluding sales or purchases of goods".

4.6 It is true to state that the issue in *Bellone* was as to the compatibility of certain articles of Italian law with the Directive. The relevant articles made the validity of all agency contracts conditional upon the agent concerned being entered in the appropriate register. For the reasons set out in the judgment of the Court of Justice it was determined that such a restriction, not being expressly authorised, would not be compatible with the Directive. It is, therefore, fair to state that the precise parameters of the arrangements which might lead to an agent being considered a commercial agent within the meaning of the Directive, and of which Advocate General Cosmos spoke, were not of central relevance to the case at hearing. It should also be noted that the court, in its judgment, simply repeated the definition of commercial agent as is found in the Directive and did not specifically adopt the formulation contained in the opinion of the Advocate General. Nonetheless, that being said, the opinion of the Advocate General is of some materiality. The fact that, in formulating the test, Advocate General Cosmos does not include the word "negotiate" does not, of course, mean that that term is not relevant to a consideration of the meaning of "commercial agent". However it is consistent with the view (and consistent with the judgment of Costello P. in *Cooney & Company*), that the use of the term "negotiate" does not extend the definition of commercial agent to the extent of requiring what might be termed active negotiation or bargain by bid and counter bid. Advocate General Cosmos would appear to have been of the view that an intermediary is necessarily involved in the negotiation of the sale or purchase concerned. It is, however, also necessary to have regard to the fact that an earlier draft of the directive used a formulation such that in order to qualify as a commercial agent, such agent, should "have a continuing authority for a fixed or indeterminate time to negotiate and/or to conclude an unlimited number of commercial transactions in the name and for account of another". It is clear, as was submitted on behalf of IROC, that this formulation (which was not ultimately adopted) would have regarded the conclusion of the transaction as being sufficient (without negotiation). In those circumstances it must be the case that the use of the term "negotiate" adds something to the overall requirement.

4.7 The United Kingdom Court of Appeal gave consideration to the meaning of the term "commercial agent" in the case of *Parks v. Esso Petroleum Company Limited* (2000) Eu LR 25. In that case the plaintiff occupied a service station owned by Esso pursuant to an agency agreement which would appear, in some respects, to be similar to that which Mr. Kenny had with the Irish arm of Esso. One significant difference was, however, that the agreement between the plaintiff and Esso in *Parks* related solely to the sale by the plaintiff of motor fuels. Mr. Parks, like Mr. Kenny, also operated a shop and a car wash but in the case of Mr. Parks, unlike Mr. Kenny, these were operated on his own account and not as agent for Esso.

4.8 In *Parks* a number of issues arose. However insofar as material to this case the key question was as to whether a person, such as Mr. Parks, carrying out the business of operating a petrol station in the circumstances of his case could be said to be a commercial agent. In that regard Morritt LJ had the following to say:-

"So I return to the one short point which arises on the appeal. Did Mr. Parks negotiate and conclude the sale of the petrol owned by Esso to those who attended his forecourt? I take the normal meaning of the word from the *Oxford English Dictionary* definition relied on by Mr. Parks. This definition does not require a process of bargaining in the sense of invitation to treat, offer, counter offer and finally acceptance, more colloquially known as a haggle. But equally it does require more than the self-service by the customer followed by payment in the shop of the price shown on the pump, which is how the system operates nowadays. In my view the motorist would be astonished to be told that when he inserted the nozzle of the pipe into the top of his petrol tank that he was "negotiating" with the site operator. In my view it is quite plain that there is no process of negotiation involved. To revert to the *Oxford English Dictionary* definition Mr. Parks relied on, Mr. Parks did not "deal with, manage or conduct" the sale of petrol to his customers, for he took no part in the customers choice and self-service. Insofar as the definition indicates the need for skill or consideration Mr. Parks provided none.

Further, the provisions of the Schedule, in particular those which distinguish between sales individually negotiated and those which depend on the customers self-selection, show beyond doubt that the regulations are not intended to apply to one in the position of Mr. Parks".

4.9 As is clear from the final paragraph of the passage quoted above the position in the United Kingdom is materially different from that in this jurisdiction. The reference to the "provisions of the Schedule" is to a schedule to the United Kingdom Regulations which prescribes the activities which are, for the purposes of United Kingdom law, regarded as secondary so that the application of the relevant United Kingdom regulations are excluded in such a case. Of particular relevance in *Parks* was an exclusion (on the basis of being secondary) in the following terms:-

"The activities of a person as a commercial agent are to be considered secondary where it may be reasonably be taken that the primary purpose of the arrangement with its principal is other than as set out at paragraph 2".

Paragraph 2 then provides as follows:-

"An arrangement falls within this paragraph if:-

- (a) the business of the principal is the sale, or as the case maybe purchase, of goods of particular kind; and
- (b) the goods concerned are such that:-
  - (i) transactions are normally individually negotiated and concluded on a commercial basis".

Paragraph 3 of the schedule then sets out various indications which ought to be taken into account in considering whether the agreement falls within para.2. And includes, at sub-para.(c), the following:-

"Customers normally select the goods for themselves and merely place their orders through the agent".

4.10 It is therefore clear that, as a matter of United Kingdom law, irrespective of the true definition of commercial agent simpliciter, the relevant regulations do not apply to cases where the customer selects the goods and merely places an order through the agent, because such cases are regarded as secondary and are thus excluded from the regulations. It will be recalled that under Article 2.2 of the Directive member states have the right to disapply the provisions of the Directive to persons who are commercial agents but

whose activities are considered secondary by the law of the member state concerned. Thus the provisions of the United Kingdom schedule are in accordance with Article 2.2. However there is no corresponding exclusion in Irish law. Notwithstanding that distinction counsel for IROC understandably place emphasis upon the fact that the Court of Appeal in *Parks* would appear to have come to the view that the nature of the relationship between Mr. Parks and Esso in that case was not such as brought Mr. Parks within the definition of commercial agent in the first place and were merely fortified in that view by the provisions of the schedule. It is undoubtedly correct to state that, in its terms, the judgment makes clear that the view of the Court of Appeal was to that effect.

4.11 On a different aspect of the law relevant to this case counsel for IROC has drawn attention to both *Julian Smith v. Reliance Water Controls Limited* (2003) EWCA CIB 1153 and *Mercantile International Group plc v. Chuan Soon Huat Industrial Group Limited* (a decision of the Court of Appeal (Civil Division) of the 8th March, 2002). Both cases involved a consideration of whether persons might properly be described as commercial agents. They are authority for the proposition that in the absence of a written agreement being a sham, that agreement is and remains a most important means of ascertaining the relationship between the parties. However for reasons which I will address later in this judgment (and in particular at paragraphs 8 and 15) the written terms of agreement will not always necessarily be the sole means of determining the contractual arrangements between the parties, particularly in relation to a long lasting and evolving business relationship.

## **5. Analysis of the Authorities**

5.1 Given that the authorities appear, on one view, to point in somewhat different directions it is necessary to look in more detail at the manner in which the respective conclusions were reached.

It will be recalled that in order to qualify as a commercial agent the person concerned must meet three tests. The first two, that is to say that the agent be self employed and have a continuing authority on behalf of the principal are uncontroversial on the facts of this case or indeed in any of the other cases referred to. The contentious issue here concerns the meaning of the phrase "negotiate the sale or the purchase" and the phrase "negotiate and conclude such transactions". Given that the word "negotiate" appears in both definitions it is upon the true meaning of that term that the real issue depends. There can be no doubt but that an agent of the type of Mr. Kenny in this case and, indeed, Mr. Parks in his case, concludes the sale of goods (and in the case of Mr. Kenny concludes the purchase of goods) on behalf of his principal. The real question is as to what more needs to be done beyond the mere conclusion of a sale or purchase for it to be said that the agent concerned has "negotiated the sale or purchase".

5.2 There appears to be common ground between the decision of Costello P. in *Cooney & Company* and that of the Court of Appeal in *Parks* to the effect that active bargaining is not required to qualify as negotiation. While the word appears in the judgment of Costello P. in *Cooney & Company* as "hassle" I suspect that that is a typographical error for the word "haggle" which also was used by the Court of Appeal in *Parks* (decided some two years later).

5.3 Both in this case and in *Parks* reliance was placed upon the Oxford English Dictionary definition of negotiate. I would infer that there may be some minor differences between the text relied upon in *Parks* and that handed into court in this case. However in substance it would appear, as common knowledge would dictate, that there are two similar but separate meanings to the word. The first does involve a form of bargaining as appears from the definition set out at item 1(a) in the current edition in the following terms:-

"To discuss a matter with a view to some compromise or settlement".

5.4 However the second meaning, as noted by the Court of Appeal in *Parks*, is to the following effect:-

"To deal with, manage, or conduct (a matter affair etc requiring some skill or consideration).

5.5 As was pointed out by the Court of Appeal in *Parks* that definition does not require a process of bargaining in the sense of invitation to treat, offer, counter offer and finally acceptance. The court also points out that it does require more than "the self service by the customer followed by payment in the shop of the price shown on the pump". In coming to that view the court expressed the view that a motorist would be "astonished to be told when he inserted the nozzle of the pipe into the top of his petrol tank that he was "negotiating" with the site operator". In that view the Court of Appeal was, doubtless, correct. However it would be equally the case that the same motorist would doubtless, be astonished to be told that by the same action he was engaging in a process where there was an invitation to treat (presumably by the presence of the petrol station with prices displayed and pumps available for self service), an offer (presumably by the motorist when he places the nozzle into the top of his petrol tank and pours) and an acceptance (presumably by the fact that the station is set up so that petrol is actually delivered). It seems to me that the proper approach is to consider, as the dictionary definition relied upon by the Court of Appeal specifies, whether the person who may be said to be negotiating (in this case the operator) has to "deal with, manage or conduct" the sale or purchase concerned and in so doing to use some skill or consideration. Therefore a purely automatic process to which the person concerned brings no material expertise is not, properly, regarded as negotiation. It is also clear that the skill or consideration must be, in some manner, brought to bear on the sale or purchase.

5.6 It should be recalled that in *Parks* the plaintiff was only involved in the sale of motor fuel products on behalf of his principal. As pointed out above there can be no doubt but that the Court of Appeal placed at least some reliance on the fact that the regulations in the United Kingdom made clear that cases where goods were selected by customers who merely ordered through the agent, gave rise to the activity of the agent concerned being regarded as secondary and thus permissibly excluded from the operation of the directive as implemented into United Kingdom law.

5.7 The business of the purchase and sale of goods is conducted in very many different ways. In some types of business it would be commonplace for there to be significant bargaining prior to any sale being concluded. In other cases the price will be relatively fixed and the manner in which persons may secure additional sales will be by virtue of other aspects of the way in which the goods are presented to the public (such as through marketing and promotion) or by the attractiveness of the presentation of the product and the like. It does not seem to me that the precise way in which a particular type of good is typically sold should necessarily be a significant factor in determining whether a person engaged in the sale of that good on behalf of a principal is to be regarded as a commercial agent. The true test is as to whether, having regard to the manner in which the sale of the good or goods concerned is carried out (or where relevant the purchase of such goods) it is necessary for the agent to bring a material level of skill to the activity (i.e. dealing with, managing or conducting the sale or purchase concerned).

5.8 The skill that may be brought to the activity may vary depending on the way in which the good concerned is typically sold. In some cases it may well, indeed, involve a skill in bargaining. In other cases it may be a skill in marketing and promotion. In yet other cases it may well be a skill in the presentation of the product in such a way as makes it attractive to members of the public so that they will purchase more of it. In substance I cannot see any material difference between an agent who uses his skill and judgment to individually promote a product to an identified individual potential purchasers on the one hand and an agent who having regard to the

nature of the product of the principal which he is involved in seeking to sell uses more general methods (but applying equal skill) to making the products attractive to the public generally and thus increase sales.

5.9 I have come to the view that there may well be a difference in the approach taken by Costello P. in *Cooney & Company* from that taken by the Court of Appeal in *Parks*. I have taken into account the fact, in particular, that the nature of the contractual arrangements under consideration by Costello P. were such that the activities of the drink distributors concerned could be characterised, on the basis of the contract as described in the Competition Authority decision, as being largely automatic. While the business of the drink distributors did involve bringing product to customers (i.e. public houses) (rather than the customers coming to them) they did so in respect of a narrowly defined range of products at prices fixed by the principal and in circumstances where there would appear to have been an express agreement that the principal was to be primarily responsible for promotion (by the employment of a sales representative) and back-up. In those circumstances it is difficult to see that the role of the distributors in *Cooney & Company* in relation to the sale of the products concerned was, in practice, any greater than that of Mr. Parks.

## **6. Conclusions on Law**

6.1 While taking into account the fact that the judgment of Costello P. in *Cooney and Company* was at an interlocutory stage and thus, notwithstanding its clear wording, does not necessarily amount to a final determination, I am satisfied that to the extent that there may be differences in the approach taken by Costello P. in *Cooney & Company* with that taken by the Court of Appeal in *Parks* I should follow the reasoning in *Cooney & Company*. If, therefore, the decision of the Court of Appeal in *Parks* is to be taken as implying that it is not possible for a person to be a commercial agent while that person exercises skill in attracting customers but where the ultimate transaction is by self service and payment, I do not regard the judgment as persuasive and I would not propose to follow it.

6.2 In all the circumstances it seems to me that the test which I should apply is to ascertain whether it may be said that Mr. Kenny brought a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of products on behalf of IROC. It is, of course, the case that the question of purchase did not arise in *Parks* because Mr. Parks would have obtained all of his motor fuels (which were the only products which he sold on behalf of Esso) directly from his principal and thus did not purchase on behalf of the principal any products.

## **7. The Competition Authority Determination**

7.1 The plaintiffs place reliance on decision No. CA/101/92E of the Competition Authority (19th May, 1994) which related to a proceeding under s.4 of the Competition Act, 1991 involving the notification under that section of an Esso contractor agreement.

7.2 It is, of course, the case that the Competition Authority has no direct function in determining whether an agency agreement renders the agent a "commercial agent" for the purposes of the directive or the Irish 1994 Regulations. However it is clear from both the decision of the authority and the correspondence which passed between the authority and IROC's then solicitors during the course of the deliberations of the authority in relation to the notification concerned, that the authority was satisfied that the standard form Esso contractor agreement (which would appear to be in all material respects identical to Mr. Kenny's agreement) did constitute persons in Mr. Kenny's position as commercial agents. It is also clear that, for their own reasons, IROC, through their then solicitors, submitted to the Competition Authority that IROC's contractors were such commercial agents.

7.3 It does not, however, appear to me that this creates any form of estoppel. The nature of the commercial arrangements between Mr. Kenny and IROC either render Mr. Kenny a commercial agent or they do not. It might be that, in certain circumstances, and as a result of direct discussions between the principal and agent concerned, as a result of which the agent had altered his position, that the principal might be estopped from denying that the agent qualified as a commercial agent for the purposes of the regulations. However the fact that a principal took up a particular position in respect of a regulatory agency dealing with a different regulatory regime could not, in my view, create any such estoppel.

7.4 However, in the overall consideration of the case, it does need to be noted that it would appear that, at one stage at least, and having taken advice and having, in particular, considered the various matters set out in the notes to the Competition Authority determination, Esso and IROC were of the view that arrangements with contractors such as Mr. Kenny rendered those contractors to be commercial agents within the meaning of the regulations. That does not, however, mean that they cannot now argue that the view then taken was wrong.

Having identified the appropriate legal test to be applied it is necessary to consider both the agreed and disputed facts.

## **8. The Relevant Facts**

8.1 As can be seen from all of the above authorities an analysis of whether a person may be said to be a commercial agent requires a consideration of the nature of the obligations which the relevant contract requires that person to carry out on behalf of the principal. While it is true to state that significant regard has to be had to the terms of the written contract between the parties (in the absence of that agreement being a sham) nonetheless the way in which parties actually implement their arrangements must also be given significant weight. This is particularly so in cases where the relationship lasts over a number of years and where, in practice, the way in which the parties do business may be said to evolve. That is not to say that the mere fact that, on occasion, business may not have been conducted in strict conformity with the contractual terms expressly set out in the agreement between the parties can lead to a conclusion that the true relationship between the parties could be said, in any meaningful sense, to have been varied by the conduct of the parties. Where, however, there has been a significant evolution in the way in which parties conduct business and where, on the facts, that evolution has become a significant and permanent feature of the relationship between the parties then, it seems to me, it is appropriate to have regard also to that feature of the business in assessing the true characterisation of the relationship between the parties.

8.2 The evidence in this case was directed towards establishing the manner in which the business relationship between the parties was actually conducted. While there was what might euphemistically be described as a difference of emphasis in the evidence on both sides there was little direct conflict in respect of primary facts. Indeed while the parties had submitted 9 and 14 witness statements respectively the only witnesses who actually gave evidence at the hearing were Mr. Kenny and Mr. Hugh Madden the General Manager of IROC. In addition the witness statements of Barry O'Flynn tendered on behalf of the plaintiff and Mary McBride, Donal O'Shea, Michael Stafford, Paul Kerrigan, Aoife Gibbons, Edward Brennan, Lynn Doherty, Martin McDonald, Derek Mooney, David Reynolds, Alan Garriock, Julian Drury-Byrne and Seamus McCormack were also admitted. Further witnesses were not called on the basis that their evidence would only have been necessary in the event of certain disputes arising in respect of matters which might be put on cross examination, which disputes did not, in fact, arise. Finally it was agreed between the parties that I should have regard, without the necessity of formal proof, to two expert reports which analysed the sales at the Martello Service Station under a variety of headings. It was agreed that the mathematical calculations contained in both reports, were correct and that, therefore, the inferences to be drawn from the reports insofar as material to determining this preliminary issue, were a matter for argument.

8.3 It will therefore be seen that the only real factual dispute between the parties concerns the manner in which the business was actually conducted and, even in relation to that area, was as much a matter of interpretation as one of actual conflict.

## **9. The Overall Business**

9.1 Furthermore the broad general outline of how the business was conducted was not, unsurprisingly, a matter which was the subject of any dispute. As pointed out earlier, at the time Mr. Kenny took over the Martello Service Station, it has just undergone a very significant redevelopment. Prior to that redevelopment the site had consisted of a two bay service operation with what was described as a "small 20 sq. metre retail space involved in the sale primarily of motor related goods". As a result of the redevelopment (which cost IR£0.3 million) and which was to the latest design, the retail space was expanded to 62 sq. metres and, there is no doubt, the shop turnover increased dramatically.

9.2 A chart included as part of Mr. McHugh's witness statement shows that the shop turnover was of the order of €100,000 in current currency in the period immediately prior to the redevelopment rising immediately to a figure of approximately €500,000 on the redevelopment and growing steadily to a current figure in excess of €1.5 million. This would appear to have been consistent with a general trend both within Esso and the industry generally. In a further chart included in Mr. McHugh's witness statement it can be seen that between 1986 and 2003 the overall shop turnover in the sites operated by IROC increased from €6 million to €59 million. It would hardly have needed evidence to establish that there has been a significant alteration in the way in which retail shops associated with petrol filling stations have conducted their business over the last 15 or 20 years. It is clear that there has been a significant increase in the range of activities which were carried on. It is therefore clear that over the period of the plaintiff's management of the Martello Service Station the importance of the shop to the overall business increased to a very significant extent.

9.3 It would also appear that there was a significant interaction between the operation of the shop and the motor fuels business being carried on at the service station. The fact that there was an attractive and well run shop carrying lines of products which motorists might wish to purchase was, amongst other things, an inducement to motorists to use the service station concerned as the place at which they would buy their motor fuels. Equally the fact that motorists might stop principally for the purposes of obtaining motor fuels gave a ready opportunity to induce the motorist concerned to make additional purchases at the shop. The fact that there was such a significant growth in the presence of attractive shops offering an increasing variety of products at service stations operated not only by IROC but also by their competitors leads to the conclusion that, while the sale of motor fuels was and remained the core and principal area of business of Mr. Kenny's (and most other) service stations, the business, in particular over the relevant period, evolved into one where the shop became an increasingly important part of the overall business and where there was a significant degree of interaction between the shop and motor fuel business being carried on at the service station. While the shop was, in itself, a business which was capable of, and did in fact, generate significant profits which ultimately benefited both Mr. Kenny and IROC, its presence and the fact that it was attractive and well run had the capacity, and did in fact, assist in the overall success of the overall business, including the sale of motor fuels.

9.4 It should also be noted that the agreement between the parties required Mr. Kenny to carry on IROC's business at Martello Service Station in a business like manner and in accordance with criteria which might be laid down by IROC from time to time. It was also the responsibility of Mr. Kenny to employ appropriate staff so as to ensure a service of the highest standard. Mr. Kenny's remuneration included a sum which was additional to both the commission and operating expenses to which I will refer later. This sum was paid on a periodic basis, based upon an assessment as to the extent to which Mr. Kenny, in fact, achieved a high standard in the presentation and operation of the service station. It would appear that this arrangement was an acknowledgement of the fact that if the operation of the business being conducted by Mr. Kenny on IROC's behalf at the Martello Service Station to was a high standard this had a significant potential to attract customers and thus increase sales both of motor fuels and, increasingly, in the shop.

## **10. The Basic Contractual Arrangements**

10.1 The starting point for any description of the arrangements between the parties must be the fact that the products which were sold at the Martello Service Station were products of IROC. So far as motor fuel and certain related products were concerned they were, of course, Esso products which were procured by IROC from within the Esso group of companies. Insofar as shop products were, in the main, acquired from third parties same were bought in the name of IROC and were paid for by IROC. Similarly the entire proceeds of sale, whether of motor fuels or other products, were lodged, in accordance with the arrangements between the parties, to a bank account in the name of IROC. Therefore the entire cost of providing all of the goods sold at Martello Service Station was met by IROC. Equally the entire proceeds of sale of those goods was received by IROC. Therefore the gross profit attributable to those goods went directly to IROC.

10.2 Mr. Kenny obtained a commission which, for most practical purposes, amounted, in relation to motor fuel, to a fixed sum based on volume, and in respect of other products, to a percentage of the gross profit which, in most cases for practical purposes, amounted to 20%. Mr. Kenny, as operator, was also required to bear most of the costs associated with running the station (with the exclusion of items such as rates which were the liability of IROC as the legal occupier). He was provided with a budget for such expenses which included provision for the payment of all staff at the station. Such staff were employed by Mr. Kenny rather than IROC. To the extent that the actual expenses incurred might be less than that budget Mr. Kenny was entitled to retain the surplus. Equally if the expenses incurred exceeded the budget Mr. Kenny had to meet the shortfall. The agreement, and supplementary instructions issued in accordance with it, made provision for the minimum standards of service to be applied at the service station.

10.3 Therefore it would appear that the following principal factors would impact on the financial rewards to be obtained by both parties from the venture.

(a) the greater level of sales the greater would be the profits made by IROC and also the greater would be the commission earned by Mr. Kenny either on the basis of a fixed amount in respect of motor fuels or a percentage of the gross margin in respect of the majority of other products

(b) in relation to products other than motor fuels both parties would in addition have the capability of making additional profits not just on the volume of sales of those products but also on the basis of the mark up by which the sale price would exceed the purchase price. In general terms that mark up would be split as to 80% to IROC and 20% to Mr. Kenny by means of the commission arrangement referred to above. It should be noted that the principal area of factual contention between the parties concerns the extent to which Mr. Kenny was, in practice, free to influence both the choice of product (including the supplier from which such product would be sourced) and the retail prices to be charged.

(c) In the case of Mr. Kenny additional profits could be earned (or indeed losses incurred) by the efficient running of the service station (or the lack of it) leading to the running costs being over, at, or under budget.

## 11. Motor Fuels

11.1 So far as motor fuel is concerned all products were, of course, Esso products with the retail price being, in effect, fixed by IROC. While the evidence showed that there were occasions where a local variation in the price being charged might be agreed (either as a promotion or to meet a competing promotion) and while it may be that Mr. Kenny exercised some limited degree of control over the timing of such changes the reality is that for all practical intents and purposes the price at which motor fuels were sold to customers was fixed by IROC. Therefore insofar as such fuels are concerned the influence which Mr. Kenny could bring to bear on the level of sales (and thus his and IROC's profits) stemmed from his ability to promote the general attractive and efficient operation of the service station so as to attract more customers thus increasing sales to the principal benefit of IROC (who would make the profit on such sales) and to his own benefit in that his commission was based on a fixed sum per unit volume.

## 12. Shop Products

12.1 In the case of shop products there is some controversy between the parties as to the extent to which it was, in practice, a function of Mr. Kenny to decide on the suppliers of such products. That is an issue to which I will return. Furthermore there is some controversy as to the extent to which Mr. Kenny had, in practice, control over the prices paid and prices charged for those products. Obviously the overall success of the shop generally would be likely to lead to greater sales in any event and thus influence both the profits of IROC and the commission earnings of Mr. Kenny. Clearly decisions as to the purchase of appropriate products to enhance the attractiveness of the shop and decisions as to the pricing of those products had a significant potential to increase the overall profitability of the shop for both parties. The extent to which the plaintiff could influence either or both of these matters is an issue to which I will also have to return.

12.2 However it is common case that the plaintiff exercised at least some not insignificant degree of autonomy in relation to the manner in which the shop was run.

The following facts do not appear to have been disputed:-

(a) subject to an overriding entitlement on the part of IROC to ensure that stocks were not kept at an excessively high level Mr. Kenny had, on a day to day basis, a large degree of autonomy as to the volume of products which would be purchased for re-sale.

(b) the extent to which Mr. Kenny had a level of autonomy in relation to selecting the types of products to be purchased and the supplier of such products (including negotiating the price of or other terms relating to such products) varied depending on the product concerned. At one end of the spectrum were products such as lottery tickets which have a fixed price and only one supplier and in respect of which little or no autonomy existed. Similarly there would seem to have been some products, at a minimum, which were specified by IROC on foot of arrangements entered into between IROC and the supplier and where the price to be paid to that supplier and other contractual terms of supply were centrally negotiated. Equally it is common case that there were some products (at a minimum) (the example of flowers being given) where Mr. Kenny had a large degree of control both as to source and price. The real dispute between the parties centres on the extent to which it can properly be said that the products in respect of which the plaintiff exercised autonomy, either in relation to the supplier or the price and terms at which the product was supplied, was significant.

(c) It is not contested that some degree of control over the retail prices actually charged was exercised by IROC. In particular, at certain times, the cash registers used were centrally controlled so that the price that would be charged by reference to the bar code on the product concerned would be centrally determined. The extent to which this system actually operated in relation to the Martello Service Station and the extent to which, when it was not operating, the prices actually charged were in fact determined by Mr. Kenny is a matter of some controversy.

## 13. The Disputed Areas

13.1 It is, therefore, the case that the following areas of dispute on the facts arise:-

(a) the extent to which Mr. Kenny had control over the products purchased for re-sale in the shop;

(b) the extent to which Mr. Kenny had control over the prices paid for such products or the other terms upon which they were supplied; and

(c) the extent to which Mr. Kenny had control over the retail prices charged to customers.

13.2 Under each heading the question really is one of degree with it being accepted that in no case had Mr. Kenny complete control but equally it being accepted that in all cases Mr. Kenny exercised (at least in some limited circumstances) a degree of control. Before passing on to an analysis of those contested facts I should deal with two matters.

## 14. The Approach

14.1 Firstly counsel for both sides submitted that the appropriate approach to the assessment of the true nature of arrangements between the parties was to look at those arrangements "in the round". I accept that this is the appropriate approach.

14.2 Secondly, for the reasons indicated above, (see para 4.11) the starting point should be the express contractual terms agreed between the parties and I refer, therefore, in detail to those terms.

## 15. The Express Contractual Terms

15.1 The agreement, which is dated 1st March, 1990 provides, *inter alia*, the following:-

"Para.1. (IROC) hereby appoints (Mr. Kenny) effective from 1st day of March, 1990 to carry on the business on its behalf at Martello Service Station to the standards and criteria laid down by (IROC) from time to time and in a business like manner. During the period of this agreement (Mr. Kenny) shall be remunerated on a commission basis as set out in the Fourth and Fifth Schedules. (Mr. Kenny) must at all times ensure the proper operation of the business of the service station and, in this regard, his duties may be delegated by him to other persons and for such time as (IROC) shall first approve. (Mr. Kenny) may not carry on any business on or from the premises other than as contractor for (IROC) in accordance with this Agreement".

Para.2: (Mr. Kenny) shall maintain a business bank account in his name through which he will transact all business

expenditure arising under this agreement.

(Mr.Kenny) shall ensure that his business account be maintained in credit at all times and when required allow (IROC) directly verify the position from his books and records”.

“Para.6: (Mr.Kenny) shall employ persons of such quality as to ensure a service of the highest standard.Such persons being employees of (Mr.Kenny) are subject to (Mr.Kenny’s) control and direction and (Mr.Kenny) shall be fully responsible for their acts or omission and for any losses or damages resulting therefrom”.

15.2 The first schedule point (ii) provides that Mr.Kenny “shall sell those grades of motor fuels, and other products specified at prices notified by (IROC) to (Mr.Kenny) from time to time”.Where selling prices were not notified by (IROC) to (Mr.Kenny), he was to sell products only at the supplier’s recommended retail prices.

The first schedule point (iii) goes on to provide that no other product (petroleum or otherwise) or services whatsoever other than those supplied or approved by IROC “shall be stored, handled, sold or distributed on or from the service station without the previous written consent of (IROC)”.Point (iv) defines a named supplier as “a supplier named and authorised by IROC for the supply of goods to the service station”.

15.3 The agreement also provides in the fourth schedule for the details of the calculation of commission.There are a number of further refinements contained in that schedule over and above the general description to which I have already referred.

(i) there is a specific and separate commission paid in relation to car wash turnover.

(ii) the commission on gross profits was at 30% up to a turnover of IR£20,000 per annum and only thereafter operates at 20%.

(iii) that commission was subject to the shop achieving a level of gross profit in respect of each product range described as the standard gross profit.Note (iii) specifies differing levels of standard gross profit for each type of product.Therefore if the shop failed to achieve at least the standard gross profit attributable to the product concerned then no commission is paid in respect of that product.It is, of course, the case that the standard gross profit was partly influenced by the mark-up on the product concerned but was also influenced by the fact that certain products might be purchased but not sold due to pilferage, wastage and the like.Therefore if there was an excessive level of such wastage the standard gross profit would not be achieved and no commission would be payable.

15.4 Clause 3 required Mr.Kenny to lodge the gross receipts to IROC’s bank account less any authorised cash payments.Sub clause (b) went on to provide that Mr.Kenny was responsible for all expenses incurred in the operation of the service station except those related to IROC’s ownership of the site, while clause (3)(c) placed upon IROC a duty to discharge Mr.Kenny’s agreed operating costs.

15.5 It seems, therefore, that by its terms the agreement permitted Mr.Kenny to determine the amount of product likely to be required for the shop, and to purchase same, but did not permit Mr.Kenny to acquire product unless it was approved by IROC and unless it was acquired from a supplier named and authorised by IROC.It was also specified in the agreement Mr.Kenny was to sell all products “at prices notified by (IROC) to (Mr.Kenny)”.

15.6 It is in the context of those express contractual terms that the areas of disputed fact are relevant.To the extent that it may have been the case that Mr.Kenny purchased products which were not the subject of specific authorisation or from suppliers which were not the subject of specific authorisation or sold product at prices which were not the subject of specific authorisation same would not appear to have been in accordance with the strict terms of the written agreement.However it is necessary to consider whether any such activities as occurred did so in circumstances which, having regard to the frequency thereof and the knowledge of same on the part of senior officials within IROC, may give rise to the inference that the agreement was, by necessary implication, varied to permit a degree of flexibility on the part of Mr.Kenny in relation to those matters.I would now propose dealing with each contention in turn.

## **16. Conclusions on Disputed Areas of Fact**

### **16.1 purchases**

Mr.Kenny’s evidence is that he exercised a significant degree of autonomy in relation to the selection of suppliers of certain products.His evidence, which was not contested, was that he was not, on commencing operations, given any express instructions, guidelines or advice in relation to the purchase of what he describes as dry stock (he defines dry stock as referring to all product save for fuel, cigarettes, newspapers, call cards, bottled gas and lotto and scratch cards).The term dry stock is not a term which has any formal role to play in the contractual arrangements between the parties.It is simply a term of convenience cited by Mr.Kenny.

It is in respect of dry stock that Mr.Kenny claims he exercised significant autonomy.It should, of course, be noted that prior to operating the Martello Service Station Mr.Kenny carried on a very similar role in practical terms, as an employee of and contractor to IROC in the other service stations which were assigned to him.Therefore he was already well used to purchasing on behalf of IROC as such employee and contractor.He was also well familiar with the larger suppliers with whom IROC was already doing business.Mr.Kenny also gave evidence, which I accept, that a variety of suppliers approached him on noticing that a new and significantly upgraded shop was in operation at the Martello Service Station for the purposes of promoting the possibility of their products being sold in that station.On the other hand I have the agreed evidence from a number of major suppliers which makes it clear that, so far as they were concerned, the terms and conditions upon which they supplied to any of the shops operated by IROC were negotiated centrally.Having regard to the totality of the evidence it seems to me that I must conclude that, so far as major suppliers were concerned, Mr.Kenny would have played a very limited role in determining the terms and conditions upon which the products concerned would be supplied (though he would have exercised a significant role in choosing which products and what amounts thereof would in fact be bought to meet the anticipated demand at the service station).He would also have played a more significant role in the initial introduction of some of those larger suppliers.

16.2 In respect of products likely to emanate from smaller suppliers and in relation to possible new lines of product I accept Mr.Kenny’s evidence that it was, in practice, and to the knowledge of IROC, left, to a significant extent, up to him to make the relevant choices, though he would, obviously, have to receive approval from IROC who would, after all, be paying the bills.I also accept Mr.Kenny’s evidence to the effect that in respect of certain suppliers who subsequently became suppliers to the entire IROC chain, he had been involved in initial discussions for the supply to his service station.As a result of satisfactorily supplying one service station I am satisfied that, at least in some cases, those suppliers became introduced to the group as a whole and achieved the



status of suppliers to the group. This is hardly surprising given that the supply of goods to motor fuel station garages was an evolving business for much of the relevant period. It would appear that in the early stages the shops were changing from a situation where only products associated with the motor business were sold to one where a much greater variety of products were being placed on the shelf. While it would be important for IROC to ensure that they had a significant degree of control over the products to be bought (and terms and conditions for such purchase) because the goods would be sold under the Esso logo, it would equally be important for IROC to pay heed to the views of a person whom, it would appear, was a successful station manager in an evolving business. This would be so, particularly, as to the types of products which would be suitable for sale in the shop. I also accept that in respect of a relatively small amount of product lines Mr. Kenny would have had almost complete autonomy.

16.3 It is also necessary to have regard to certain figures put to Mr. Kenny on behalf of IROC in the course of his evidence and accepted by him. The figures involved an analysis of the sales and purchases of all products in the service station (including motor fuels) for each year from 1995 to the termination of the arrangements between the parties in 2004. The figures relate, in particular, to suppliers who are identified by Mr. Kenny in the pleadings, in his witness statement, and in evidence, as having been procured by him. Sales attributable to the products provided by such suppliers were identified. The figures suggest that those sales represented a figure growing from 6.5% in 1996 to almost 11% in 2003, was attributable to the products concerned. A number of comments need to be made in relation to those figures. It should be noted that IROC did not accept that all of the suppliers identified by Mr. Kenny as having been procured by him were in fact so procured. On the evidence I am satisfied that there is some substance in the position of IROC on this question. However I am also satisfied that in many cases the procurement of suppliers can not be uniquely attributed to either Mr. Kenny or IROC. It should be remembered that the Martello Service Station was, for much of the relevant period, a flagship station in an evolving business. In that context it seems to me reasonable to accept Mr. Kenny's view that in many cases suppliers may have had initial contact with him through local sales representatives but to have subsequently entered into long term contracts with IROC such that the terms and conditions of such long term arrangements would have been negotiated centrally. The mere fact, therefore, that the commercial arrangements which ultimately governed the supplier and IROC were negotiated centrally does not necessarily mean (and I am satisfied does not in fact mean in some cases) that Mr. Kenny did not have an appropriate and significant role in the identification and procurement of the supplier concerned.

16.4 Secondly it is clear from the above figures that the percentage attributable to the relevant suppliers increased significantly over the period. This reflected the growing importance of the shop as part of the overall business. It should also be noted that the figures relate to the percentage of total sales (including motor fuels) at the service station. The figure of just under 11% for 2003 increases to a figure in excess of 25% for that year if the sales concerned are viewed as a percentage of total shop sales (excluding motor fuels).

16.5 It should finally be noted that the figures produced to and accepted by Mr. Kenny also include corresponding figures for the percentage of purchases (as opposed to sales) calculated on the same basis. Those percentage figures are lower increasing from just over 5% in 1996 to 8.7% in 2003. The inference to be drawn from the fact that the purchase figures represent a lower percentage than the sale figures is that the profit on the products supplied by those identified by Mr. Kenny was significantly greater than the profit on the products (including, of course, motor fuels) supplied by others (including Esso itself). In those circumstances it is appropriate to infer that the proportion of the profits attributable to sales from those suppliers was significantly higher than the percentage of sales so attributable because the higher level of profit on those products would give them a significantly higher weighting in the calculation of the overall profits. For all of the above reasons it seems to me that the profits attributable to the resale of products which were purchased from suppliers procured (at least in part) by Mr. Kenny were a significant part of the overall profits of the station. In using the term "supplier procured" in respect of a supplier, I refer to those suppliers in respect of whom I am satisfied Mr. Kenny played at least a material role in their procurement.

#### 16.6 Retail Sale prices

Much of the accepted expert evidence was concerned with attempting to identify the extent to which, in practice, the prices being charged at the Martello Service Station were in fact the prices fixed by IROC. This exercise was done by reference to periodic stocktakes. For the purposes of valuing a stocktake those who were engaged to conduct the exercise were given Esso's "official" valuation for each item. A comparison has now been made with the actual till roll (or its equivalent) for the same day upon which the stock take occurred for the purposes of establishing the price at which the products sold on that day were actually retailed. The result of that exercise gave data for six separate dates between 3rd July, 1998 and 14th April, 2004. There was one date in each year other than 2001 for which no suitable data was available.

16.7 It would be fair to divide the period into two sub periods, one up to 2001 and one since 2001. In the former period the figures suggest that in respect of almost all articles the price for which they were actually sold corresponded with the price on the official Esso list. In the latter period it would appear that the correspondence was of the order of 50% in relation to the number of articles and 90% in respect of their value. This latter apparent dichotomy can be explained by the fact that it would appear that there was a correspondence of price in respect of articles which achieved relatively high sales and a relative lack of correspondence in price in relation to articles which had lower value sales. Again this latter is not, perhaps, surprising having regard to the fact that a relatively high proportion of the total sales in the shop would appear to relate to products which have a fixed or relatively fixed price. In this regard the figures in the 2003 trading accounts are illustrative.

16.8 The total sales figure, as revealed in the appropriate accounts, was €4,246,605. Of this the total shop sales (which exclude fuels of €2,417,675 and wash and vacuum sales of €93,235) amount to €1,735,696. Of this close to half of the sales (or €880,239) came from cigarettes, lottery, news and magazines, motor oil, bottled gas and call cards. Thus a relatively high proportion of the sales in the shop can be seen to have come from product lines in respect of which there was, in reality, little or no control on the retail price, whether by Mr. Kenny or IROC.

16.9 It would, therefore, seem that a similar picture emerges in relation to retail sales price policy as applied in respect of purchasing policy. In relation to major lines of standard products Mr. Kenny exercised little or no control (though in some cases it is unlikely that IROC exercised much control either). In respect of certain types of product, particularly those not supplied by major suppliers, he exercised a much greater degree of control over the price for which the product was actually sold.

16.10 The high level of correspondence between the "official" prices and those at which products actually sold in the 1998-2000 period stems, I am satisfied, from the fact that during that period the centrally controlled cash register was in operation. On that basis I am satisfied that such central control lasted for somewhat longer than Mr. Kenny suggested. I am also, however, satisfied that it is probable that the period up to 1998 predated that central control and was, therefore, more similar to the period after 2001. I also accept Mr. Kenny's evidence that, in his case, the central control was "turned off" because of difficulty encountered as to differences between the price marked up in the shop and the centrally contracted price appearing on the cash register.

## **17. Conclusions on facts**

17.1 Taking the arrangements between the parties in the round I am satisfied that there was, to the knowledge of IROC, a significant and relatively permanent practice which amounted to a variation in the strict terms of the written agreement between the parties. This practice was such as conferred on Mr. Kenny a greater degree of autonomy both in the identification of suppliers, the negotiation of terms with suppliers, and the setting of the retail prices than would have been in strict accordance with the terms of the agreement. In attempting to characterise the extent of that variation it seems to me that it can best be described as limited but not insignificant. To describe it as anything other than limited would be to ignore the evidence that all of the sales of motor fuel and a significant portion of the sales of other products which came from major suppliers were to all intents and purposes determined both as to the supplier, the terms and conditions of supply, and the terms of sale, either by IROC or, in certain cases, in relation to the retail price, by the supplier.

17.2 However it is also necessary to describe the level of autonomy in practice granted to Mr. Kenny as being significant for to do otherwise would be to ignore the fact that it would appear that IROC management were content to allow a successful shop to continue to operate successfully and to rely on the judgment of Mr. Kenny in respect of new variations in the products which were to be sold and the terms and conditions both as to purchase, identity of supplier, and retail price which would govern the gross profit in relation to those products. This is again hardly surprising given the undoubted success of the station to the consequent benefit of both Mr. Kenny and IROC.

## **18. Overall Conclusions**

18.1 For the reasons analysed in detail above I am satisfied that, with the agreement and acceptance of both parties, the arrangements between them operated in a fashion which amounted to a variation on the strict written terms of the agreement between them. The arrangements, as so operated, gave Mr. Kenny a limited, but not insignificant, degree of autonomy in relation to the products that would be purchased for re-sale in the service station shop. Those arrangements also gave Mr. Kenny a limited but not insignificant autonomy in relation to identifying potential new suppliers of such products, dealing with the terms and conditions upon which such products were supplied, and, to perhaps a greater extent, save in the period between 1998 and 2000, in relation to the retail price. By influencing such matters Mr. Kenny had the opportunity to play a material role in the level and types of sales and purchases at the station.

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

18.3 In all those circumstances I am satisfied that the arrangements, as they operated, with the knowledge and agreement of both parties, were such as allowed for the exercise by Mr. Kenny of a significant level of "skill or consideration" in relation to "dealing with, managing or conducting" the purchase and sale of products on behalf of IROC. In those circumstances I am satisfied that, properly considered, it can be said that Mr. Kenny negotiated both the purchase and sale of goods on behalf of IROC as his principal. It therefore follows that I should determine, for the purposes of the preliminary issue, that Mr. Kenny was, at all material times, a commercial agent within the meaning of the 1994 Regulations.