



Neutral Citation Number: [2018] EWCA Civ 518

Case No: A3/2016/3823

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON MERCANTILE COURT
His Honour Judge Waksman QC
[2016] EWHC 1587 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2018

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE IRWIN
and
LORD JUSTICE HENDERSON

Between :

COMPUTER ASSOCIATES UK LIMITED

Appellant

- and -

THE SOFTWARE INCUBATOR LIMITED

Respondent

Mr Jasbir Dhillon QC (instructed by CMS Cameron McKenna Nabarro Olwsang LLP) for
the Appellant

Mr Oliver Segal QC (instructed by Fox Williams LLP) for the Respondent

Hearing dates : 21 November 2017 - 22 November 2017

Approved Judgment

Lady Justice Gloster :

Introduction

1. This is an appeal by Computer Associates UK Ltd ("the appellant" or "CA"), against the order of HHJ Waksman QC ("the judge") dated 14 September 2016 and a judgment dated 1 July 2016. The judgment awarded The Software Incubator Limited ("the respondent" or "TSI"): (1) £475,000 pursuant to the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations"); (2) £5,000 and US\$3,724 as commission due under a written contract between CA and TSI dated 25 March 2013 ("the Agreement"); and (3) £15,631.06 as damages for breach of the Agreement. The judge's reasons are set out in his judgment at [2016] EWHC 1587 (QB).
2. The Regulations derive from Council Directive 86/653/EEC of December 1986 on the co-ordination of the laws of member States relating to self-employed commercial agents ("the Directive").
3. The appeal concerns the important question as to whether a licence to use electronically supplied software amounts to the "sale of goods" under the Regulations.
4. CA sought permission to appeal on nine numbered grounds. The judge gave permission to appeal on grounds 1-2, 7 and 9 only. Henderson LJ subsequently granted permission on the other grounds.
5. Mr Jasbir Dhillon QC appeared on behalf of the appellant and Mr Oliver Segal QC appeared on behalf of the respondent.

Factual background

6. The software at the heart of this case is release automation software ("RAS"), which is packaged software aimed at large institutions, such as in the financial services industry ("the Software"). It is used to "deploy" other software – to facilitate and automate the introduction of new bespoke software across computer operating systems. It is to be contrasted with systems management software, which involves the monitoring of computer systems. The two are complementary. Both products are generally sold as downloads rather than disks, and by way of (usually perpetual) licence.
7. TSI is a company owned and controlled by Mr Scott Dainty ("Mr Dainty"). Mr Dainty worked as a "Re-Seller" (from 2009) and then a "Consultant" (from 2010) for an Israeli company, Nolio Ltd, which first produced the Software. In March 2013 Nolio was purchased by CA, which has a US parent company and which sells a large portfolio of products, mainly concerned with systems management software (it did not previously produce/sell RAS).
8. At that time, the consultancy agreement between Mr Dainty and Nolio was terminated and, in its place, CA entered into the Agreement with TSI on 25 March 2013.

9. Pursuant to the Agreement, TSI acted on behalf of CA to promote the Software in the UK and Ireland between 25 March 2013 and 9 October 2013. For the purpose of the Agreement, CA was the principal and TSI was the agent.
10. By 21 June 2013, Mr Dainty of TSI had begun discussions with another software company called Intigua. On 16 September 2013, TSI entered into an agreement with Intigua ("the Intigua Agreement") which was in similar terms to the Agreement whereby TSI agreed to promote and market the Intigua software in UK/Ireland with an effective date of 1 October 2013.
11. On 9 October 2013 CA terminated the Agreement summarily on the purported basis that TSI, by reason of accepting an engagement with Intigua, was in breach of its duties: (a) to devote substantial time and effort to performing its obligations under the Agreement, and (b) not to engage in any activity competing directly with the Software.

The decision below

12. The judge's reasoning was set out in his judgment of 1 July 2016. In summary:

Software as goods

- i) He rejected CA's submission and held that electronically supplied software amounted to "goods" within the Regulations for the reasons set out in the judgment at [33] – [61] and [68].

Software licence as a sale

- ii) He rejected CA's submission and held the supply of the Software by way of a perpetual licence amounted to a "sale of goods" for the reasons set out in the judgment at [62] – [69].

Repudiatory breach

- iii) The judge construed clauses 3.2 and 3.6 of the Agreement as permitting TSI to enter into contractual obligations owed to Intigua which were identical to those duties owed to CA at [74], [76] – [79] and [95]. As such, the judge held that TSI was not in contractual breach.

Conflict of interest

- iv) The judge accepted that TSI owed a duty to CA to avoid any conflict of interest, but he distinguished the facts of the authorities relied upon by CA, and concluded there was no breach of the conflict of interest rule, or if there were breaches of that rule, they were minor breaches that were not repudiatory at [91] – [125] and [129] – [131].

Regulation 18

- v) Regulation 18 excludes compensation under Regulation 17(2) if the principal has terminated the agency contract because of a default attributable to the commercial agent, which would justify immediate termination of the agency contract. The judge did not express any view on Regulation 18 because he found that no repudiatory breach had been committed by TSI at [134].

Quantum of Compensation

- vi) Upon termination of the agency, Regulation 17(2) and (6) set out the right to compensation, which is what TSI claims in this case. It provides that the commercial agent "shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal." The determination of such compensation was the subject of Lord Hoffmann's judgment in *Lonsdale v Howard* [2007] 1 W.L.R. 2055. At [11], he stated the value of the agency relationship lay in the prospect of earning commission, the agent's expectation that proper performance of the agency contract would provide him with a future income stream and it is this which had to be valued. The judge assessed the quantum of TSI's compensation under Regulation 17 as £475,000 at [135] – [172].

Contractual damages

- vii) This issue related to two types of contractual damages. The first type was damages for lack of adequate notice of termination and the second type was for post-termination commission. On the first type, the judge held there could be a separate claim for contractual damages even where there had been a successful claim for compensation under Regulation 17(2). He was persuaded by case law that supports the entitlement to claim damages under both heads. On the second type, the judge found this was a debt-claim; certain sales have been made and the agent was entitled to 100% commission on those sales.
- viii) The judge awarded TSI £15,631.06 as damages for lack of adequate notice of termination because he found that there was no lawful basis for CA's termination of the Agreement on 9 October 2013.

The issues on the appeal

13. The issues on the appeal may be summarised as follows:

- i) Whether software, in the form of the Software, which was supplied to CA's customers electronically and not on any tangible medium, constitutes "goods" within the meaning of Regulation 2(1)?
- ii) Whether the grant of licences of the Software by CA to its customers constitutes the sale of "goods" within the meaning of Regulation 2(1)?
- iii) Whether TSI was in repudiatory breach of clauses 3.2 and 3.6 of the Agreement by accepting an engagement for Intigua effective on 1 October 2013?
- iv) Whether TSI was in repudiatory breach of its duty as an agent and under Regulation 3 by failing, prior to TSI's entry into the engagement with Intigua, to disclose that TSI intended to accept an engagement as Intigua's agent and the full nature of the proposed engagement and activities and to seek CA's agreement to such engagement and activities?

- v) If TSI committed either of the repudiatory breaches of the Agreement referred to in issues 3 and 4 above, whether TSI's claim for compensation under Regulation 17 was excluded pursuant to Regulation 18(a)?
- vi) Whether the judge's assessment of the quantum of compensation that TSI was entitled to under Regulation 17 was wrong?
- vii) Whether the judge was wrong in failing to deduct TSI's damages for post-termination commission and lack of notice of termination from the award of compensation under Regulation 17?
- viii) If TSI committed either of the repudiatory breaches of the Agreement referred to in issues 3 and 4 above, whether CA lawfully terminated the Agreement on 9 October 2013 such that TSI is not entitled to any damages for lack of notice of termination?

14. Issues 2 and 5 - 7 only arise if issue 1 is answered in the affirmative.

The appellant's submissions before this court

15. The arguments advanced in the written and oral submissions by counsel acting on behalf of the appellant, Mr Dhillon, may be summarised as follows:

- i) As to issue (i): the judge's conclusion was wrong and the supply of the Software by electronic means does not amount to the "sale of goods" because:
 - a) electronically supplied software in general, and the grant by CA to its customers of a licence to use the electronically supplied Software in particular, did not involve any tangible property; and
 - b) on its true construction, the meaning of sale of "goods" in the Regulations is limited to tangible property and does not include software.
- ii) As to issue (ii): the judge's construction of Regulation 2(1) was wrong and he ought to have held the supply by CA of the Software to its customers by perpetual and/or limited term licences was not a sale of "goods" within Regulation 2(1). Even if the appellant fails on issue (i), the immediate context for the word "sale," namely the words "of goods", provides an indication that a "sale" requires a transfer of ownership of the relevant property. The word "sale" should be confined to its natural meaning.
- iii) As to issue (iii): TSI was in repudiatory breach of clauses 3.2 and 3.6 of the Agreement by accepting an engagement for another principal, Intigua, which was effective on 1 October 2013. The contractual duties owed by TSI to CA under clauses 3.2 and 3.6 of the Agreement were incompatible with the existence, at the same time, of identical contractual duties owed by TSI to Intigua.
- iv) As to issue (iv): TSI was in repudiatory breach of its duties as an agent and under Regulation 3 by failing: (a) to disclose to CA that TSI intended to accept an engagement as Intigua's agent, (b) fully to disclose the nature of the proposed engagement and activities, and (c) to seek CA's agreement to such

engagement and activities before TSI entered into the Intigua Agreement because the interests of Intigua did or may conflict with the interests of CA.

- v) As to issue (v): if, contrary to CA's appeal, TSI was within the scope of the Regulations, and, as submitted above, TSI committed a repudiatory breach of the Agreement, CA relies upon Regulation 18(a) as excluding any right that TSI has to compensation under Regulation 17.
- vi) As to issue (vi): This issue only arises if the Regulations apply to TSI. The judge's assessment of the quantum of TSI's compensation under Regulation 17 was flawed and incorrect for three reasons. First, the quantum of compensation should have been calculated only by reference to the income, benefits and goodwill generated under the Agreement, and not by reference to the TSI-Nolio Agreement or the Dainty-Nolio Agreement. Second, the judge failed to take into account the fact that, if CA had not given notice of termination of the Agreement on 13 September 2013, TSI would have given notice to terminate the Agreement by 31 December 2013. The effect was to grant the agent a windfall by nature of the fact the principal had terminated first. Third, the judge was wrong to assume the notional term of the hypothetical agency would be four years.
- vii) As to issue (vii): If TSI is entitled to compensation pursuant to Regulation 17, the judge was wrong to award TSI US\$3,724 and £5,000 as damages for post termination commission and £15,631.06 as damages for lack of notice of termination in addition to compensation under Regulation 17. As a matter of law, the commission and damages due under the Agreement must be deducted from any award under Regulation 17 because the latter already accounts for the benefits payable after termination of the Agreement which are in fact payable to TSI.
- viii) As to issue (viii): if TSI committed repudiatory breaches of the Agreement, it follows that CA lawfully terminated the Agreement on 9 October 2013 and, therefore, TSI was not entitled to any damages for lack of notice of termination.

The respondent's submissions before this court

- 16. The arguments advanced by Mr Segal on behalf of the respondent, in written and oral submissions, in relation to the above issues may be summarised as follows:
 - i) As to issue (i): there was nothing in the Directive or Regulations themselves which indicated a distinction between the sale of something tangible and something intangible. CA attempted to suggest such a distinction largely by analogy with legislation from unrelated fields which was originally enacted at a time when the sale of software did not exist. In the context of the Directive, this court was entirely at liberty to let the legislation speak. There is nothing in any relevant authority that conclusively determines the meaning of "the sale or purchase of goods". From a purposive perspective, there was no basis for providing protection to a commercial agent selling tangible goods on behalf of his principal but not providing such protection to commercial agents selling (what may be essentially the same) intangible goods on behalf of his principal.
 - ii) As to issue (ii): the focus should be on the "economic reality" rather than the ostensible form of a transaction. There was no substantive difference - in the

purchase process, in the delivery process, or in the effective possession in the hands of the customer – between the two methods of obtaining the software product from its producer: 'sale' or 'indefinite licence.'

- iii) As to issue (iii): the appellant was attempting to re-examine the matters already addressed. In order for the court to find for the appellant on this issue, it would have to find that "substantial" means "majority" and that the judge was not entitled to accept the evidence as to what was contractually agreed. The court should not disturb the judge's finding.
- iv) As to issue (iv): the judge found for the respondent both on the construction point and on the facts. He rejected CA's argument that, on its proper construction, Clause 11.2 required TSI to work full time for CA. This was not an employee/employer relationship. Further, he accepted TSI's case that the CA and Intigua products did not compete; and that the two products could not become competitive by combining Intigua's product with a free third-party product. The court should not disturb the judge's finding on this issue.
- v) As to issue (v): the words of Regulation 18(a) meant what they said: the termination must, as a matter of fact, be by reason of the default relied on by the principal to avoid paying indemnity/compensation under Regulation 17 (it was accepted that a principal does not have to prove that such default has occurred before terminating; it was enough that it believed it had occurred and terminated for that reason).
- vi) The judge found as a matter of fact at [24] the reason CA terminated the agreement was "because they regarded [Mr Dainty] as working for a competitor. In fact this was not so..."
- vii) As to issue (vi): compensation under Regulation 17 should equate to the value of the agency as at the date of termination, being the value of the income stream the hypothetical purchasing agent would expect to receive on the "obviously necessary" assumptions that "the agency would have continued and the hypothetical purchaser would have been able to perform the agency contract": *Lonsdale v Howard & Hallam Ltd* [2007] 1 W.L.R. 2055. The judge correctly applied *Lonsdale* and this finding should not be disturbed.
- viii) As to issue (vii): this was broken down into two parts.
 - a) Effect of an award for failure to give lawful notice under Regulation 15: TSI submitted most of the cases feature awards under both the heads of Regulation 17 and failure to give notice, with no set-off.
 - b) Effect of an award in contract for unpaid commission in post-termination sales for which the agent was largely responsible whilst engaged: the judge was right to find the modest Regulation 8(a) award had not affected the notional value of the agency. It is a debt claim; certain sales have been made and the agent was entitled to 100% commission on those sales.
- ix) As to issue (viii): if CA succeeds on either issues (iii) or (iv) of its appeal, then TSI was not entitled to damages for failure to give lawful notice under Regulation 15.

Discussion and determination

Issue 1: Whether software, in the form of the Software, which was supplied to CA's customers electronically and not on any tangible medium, constitutes "goods" within the meaning of Regulation 2(1)?

17. This is the most important issue on this appeal. In my judgment, the appellant's main arguments in relation to this issue are to be preferred and the judge was wrong to decide otherwise. While the judge explained at [43] he was working from first principles, the first problem with his analysis is that he failed to identify those principles.
18. Regulation 2(1) confines the application of the Regulations to agents authorised to negotiate or conclude "the sale or purchase of goods" on behalf of their principal. Mr Dhillon's primary argument was that the Regulations did not apply to the Agreement because:
 - i) CA's supply of computer software by electronic means and not on any tangible medium did not involve tangible property;
 - ii) "goods" within the context of the Regulations must involve tangible property; and
 - iii) CA's sale of the Software to its customers did not, therefore, involve the sale of "goods" within the meaning of Regulation 2(1).
19. Despite the challenges posed by this analysis, and my concern that such an approach might appear to be out-moded in light of technological advances, the weight of authority on this issue compels me to conclude that, on a proper construction of the Regulations, the Software did not constitute "goods" within the meaning of Regulation 2(1).

The supply of the Software

20. CA's unchallenged evidence was that: (1) CA provided the Software electronically by email which contained a link to an online portal from which the customer downloaded the Software; and (2) the Software was never provided by CA to its customers on any tangible media. Although the judge accepted at [35] that the Software was intangible and that licences did not constitute real or personal property, he reasoned that the nature of the rights, in respect of the Software granted to customers of CA, led to the conclusion that those rights amounted to the sale of "goods." In my judgment, the judge's conclusion on this point was wrong for the reasons that follow.

"Goods" within the context of the Regulations

Legislative background

21. The 1993 Regulations are the UK's implementation of Council Directive 86/653/EEC of December 1986 on the co-ordination of the laws of member States relating to self-employed commercial agents. They came into force on 1 January 1994. According to the preamble to the Directive, their main purpose was to provide equal protection to commercial agents across the EU and, in particular, to harmonise the agent's right to valuable 'indemnity' or 'compensation' on termination.

22. The Regulations set out the rights and obligations as between commercial agents and their principals (Regulations 3 to 5) and deal with remuneration (Regulations 6 to 12), and the conclusion and termination of the agency contract (Regulations 13 to 16). They contain provisions relating to the indemnity or compensation payable to a commercial agent on termination of his agency contract (Regulations 17 to 19) and also to the validity of restraint of trade clauses (Regulation 20).

The tangible/intangible distinction

23. Under Regulation 2(1), the Regulations only apply to the Agreement if TSI is an agent that was authorised to negotiate or conclude "the sale or purchase of goods" on behalf of CA.
24. There is no definition of the key terms "goods" or "sale" within the Regulations. There is force to Mr Segal's submission that there is nothing in the Directive or Regulations themselves which indicates a distinction between the sale of something tangible and the sale of something intangible for the purpose of defining "goods." I am not persuaded by Mr Dhillon's submission that the use of the words "sale of" is of itself enough to provide a clear indication that the meaning of "goods" is limited to tangible property.
25. Nonetheless I do accept his submission that the distinction between tangible property which has been held to be "goods", and intangible property, which authority on the whole has not held to be "goods", is widely recognised in: (1) case law and textbook authority concerned with the Regulations; (2) English and other common law jurisdictions under sale of goods or other similar legislation; and (3) in European law.

Authority under the Regulations

26. I begin with case law and textbook authority. The High Court has held that, if no hardware is supplied, then the Regulations do not apply to the supply of software because it is intellectual property, so there was no sale of "goods" within the meaning of Regulation 2(1): see per Tugendhat J in *Accentuate Ltd. v. Asigra Inc.* [2010] 2 All E.R. (Comm) 738 at [55] – [56]:

"55 Although the supply of the hardware is ancillary to the supply of the software, the supply of the hardware is critical to the Distributor's case. The Regulations apply to a person who negotiates the sale or purchase of "goods": see Regulation 2(1) cited in para 26 above. If no hardware was to be supplied under the MRA, then the Regulations would not apply at all.

56 Software is intellectual property, not a chattel, but hardware is a chattel. In so far as the performance of the MRA leads to the formation of a Software Licence Agreement in the form of Schedule C, then that is an agreement made between the Licensor and the end user."

27. I accept Mr Dhillon's submission that Tugendhat J clearly interpreted "goods" within Regulation 2(1) as limited to tangible property and not extending to software programmes supplied without any physical medium, which only involved intangible property. HHJ Waksman QC rejected this statement as *obiter* and brief. However, in my judgment, it is a good example of how the courts have maintained the distinction and deserves greater weight than the judge afforded it.

28. Mr Dhillon also directed the court to a leading textbook in the commercial agents' field which expresses the view that, in the light of English sale of goods law, it is likely that software supplied by email attachment or by download from a website is not "goods" within the meaning of the Regulations. Thus in Saintier & Scholes, *Commercial Agents and the Law*, (2005), at p. 42, the authors write:

"The meaning of "goods"

The uncertainty in this area is exacerbated by the absence of a definition of "goods" in the Directive. According to the DTI guidance notes of 1994, "goods" clearly has to be interpreted in accordance with the EC Treaty, which explains why the Agency Regulations do not define the word. The DTI then adds that the definition provided by the Sale of Goods Act 1979, s 61(1) is a "reasonable" guide, without "necessarily being absolutely co-extensive with the Directive meaning".

It has been suggested that the definition of "goods" in the EC Public Procurement Directive implemented in England by the Public Supply Contract Regulations 1995 could provide some help on the grounds that an EC law definition in one directive is at least persuasive for the interpretation of the same term in another. It stipulates that "goods" includes electricity, substances, growing crops and things attached to and forming part of the land which are agreed to be severed before the purchase or hire under the supply contract and any ship, aircraft and vehicle. In the case of *Tamarind and Others v. Eastern Natural Gas and Eastern Energy*, gas was treated as goods, which is in line with common law, since gas would be treated as goods under the SGA 1979.

In relation to commercial agents dealing with computer products, especially software, following the case of *St Albans City and District Council v. International Computers Ltd* software is likely to be seen as "goods" if the software is supplied via a physical medium, but not if it is supplied by email attachment or by download from a website."

The logic of this approach provides support for the appellant's case on this issue.

29. Mr Dhillon also relied on the Scottish authority, *Gailey v. Environmental Waste Controls* [2004] Eu. L.R. 355, in support of his case. He argued that the Outer House of the Court of Session observed that the Regulations do not apply to "the provision of services or sale of incorporeal property" on the ground that this is a different type of transaction from a "sale of goods": at [24]. He submitted Lord Drummond Young interpreted "goods" within Regulation 2(1) as not extending to incorporeal property which is the same as intangible property. I do not agree that it is completely clear that the two are the same. This is a point of dispute on which the court did not receive adequately clear submissions to enable me to form a conclusion on what looks to be a point of Scottish law. I did not find this authority helpful on this issue.

Authority in sale of goods and other contexts

30. However, there is further authority on the meaning of "goods" in sale of goods legislation and other related contexts, which provides support for Mr Dhillon's case that "goods" in Regulation 2(1) is limited to tangible property.
31. In *St Albans D.C. v. International Computers Ltd.* [1996] 4 All E.R. 481 at 493j, the Court of Appeal expressed the *obiter* view that a software programme is not "goods"

for the purposes of the Sale of Goods Act 1979 and distinguished that situation from where the programme was contained on a physical disk.

32. The distinction between data and the physical medium on which it may be contained was followed and applied by this court in *Your Response Ltd. v. Datateam Business Media Ltd.* [2014] EWCA Civ 281 at [18] – [20] and [42] where it was held that a database stored electronically gave rise to intangible property which does not amount to “goods” and, therefore, could not be the subject of a common law possessory lien. I am persuaded by Mr Dhillon’s submission that this case is relevant because legally an analogy can be drawn between an electronic database and the Software.
33. The Scottish authority on this point I found much more helpful and persuasive than *Gailey*. In *Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd.* [1996] S.L.T. 604, the Outer House of the Court of Session recognised the distinction between the intangible information in software and any physical medium on which it is held. It expressed the view at 608L – 609B that the supply of software without tangible media was not to be regarded as a “sale of goods.”
34. Moving further afield to Australia, the New South Wales Supreme Court has held that software delivered by means of an internet download was not “goods” for the purposes of the Australian Sale of Goods Act 1923 (which is in materially similar terms to the English Sale of Goods Act 1979), because the software was supplied in an intangible form and “goods” are limited to tangible items: see *Gammasonics Institute for Medical Research Pty Ltd. v. Comrad Medical Systems Pty Ltd.* [2010] NSWSC 267 at [1] – [3], [5] – [6], [12] – [15], [24], [47]. I find force in Mr Dhillon’s submission that, while the judge in *Gammasonics* had sympathy with the arguments of the commentators as to the perceived injustices to consumers, she nevertheless upheld the ruling that was the subject of the appeal that software is not “goods” for the purpose of the legislation. This conclusion supports the appellant’s construction of Regulation 2(1) that a sale of “goods” requires tangible property.

European law authority

35. This conclusion is further supported by a body of European law outside the Regulations/Directive. There was some dispute between the parties as to whether *State v. Sacchi*, Case 155/73, [1974] E.C.R. 409 at pp.426–427 and p.431 is a decision that recognises that “goods” within the meaning of the rules of the EC Treaty concerning the free movement of goods are limited to tangible property and do not include intangible things. At p.431 the CJEU held:

“The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. However, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods.”
36. Mr Segal submitted that it was a stretch to suggest that this decision recognised that “goods” were limited to tangible property. However, I consider Mr Dhillon’s conclusion to be a correct reading of this case. In my judgment, the case approaches the issue via the tangible/intangible distinction for “goods” described above.

37. *Sacchi* was followed by *Jagerskiold v. Gustafsson* (Case C-97/98) [1999] E.C.R. I-7319 which held that fishing rights or fishing licences/permits do not constitute "goods" within the meaning of the EC Treaty provisions relating to the free movement of goods, but rather amount to the provision of services within the meaning of the free movement of services provisions of the Treaty. The CJEU made clear at [36] – [38] that the intangible rights, including intellectual property, were not "goods" and relied upon the *St Albans* distinction between the intangible fishing rights and the tangible document on which the fishing rights were recorded.
38. The CJEU dealt with this issue again in *Brown Boveri & Cie AG v. Hauptzollamt Mannheim* (Case C-79/89) [1991] E.C.R. I-1853. In that case, the court determined the interpretation of Article 3 of Council Regulation (EEC) No. 1224/80 of 28 May 1980 on the valuation of goods for customs purposes with respect to consignments of computer hardware and software. Article 3 of the Customs Regulation provided in material part:

"the customs value of ... goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community ..."
39. In *Brown Boveri*, the court held at [21] that the claimant "is correct in arguing that software is not, as such, "goods" within the meaning of Article 3(1) of the regulation on customs value but is intangible property not subject to the Common Customs Tariff." This supports the original proposition that the European courts have continued to support a distinction between tangible and intangible property for the purpose of construing "goods."
40. Mr Dhillon also addressed the court on the 6th VAT Directive, which expressly states that "goods" for the purposes of that legislation are limited to tangible property, as a result of which it has been held that electronically downloaded software and electronic books do not constitute the supply of "goods" and amount to the supply of "services": *Levob Verzekeringen B.V. v. OV Bank N.V.*, Case C-41/04 [2005] E.C.R. I-9433 (A-G Kokott); *Commission v. Luxembourg*, Case C-502/13 (E.C.J.); *Commission v. France*, Case C-479/13 (E.C.J.).
41. Mr Segal attempted to convince this court that many of these cases were limited in their applicability to the present context and enacted at a time when the sale of software did not exist. While I see the attractiveness of the submission, I do not consider it changes the reality that the distinction between tangible property, which has been held to be "goods", and intangible property which authority has not defined as "goods", is widely recognised in a number of different contexts.

The context

42. As with any interpretation exercise, the context is central to understanding the meaning of the language. The Directive and Regulations are aimed at commercial agents engaged in commercial transactions. I found Mr Dhillon's submission persuasive that this is relevant to the question as to how far the courts can go in construing the language. Popplewell J accepted this point in *Nagel v Pluczenik Diamond Co NV* [2017] EWHC 1750 (Comm) at [63]:

"My starting point is that in interpreting a Directive and Regulations aimed at commercial agents, it is necessary to interpret "commodities" in its commercial sense, as it would be understood as such by commercial parties both as principals and agents. Commodities is a term often used in the commercial world of trade and finance in a particular sense, which is a narrower sense than the everyday use of the word. In everyday use it can cover almost all things which can be bought or sold; but in its commercial sense it is not synonymous with "any tangible goods". In the commercial world it includes, for example, oil and gas products, some precious and industrial metals, grain and other agricultural or raw foodstuffs such as coffee, sugar or pork bellies. Many are subject to futures and options trading, but not all."

43. *Nagel* supports adopting a narrower interpretation of language within a commercial context. The legislation and European case law is an appropriate guide to understanding how the term "goods" has been understood by the commercial parties at whom the Regulations and Directive are aimed. Mr Dhillon directed the court to Case C-85/03, *Mavrona & Sia OE v. Delta Etairia Symmetochon AE*, Order of the Court dated 10 February 2004, at [15]:

"[the Directive] precisely circumscribes the concept of commercial agent and limits it to well defined situations."

44. *Mavrona* at [16] supports the proposition that, in the absence of any indication in the Regulations that they apply to a particular contractual relationship, they will not apply. This justifies a stricter interpretation of the Regulations. There is force to Mr Dhillon's submission that the definition of commercial agent, insofar as it assists with defining "goods," within the Regulations should not be interpreted beyond the ordinary meaning of the language on purposive or policy grounds. I agree that this is impermissible in relation to a provision which defines to whom the Regulations apply.
45. Having said this, I am somewhat uncomfortable with a conclusion that the tangible/intangible distinction leads to a construction of "goods" that excludes the Software, which seems artificial in the modern age. However, I consider this to be justified given the commercial context and notwithstanding the superficial attraction of the respondent's arguments, which I next consider.

The superficial attraction of the respondent's position

46. Mr Segal's submissions on construction are superficially attractive. He submitted that the correct approach to construction is to determine the autonomous meaning of the Directive in the context of its purposes as set out in its preambles: *Usedsoft v Oracle* (Case C-85/03) [2012] 3 C.M.L.R. 44. at [39] – [41]. He submitted that the fact the legislators did not contemplate software when drafting the legislation justified a purposive interpretation of the Directive. If the legislation were being designed today, software might well be classified as "goods".
47. He directed the court to two of the recitals to the Directive which he submitted made clear that its focus was on the rights of agents/intermediaries involved in commerce and industry on behalf of principals:

"Whereas the restrictions on the freedom of establishment and the freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by Directive 64/224/EEC (4); ...

"Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; ..."

48. The relevant purposes of the Directive are to protect and harmonise the law relating to those carrying on the activity of commercial representation on behalf of and in the name of principals: *Mavrona* at [13] and [17]. Mr Segal further submitted, to the extent that the UK Regulations themselves shed light on the issue, they confirmed the scope of the Directive as primarily concerned with a principal using an agent to develop a market for its products: see the Schedule to the Regulations and *Crane v Sky In-Home Service Ltd* [2007] 2 All E.R. (Comm) 599 at [55] – [56]. I find force in his submission that the Software and the provisions of the Agreement fall squarely within those purposes/scope.
49. This was the position the judge accepted. At the core of his conclusion was the view that the court should ensure the law keeps abreast of recent developments in technology by giving an expansive interpretation of "goods" to accommodate electronically supplied software. That was also the approach of the judge at first instance in *Your Response*.
50. I have sympathy with this approach, given what I perceive to be the various difficulties with maintaining the tangible/intangible distinction. I will outline four of these here.
51. First, the judge had a point when he stated that there is no logic in making the status of software as "goods" (or not) turn on the medium by which they were delivered or installed. While such a distinction has been followed and applied by the High Court and the Court of Appeal, amongst other courts, it is difficult to see any principled basis for such an approach. For example, Mr Dhillon accepted that if, in the present case, a company or individual had asked for, or been sent, a backup disk that carried the Software in case something went wrong, in such a circumstance, the Software would be tangible property. The idea that this latter situation would fall under the Regulations, while the former would not, appears illogical.
52. Second, my conclusion that the definition of "goods" does not include electronically supplied software enables the odd inference to be drawn that the legislators would have wanted to protect a commercial agent selling hard copy books on behalf of its principal to a wholesaler for onward sale to consumers, but not one selling electronic books to the same wholesaler for onward sale to the same consumers. Both of these examples highlight the arbitrariness of the tangible/intangible distinction.
53. Third, Mr Segal submitted the appellant's argument is undermined by the way gas and electricity are treated under the Regulations. In *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* [2000] Eu. LR. 708, the High Court upheld the claim under Regulation 17 that the supply of gas and electricity constituted "sales of goods." I

agree with Mr Segal that it is impossible coherently to explain why gas and electricity are any more tangible property than the Software.

54. Fourth, where two other common law jurisdictions have updated their existing sale of goods legislation, they have taken account of the increasing prevalence of intangible/digital products. New Zealand enacted a Consumer Guarantees Act 1993, which operates alongside a Sales of Goods Act modelled on our Sale of Goods Act 1979. The legislation provides that "goods" includes "for the avoidance of doubt...computer software." Australia, which enacted the Australian Consumer Law, also amended the definition of "goods" to include computer software.

My conclusion – not sale of "goods"

55. However, despite the problems of principle which arise if one excludes electronically supplied software from the definition of goods, I am not persuaded that it is open to this court to impute what many might think was a common-sense meaning of "goods" to the legislators of the Directive in 1986 and the Regulations in 1993 when the Directive was implemented. To do so would be contrary to precedent. This court cannot simply ignore the weight of judicial authority that supports maintaining the tangible/intangible distinction.
56. The answer to the judge's approach in this case is the same as the answer given by this court in *Your Response* at [9] – [10], [27], [38] – [39], and [41]: namely, that an approach which departs from precedent and the well understood meaning of "goods" in law should be resisted by the judiciary. The judge's conclusion was inconsistent with his acceptance at [45] that policy considerations were a matter for the European legislature and for the UK parliament, not for the court.
57. In terms of context, it is relevant that the Directive is not aimed at consumers but rather at commercial parties. Consumers have the consumer regulations, which I will address later in this judgment. As such, I do not consider that commercial parties are so in need of protection that the judiciary should adopt a completely different approach to interpreting "goods" than that established by precedent.
58. I find support for this conclusion from the way this has been dealt with in New Zealand and Australia. In defining software as "goods" within their respective consumer sales' regimes, both countries have left it to the legislature to make the change.
59. Mr Segal asks this court to take a significant step. While (as Davis LJ said in *Your Republic* at [39]) the law of unintended consequences plays no role in the law of England and Wales, this court must be aware of the potential consequences of the judge's interpretation. There is real force to Mr Dhillon's submission that the judge's conclusion would have unjust and unanticipated potential consequences in that it could lead to:
- i) the creation of proprietary rights which may, in the case of an insolvency of an IT company, enable a customer to assert a preferential position to the disadvantage of other creditors or adversely affect lenders who have drafted loan agreements and security rights on the basis of the law as previously understood;
 - ii) the recognition of information as property which the law does not appear to have hitherto done; and

- iii) the creation of a new offence under the law of theft.
60. The same point was made by this court in *Your Response* at [34], [39] and [42]. Given the number of IT companies and IT contracts in existence, I agree that the implications of the judge's interpretation could be significant: see *Your Response* at [39].
61. There is little doubt that maintaining the tangible/intangible distinction in relation to the Software leads to an undesirable result from the perspective of commercial agents. Mr Dhillon accepted that the status quo permitted a certain kind of injustice to persist.
62. However, I was persuaded by his submission that, before the court could construe the 1986 Directive so as to protect commercial agencies in respect of the sale of electronically supplied software, it was important to consider how the European legislature had in fact dealt with this issue since the Directive was implemented. The judge ignored the Consumer Rights Directive 2011/83/EU of 25 October 2011 on consumer rights ("CRD") because it concerns consumers. In my view, he was wrong to do so.
63. The approach taken by the Consumer Rights Act 2015 ("CRA"), which implements the CRD, supports the appellant's case on this issue. For the purposes of contracts for the supply of goods between a consumer and a trader:
- i) "goods" are defined as "tangible moveable items": CRA, section 1(8); CRD, article 2(3); and
 - ii) "sales contract" is defined as a contract under which "the trader transfers or agrees to transfer ownership of goods to the consumer" and the consumer pays the price: CRA, section 5(1); CRD, article 2(5).
64. Chapter 3 of the CRA introduces the new concept of a contract to supply digital content to a consumer, which attracts similar rights to those enjoyed by a consumer in relation to a contract for the sale of goods. "Digital content" is defined as "data which are produced and supplied in digital form": CRA, section 1(9); CRD, article 2(11).
65. Recital (19) to the CRD states that computer programmes are "*digital content*". Recital (19) provides that if digital content, such as computer software, is supplied on a tangible medium it should be considered to be goods within the meaning of the CRD. However, recital (19) also states that contracts for digital content, including software, which is not supplied on a tangible medium should not be classified for the purposes of the Directive as sales contracts or services contracts; in other words such a software contract does not involve the transfer of the ownership of "goods." Therefore, a contract for the supply of software electronically is classified as a contract for the supply of digital content, a new category of contract and associated rights created by the CRD and implemented by the CRA.
66. The CRA and CRD demonstrate that the European legislature has:
- i) proceeded on the basis of the well-established meaning of "goods" being limited to tangible, moveable items (as per the case law described above); it has not adopted a wider definition of "goods" to include intangible items;

- ii) drawn a clear distinction between software, which is provided on a tangible medium and which can be "goods", and software which is not provided on a tangible medium, which is not "goods;" and
- iii) accepted the policy arguments in favour of extending the legal rights available to consumers in respect of sale of goods contracts to electronically supplied software and other digital content by creating a new category of legal contract, namely a contract to supply digital content.

67. For the purposes of my conclusion, I find it relevant that the legislature opted to create a *sui generis* obligation – the supply of digital content - rather than widening the meaning of "goods." The novel legislative solution demonstrates to my mind that this is clearly an area in which reform must come from the European legislature and/or the UK parliament and not via judicial interpretation.
68. This court will not go behind the judge's finding of fact that the Software in the present case is intangible property. Accordingly, I conclude that the judge was wrong in law in holding that the Software, which was supplied to CA's customers electronically and not on any tangible medium, constitutes "goods" within the meaning of Regulation 2(1). I would therefore allow the appeal on this issue.
69. The consequence of this determination is the Regulations do not apply to the Agreement and issues 2 and 5 – 7 no longer fall to be determined in this appeal.

Issue 3: Was TSI in repudiatory breach of clauses 3.2 and 3.6 of the Agreement by accepting an engagement for Intigua effective on 1 October 2013?

70. I agree with Henderson LJ in his Order dated 20 February 2017 granting permission to appeal on issues 3 and 4 that these are evidential disputes in relation to which the judge made "careful and detailed findings of primary fact." The court should be slow to go behind these findings.
71. As to this issue, the judge construed clauses 3.2 and 3.6 of the Agreement as permitting TSI to enter into contractual obligations owed to Intigua which were identical to those duties owed to CA. As such, he held that TSI was not in contractual breach.
72. I agree with this conclusion. The relevant clauses in the Agreement show that this is clearly a non-exclusive agency. TSI agreed to devote a "substantial amount of time and effort" to its principal. It was possible for it to do this and to work for more than one principal. CA's argument to the contrary only succeeds if "substantial amount of time" means the "majority of time;" a conclusion which I am not persuaded the Agreement supports. Further, it is telling that the two commercial parties did not choose to expressly restrict TSI's ability to act for another principal. I agree with the judge at [76] that, provided there was no conflict under Clause 3.6, the Agreement allowed for TSI to take on another principal.
73. In addition, I conclude that the judge was perfectly entitled to find on the facts that there was no breach of the Agreement because TSI was not in fact prevented from carrying out, and/or did not fail to carry out, its duty to devote a substantial amount of time to its work for CA.
74. Given these considerations, I would not allow the appeal on this issue.

Issue 4 - Whether TSI was in repudiatory breach of its duty as an agent and under Regulation 3 by failing, prior to TSI's entry into the engagement with Intigua, to disclose that TSI intended to accept an engagement as Intigua's agent and the full nature of the proposed engagement and activities and to seek CA's agreement to such engagement and activities?

75. Given my finding on issue 1, Regulation 3 is no longer relevant to the determination of this issue.
76. In relation to the common law position, I accept Mr Dhillon's submission that TSI was bound by the common law proposition of law that an agent may not put himself in a position or enter into a transaction by which his personal interest or duty to another principal may conflict with his duty to his principal, unless his principal with full knowledge consents. The judge accepted that TSI owed a duty to CA to avoid any conflict of interest, but he distinguished the authorities relied upon by CA on their facts. He concluded there had been no breaches of the conflict of interest rule, or, if there had been breaches of that principle, they were minor breaches, which were not repudiatory at [91] – [125] and [129] – [131] of the judgment.
77. For the purpose of determining this issue, it is necessary to consider the Agreement. Clause 12.1 prevented TSI from being engaged "in any activity competing directly with the actual and/or planned activities and/or [Product] of [CA]."
78. There are two sub-issues of fact here: first, whether the respective natures of CA's product and of the Intigua product were such that TSI acted in actual/potential conflict of interest in promoting both products in the relevant period; second, whether TSI devoted a substantial amount of time to Intigua during the relevant period which put it in conflict with its duty to devote the same time to CA.
79. As to the first sub-issue, the judge heard considerable evidence on this point. He dealt accurately and thoroughly with that evidence at [81] – [89] of the judgment. In my view, he was entitled to accept TSI's case that the two products did not realistically compete at all; and that the two products could not become competitive by combining Intigua's product with a free third-party product.
80. As to the second sub-issue, I agree with the judge's finding at [113] that, if one takes the terms of the Intigua Agreement at face value, so that TSI was obliged to and did spend a substantial amount of time on Intigua, it was unlikely that it could do the same for CA. However, in the judge's view, this did not happen. I do not think that there is a sufficiently strong evidential basis for this court to depart from that finding.
81. In my judgment, there was no breach of the conflict of interest rule. In any event, the breaches described at [128] of the judgment were not serious enough to amount to a repudiatory breach. As such there was no lawful basis for CA's termination on 9 October 2013. Accordingly, I would not allow the appeal on this issue.
82. This means that CA's termination was itself a repudiatory breach of contract entitling TSI to damages which are limited to the earning of the consultancy fee for the balance of the notice period.

Issue 8: If TSI committed either of the repudiatory breaches of the Agreement referred to in issues 3 and 4 above, whether CA lawfully terminated the Agreement on 9 October 2013 such that TSI is not entitled to any damages for lack of notice of termination?

83. The judge awarded TSI £15,631.06 as damages for lack of notice of termination because he found there was no lawful basis for CA's termination of the Agreement on 9 October 2013. Given my view as to issues 3 and 4 above, the judge's findings were correct in this respect. It follows that I would not allow the appeal on this issue.

Disposition

84. I would allow the appeal on the first issue and it follows that, accordingly, I would allow the appeal in relation to Issues 2 and 5–7. Otherwise I would dismiss the appeal.

Lord Justice Irwin:

85. I agree.

Lord Justice Henderson:

86. I also agree.

