



Neutral Citation Number: [2016] EWHC 1587 (QB)

Claim No: LM-2014-000241

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

LONDON MERCANTILE COURT

Date: 1 July 2016

Before:

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

THE SOFTWARE INCUBATOR LIMITED

Claimant

- and -

COMPUTER ASSOCIATES UK LIMITED

Defendant

Oliver Segal QC (instructed by Fox Williams LLP, Solicitors) for the Claimant
Jasbir Dhillon QC (instructed by Olswang LLP, Solicitors) for the Defendant

Hearing dates: 11-15 and 19-20 April 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. The Claimant in this action, The Software Incubator Ltd ("TSI") is the corporate vehicle for the consulting activities of its owner and director Mr Scott Dainty. These included acting as agent for the promotion of what is known as application release automation software ("RAS"). By a written agreement made on 25 March 2013 between TSI and the Defendant, Computer Associates UK Ltd ("CA") ("the Agreement"), TSI, through Mr Dainty, agreed to act as a non-exclusive agent for the promotion of CA's RAS in the UK for an initial, but renewable term of 12 months. Under the Agreement, TSI was paid a consulting fee of £10,000 per month plus commission at the rate of 3.8% for sales up to £3,000,000 per annum and at the rate of 10% above that.
2. On 13 September 2013, CA gave 90 days written notice to TSI of termination of the Agreement ("the Notice Letter") but on 9 October 2013 it altered its stance and purported to accept alleged repudiatory breaches on the part of TSI thereby entitling it to terminate the Agreement forthwith ("the Termination Letter"). TSI denies any repudiatory breach.
3. As a result, TSI has claimed the following against CA:
 - (1) damages at common law for repudiatory breach, limited to the monthly fee which would have been paid for the remainder of the notice period;
 - (2) compensation payable pursuant to Regulation 17 (2) of the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations");
 - (3) commission payable pursuant to Regulation 8 of the Regulations on certain post-termination sales; alternatively, if Regulation 8 is inapplicable, a similar claim at common-law under the Agreement.
4. In response, CA denies any liability to TSI for one or more of the following reasons:
 - (1) there is no claim under the Regulations at all because they do not apply. This is because the supply or sale of software being promoted by TSI for CA is not "the sale of goods" for the purpose of the definition of "commercial agent" in Regulation 2 (1) of the Regulations; alternatively, TSI's activities as a commercial agent were "secondary" for the purpose of Regulation 2 (3) and so again, the Regulations do not apply;
 - (2) even if they did apply, TSI was itself in repudiatory breach of the Agreement and as a result: (a) there could be no contractual damages claim and (b) there can be no compensation claim under Regulation 17, by reason of the operation of Regulation 18 (a);
 - (3) there is no separate Regulation 8 claim for commission in respect of post-termination transactions because on the facts, they were not "mainly attributable" to TSI; alternatively, the Regulation 8 claim was excluded by the Agreement.

THE EVIDENCE

5. At the trial of this action, I heard from the following witnesses on behalf of TSI: Mr Dainty himself, and Philip Cherry, formerly a consultant at CA who worked with TSI and who became a business associate of Mr Dainty. For CA, I heard from Ritu Mahandru, CA's Vice-President for sales of application development software for Europe, the Middle East and Africa, Jack Kudale, who was at the material time the world-wide senior Vice-President for application delivery solutions at CA Inc., CA's parent company, Noelle Doherty, Stephen Bartlett and Daniel Humphreys, all account directors at CA, Eric Grotefeld, the current Senior

Vice-President for the application delivery business unit worldwide but at the time running that unit in Europe, and Benny Van de Sompele, a consultant for CA Belgium BVBA/SPRL, an associated company of CA.

6. In addition, each side called an expert forensic accountant to deal with quantum. For TSI, I heard from Charles Lazarevic of Moore Stephens LLP and for CA I heard from Daniel Ryan of Berkeley Research Group.
7. There is a very substantial volume of contemporaneous emails which is of considerable assistance when considering the events of 2013 and the allegations made against TSI.
8. I deal with the particular witnesses in context below, but make some observations about Mr Dainty's evidence here. Generally, I thought he was a reliable witness although on some occasions he sought to understate his plans for or involvement with Intigua and was occasionally evasive when pressed on certain points or began simply to make arguments in support of his case. But on other occasions he made concessions. He was obviously somewhat embarrassed at having to deal with his discussions with Intigua (as might any party who was thinking of leaving his current engagement and then being given notice) because he would naturally not want to mention it openly. But the question is whether what he actually did in relation to Intigua amounted to a repudiatory breach.

THE BACKGROUND

9. RAS is "software about software" in the sense that its purpose is to coordinate and implement automatically the deployment of and upgrades for other software applications across the different operational environments in large organisations like banks and insurance companies, so that the underlying applications are fully integrated with the software operating environment. To do this manually, which involves many layers of testing, can be extremely time-consuming for a large organisation and the purpose of RAS is to perform these tasks automatically. Sophisticated RAS is complex and expensive and the time taken to close a deal with a large organisation can be considerable.
10. The RAS with which I am concerned was originally developed by an Israeli company called Nolio Limited ("Nolio"). I shall refer to the version of the software originally marketed by Nolio and then by CA as "the Product" which is how it is referred to in the Agreement.
11. Mr Dainty has been involved in software sales since 1998. By early 2009 he was ready to begin acting as an independent consultant and on 14 January 2009 he incorporated TSI. Through that vehicle he made a contract with Nolio dated 19 July 2009 pursuant to which TSI agreed to promote, market and sell the Product. He received an advance monthly payment of £4,000 and commission of 40% on any sales. On 1 September 2010 that agreement was replaced by a consultancy agreement made between Nolio and Mr Dainty personally, though he still traded through TSI which invoiced for and received the monies due, from Nolio ("the Nolio Agreement").
12. Under the Nolio Agreement, Mr Dainty received a monthly fee of £8,000 plus commission. The commission was expressed partly in money and also in percentages. His focus was on banks, insurance companies, telecoms companies and other FTSE 250 companies.
13. It is common ground that the process of selling the Product to a potential customer is or may be drawn out, involving parties at different levels of seniority or skill sets at the customer. In 2010 Mr Dainty closed a deal with City Index for Nolio with a value of \$110,000 yielding a

commission for Mr Dainty of \$14,357. In January 2011 he procured the sale of the Product to Tesco for in excess of \$500,000 producing a commission of \$60,609 and there was a further smaller sale in December 2012. In March 2011 he negotiated a sale to ICAP, a financial services company, worth \$250,000 with a commission of \$25,649. In November 2011 he procured a sale to BUPA worth more than \$500,000 and commission of \$23,975. In September 2012 he negotiated a deal with Thompson Reuters worth about \$1.95m with commission of \$74,796. There was a further deal in March 2013 worth another \$1.125m securing a similar commission. On 12 March 2013 he secured an agreement worth \$4m from Barclays which was the product of 2 years of work by Mr Dainty and Nolio. So it cannot be said (nor is it suggested) that Mr Dainty did not know how to sell the Product.

14. In early 2013 Mr Gerstel, Nolio's CEO, told Mr Dainty that Nolio was being sold to CA. The CA Group, to which it belongs, is a multinational software development company with a global presence. But it had no RAS presence here at all. Its acquisition of Nolio meant that Mr Dainty would have to terminate his agreement with Nolio and procure a new one with CA. After some negotiations, he made, through TSI, the Agreement. It provided that CA would pay the commission due to TSI for the deals which had in fact been closed just prior to its acquisition of Nolio, in particular in relation to Tesco, Barclays and Thomson Reuters. It was also agreed that the value of those deals would count for later commission purposes, which meant in effect that future commission claims would be at the higher rate of 10%.
15. The Agreement contained the following material terms:
 - (1) the Recitals refer to the development by CA of the Product and that TSI had represented that it has the experience, know-how, willingness, pre-requisite ability and connections to market and promote it to customers in the UK and Ireland and that CA decided to retain the services of TSI and granted certain rights of marketing and/or promotion;
 - (2) by clause 2.1, CA engaged TSI on a non-exclusive basis to approach potential customers for the purpose of promoting, marketing and selling the Product;
 - (3) by clause 3.1, TSI would provide CA with the services listed in Exhibit A. The latter said that TSI would act as Director, Solution Sales and provide CA with the following services: development, management and implementation of CA sales, plans, revenues and budgets according to company business and work plans to achieve company annual and quarterly sales objectives, oversee the hiring and development of UK sales organisations and maintain key customer relationships and develop and implement strategies for expanding the customer base;
 - (4) by clause 3.2 "During the Term and in consideration of the payments to be made hereunder, Consultant shall devote a substantial amount of time and effort in providing the Services";
 - (5) by clause 3.7, entering the Agreement did not itself oblige CA to offer any work to TSI nor for TSI to provide or for CA to accept or pay for any particular services. Neither party wished to create any mutuality of obligation between them;
 - (6) by clause 3.8, as an independent professional, TSI would not be subject to direction or control and itself accepted responsibility for the proper provision of the Services;
 - (7) by clause 6.2 CA agreed to pay a monthly fee during the Term the terms of which would be provided in CA's 2013 compensation plan document attached as Appendix A. That appendix in fact included not merely the consultancy fees but the commission terms as well;

- (8) clause 9 provided, among other things, as follows:

“CA SHALL NOT BE LIABLE TO THE CONSULTANT, THE CUSTOMER, OR TO ANY THIRD PARTY, FOR INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES, FOR LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE, LOSS OF DATA OR LOSS OF BUSINESS, WHETHER IN ACTION, IN CONTRACT OR TORT, EVEN IF THOSE DAMAGES WERE FORESEEABLE OR RESULTED FROM THE BREACH OF A FUNDAMENTAL TERM HEREIN, OR IF CA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.”

- (9) by clause 10.1 the Agreement would commence on the effective date and continue in full force and effect for a period of 12 months thereafter and would be automatically renewed for additional successive periods of 12 months each. “In consideration of the terms and conditions hereof, either party may terminate this Agreement for any reason or no reason by giving the other party 90 days’ prior written notice”;
- (10) by clause 10.2 in the event of either party terminating that termination would not affect the other party’s financial obligation to make any required payments “hereunder” for referrals made by TSI. TSI “hereby releases and agrees to indemnify CA for any statutory or other claims by any party relating to termination including without limitation any claim under the Commercial Agents (Council Directive) Regulations 1993. Notwithstanding the foregoing, CA could terminate the Agreement “for cause” at any time if TSI was in default with respect to any provision of the agreement and such failure or default was not capable of remedy or continues unremedied for a period of 14 days after written notice from CA;
- (11) by clause 11 TSI agreed to keep confidential the Agreement and all information disclosed by CA to it during the term, among other things;
- (12) by clause 12.1 TSI covenanted throughout the Term and for a period of 12 months following the effective date of termination howsoever arising that it would not (a) “engage directly or indirectly in any capacity whatsoever... In any activity competing directly with the actual and/or planned activities and/or Application Release Automation products of CA (including the Product); and (b) whether on its own account or on behalf of others... entice away from CA any person firm or company with whom to TSI’s knowledge CA had any contractual or commercial relationship as an employee ,consultant, licensor, joint venture, supplier, customer, distributor, Consultant and/or contractor of whatsoever nature”;
- (13) Clause 16.4 was an entire agreement clause whereby the Agreement contained the whole agreement between the parties superseding any previous communications and it excluded any representations or statements of any kind made by either party which were not expressly stated in the Agreement.

16. The culture at CA, as both sides would agree, was very different from that of the small start-up company which Nolio originally was. CA was a much larger, more formal, organisation with many more layers of administration. As Mr Dainty accepted in evidence, having worked there for a while, it was not his preferred environment.

17. In the course of 2013 he continued to work on a project to sell the Product to Nationwide which had begun back in 2011 and equally, to Deutsche Bank (“DB”) in a process which had started back in 2012. Neither, in the event, came to fruition.

18. By the summer of 2013, he was disillusioned and started to have discussions with another company called Intigua which sold management stack software whose essential function was to monitor and maintain other software at the operating level. It is, according to Mr Dainty, a

significantly different product from the Product. To a certain extent only, CA disagrees, I say that because it accepts that the products themselves do not compete directly. I deal further with the question of competition below.

19. However, before Mr Dainty's plans became too far developed, he was issued with the Notice Letter dated 13 September. It said that, in accordance with Clause 10.1 of the Agreement, notice of termination had the effect that the Agreement would end on 15 December 2013 i.e. 3 months hence. It added that during the notice period "you will continue to provide services as detailed in the Agreement as normal" and "we would... remind you of your obligations contained within the Agreement".
20. Thereafter, Mr Dainty continued to be involved in the ongoing negotiations for new deals but relations with CA were difficult; first, because Mr Dainty let it be known to some of his colleagues who had previously been with him at Nolio, that he was pleased to be leaving and second, because CA was somewhat ambivalent as to the extent to which it really wanted him to be fully involved in the negotiations, given his departure in the near future.
21. The notice period did not run its course because of the Termination Letter dated 9 October 2013 by which CA purported to terminate the Agreement forthwith. It stated as follows:

"Dear Scott,

In our written notice of termination of the above referenced contract on 13 September 2013 CA reminded you of your obligations during the notice period. It has come to our attention that you are in breach of the provisions of the above referenced agreement (namely clause 3.2 and 12.1) by asserting your employment or engagement with Intigua (see attached your linked in profile - taken today). As a result of such breach of contract CA is providing notice of termination effectively immediately.

You will be paid up to today. However, if CA discover that you have been working for Intigua prior to the date of this letter CA will seek to recover sums paid for any time when you were working for a competitor of CA in breach of your agreement and being paid by CA to provide services to CA. CA will be contacting Intigua to inform them of this situation...."

22. It will be recalled that Clause 3.2 obliged TSI to devote a substantial amount of time and effort in providing the Services and Clause 12.1 prevented TSI from engaging in competing activities. Both of the breaches of these Clauses were said to flow from TSI's involvement, or assertion of an involvement, with Intigua. Although, prior to 9 October, CA was aware of Mr Dainty's negative attitude in some respects, it did not allege this to be a material breach in the Termination Letter. Nor was it alleged that TSI failed to perform overall in addition to a breach of Clause 3.2. I should add here, that at the end of the trial, CA abandoned its allegation that TSI was in repudiatory breach or that it contributed to a repudiatory breach, by virtue of disparaging remarks about CA in some of Mr Dainty's emails. That was a sensible concession.
23. It is common ground between the parties that if the matters complained of did amount to a repudiatory breach on the part of TSI, then CA was entitled to terminate the Agreement summarily. At trial, CA relied not only upon the matters expressly stated in the Termination Letter but some others. These included: (a) the disclosure of a copy of the Agreement to Intigua on 9 July 2013, (b) informing Intigua prior to 16th July that he had been visiting DB in New York and (c) on 26 September 2013 sending an analyst's report to Intigua. CA was not aware of such communications until disclosure in these proceedings.
24. There was something of an issue at trial as to whether all of the repudiatory breaches now relied upon by CA were articulated in the Termination Letter and if not, the extent to which

CA could rely upon them in accordance with *Boston Deep Sea* principles. For reasons which appear below, that issue is not of any significance here.

25. Equally, there was a question whether, if TSI was in repudiatory breach as a matter of contract, so as to justify CA's summary termination, that also had the effect of removing TSI's entitlement to claim compensation under Regulation 17 (2), because of the operation then of Regulation 18 (a). Again, for reasons appearing below, this issue does not in fact arise.
26. It is somewhat ironic that if CA had not taken any steps to remove TSI, the latter would almost certainly have given notice itself in late 2013 because Mr Dainty was simply unhappy working with CA and he had found another opportunity. Had TSI given such notice, it would have no claim for damages in contract or for compensation under Regulation 17 (2). However, this did not happen and I have to assess the merits or otherwise of TSI's claim on the basis of what did happen.
27. Before turning to the facts, I deal with 3 legal issues as follows:
 - (1) What is the relevant notice period for the purposes of Clause 10.1?
 - (2) Did the supply of the Product here amount to the "sale of goods" as required by Regulation 2 (1)? and
 - (3) What is the meaning of Clause 3.2 of the Agreement?

THE RELEVANT NOTICE PERIOD

28. TSI contends that the 90 day notice period in Clause 10.1 cannot be given at any time, but only so as to expire at the end of any given 12 month period. Accordingly, although CA gave notice by letter dated 13 September 2013, that notice did not expire on 13 December but rather on 25 March 2014 being the first anniversary of the Agreement. CA argues to the contrary.
29. Since it is common ground that the Agreement actually terminated on 9 October by the sending of the Termination Letter, the only relevance of the contractual notice period is that, however long it was, it was on any view running as between 13 September and 13 December 2013, and also, it provides a basis for the contractual measure of damages in contract if, by the Termination Letter, CA had repudiated the Agreement. As to that, if TSI is right the relevant damages period would run from 9 October 2013 to 25 March 2014. On the other hand, if CA is right, then the notice period must expire on 13 December, the original notice having been given on 13 September 2013.
30. I find that the correct interpretation of Clause 10.1 is that proffered by CA. Coming as it does within a separate part of Clause 10.1, I consider that the right to give notice is a free-standing right which is what one would normally expect in a term contract. If the purpose of the 90 day notice was only to prevent the Agreement from renewing at any 12 month anniversary, one would expect to see a provision saying that it would renew automatically unless 90 days notice was given to end at the anniversary. I agree that, on CA's view, it could be said that the automatic rollover at the end of each 12 month period is strictly unnecessary because in effect, the Agreement continues until and unless terminated by the 90 day notice. But terms providing for a rollover on a 12 month basis are not unusual.
31. In Clause 10.2, there is a reference to TSI's continued right to receive required payments "during the period preceding the effective date of termination." I think that this tends to support the interpretation contended for by CA. I agree that later in Clause 10.2 there is a

reference to the right of CA to terminate the Agreement for cause “at any time” and this is different from Clause 10.1 where that phrase does not appear. But I do not think that makes a difference. The point being made by the use of that phrase in Clause 10.1 is surely that the termination can be made without any notice.

32. Accordingly, CA was entitled to give the 90 day notice of termination with immediate effect i.e. not so as to expire only on the first anniversary. Thus it expired on 13 December 2013.

DO THE REGULATIONS APPLY AT ALL?

Introduction

33. CA contends that the Regulations do not apply to this case at all because:
- (1) the Agreement is concerned with the negotiation for and promotion of the supply of the Product which is software and such supply does not constitute “the sale of goods” for the purposes of the definition of “commercial agent” in Regulation 2(1);
 - (2) even if some part of TSI’s role could be described as negotiating the sale of goods, such activities are to be regarded as “secondary” for the purposes of Regulation 2 (2) and (3) and the Schedule to the Regulations.
34. I deal with each of these in turn.

The Nature of the Product and software generally

35. The Product is an application as opposed, simply, to data. More particularly, in this case, it is a program designed to give effect to the automatic deployment of or changes to other applications across a large computer network. Like other software it is itself intangible in the sense that it does not exist in three-dimensions and cannot be physically handled or transported. But its effects can be observed as with, for example, gas or electricity.
36. In common parlance, and without wishing to state the obvious, I believe that as a piece of sophisticated, commercial non-bespoke software, it would be regarded, at the very least as a “product”. It would not be regarded, nor is it, a “service”. Like other pieces of software, it is “commodified” i.e. it is capable of transfer and commercial exploitation. Moreover, so far as “tangibility” is concerned, while software itself is intangible and its method of delivery may be electronic, it can only operate in a tangible environment i.e. (a) being loaded onto a hard disk or server or some other permanent storage system, somewhere, and (b) when it runs, it will be run on a computer, tablet, reader mobile phone (depending on the software) and so on. In that sense it is akin to digital music. As Professor Clark of University College Dublin put it in an article called “The Legal Status of Software” in March 2016, “Digital content... possesses a functional equivalence to goods.”
37. Indeed, for the purposes of the Agreement, the Product is treated very much as tangible goods. Thus TSI was engaged to promote, market and sell it - there was clearly no difficulty foreseen in referring to sales and commission on those sales. Moreover, and although hardly determinative, the purported release of CA by TSI of any claims under the Regulations set out in Clause 10.2, rather suggests, objectively, that absent such a release, the Regulations would have applied.
38. While there is copyright in the Product owned by CA, it would be wrong to describe the Product as simply intellectual property in my view. Rather, the property rights associated with

it are simply intellectual as opposed to real or personal. In that sense it is like other products, for example, music downloaded on MP3 files or books downloaded in electronically readable form. The fact that there are detailed provisions as to the use of the Product and the terms of the licence (see, for example, the master agreement made between CA and Tesco at D5/p3839 – “the Tesco Agreement”) does not alter this. In the case of the Product, the agreements with CA usually provide for the grant of a perpetual licence. Although it is possible to supply it on a lesser licence, it was not suggested to me by CA that perpetual licences were not the usual commercial aim and indeed Mr Dainty said that they were the most popular. I proceed on that basis.

39. Finally, the Product can be delivered either on tangible media or electronically. See in this regard, for example, paragraph 11 (f) of the Tesco Agreement. These days I would suggest that the essential characteristics of a piece of software like the Product cannot depend on its mode of delivery any more than the nature of tangible goods depends on whether they are transported by rail, sea or air.
40. Working from first principles, therefore, I would consider that the Product would today, be regarded as “goods” albeit that it is not tangible.

The Directive and the Regulations

41. The next question is whether there is anything in the Regulations or the underlying Council Directive 86/653/EEC of December 1986 (“the Directive”) which requires a different view.
42. The Preamble to the Directive refers to the need to harmonise the law in Member States relating to “commercial representation contracts”. It refers to the fact that trade in goods between Member States should be carried on under conditions which are similar to a single market and thus the approximation of Member States’ legal systems. The reference therein to trading goods does not, in my view, impel a particularly narrow definition of goods.
43. It is right to note that in an earlier proposed version of the Directive, the commercial agent was defined very broadly as one who had the power to “conclude an unlimited number of commercial transactions in the name and for account of another” whereas the actual Directive restricts the role of a commercial agent to one who has authority “to negotiate the sale or purchase of goods on behalf of another person”.
44. Accordingly, and whatever else is excluded by this change, clearly an agency to provide or supply services is out with the Directive. I accept that commercial contracts are not simply to be divided up into the sale or supply of goods on the one hand and the supply of services on the other in some binary fashion. To take but one example, it might be difficult to say that a letting agent was engaged on behalf of its principal in selling or supplying either goods or services. Equally, and by analogy, while Article 7 (1) (b) of the Recast Brussels Regulation on jurisdiction provides a method of determining the place of performance of the obligation in question in cases of either the sale of goods or the provision of services, that Article clearly contemplates that there may be contracts which fall into neither category.
45. Accordingly, I would not, for the purpose of interpreting the Regulations, hold that the supply of software must be treated as the sale of goods simply because it is clearly not the provision of services. Nor would I interpret the Regulations as including the supply of software simply because it might be a good idea to provide the protection offered by a harmonised EU law of commercial agency to as many agents as possible. First, if this is a pure question of policy, then there is a strong argument that this is a matter for EU legislation and not the Court. But

second, and in any event, the view was clearly taken by the EU legislators that the maximum protection that could be given to commercial agents was not in fact to be given, since the scope of the actual Directive was much narrower than the draft.

46. The true question is whether, having regard to the commercial context of the supply of software and its attributes, it should, in the modern world, be treated as a form of sale of goods for the purpose of these Regulations. In that context, I do not see that the expression “sale of goods” should be read as excluding the supply of software simply because the ownership of the intellectual property rights therein will not usually be transferred absolutely (i.e. by way of assignment) or because the software is not tangible. Those points might have more resonance in the context of the law of sale of goods but in my judgment, context is everything. It follows that the debate as to whether software constitutes “goods” for the purposes of sale of goods legislation is not directly relevant. However, since I have been addressed fully by reference to that debate, I now turn to it but with the heavy caveat just expressed.

The Sale of Goods Context

47. I accept that, in the context of the “pure” law of sale of goods where, among other things, the question of the passing of property and risk may arise and where such contracts are distinguished from contracts of hire purchase or hire, there may be difficulties of application to the supply of software. I also accept that at least in the case of consumers, as defined by s2 (2) of the new Consumer Rights Act 2015 (effective as from 1 October 2015 and being derived, among other things, from the Consumer Sales Directive 1993 and the Consumer Rights Directive of 2011) software is given its own special treatment via the rubric of digital content. But the argument made before me, that for the purpose of the Regulations, this proves that software has to be treated as something other than goods, has been overstated in my view. First, in respect of non-consumer sales, the 2015 Act and its section on digital content simply has no application. The question will still arise whether software falls within the definition of “goods” as set out in s61 of the Sale of Goods Act 1979, as amended. Second, it misses the point about the importance of context - a definition which is apt for pure sale of goods purposes may not be apt for the purposes of the Regulations.
48. Section 61 of the 1979 Act states that goods “includes” all personal chattels other than things in action and money” which may suggest a requirement of being tangible. On the other hand, it is only a partial and not exhaustive definition. And it can be said that at least in some jurisdictions, the proper legal “home” for contracts to supply software is seen as the law relating to “goods” see for example the New Zealand Commercial Guarantees Act 1993 which provides that “goods” includes “for the avoidance of doubt... computer software.”
49. In fact, even in the sale of goods context, the case law dealing with the status of software is both scarce and limited in effect.
50. The English authority most commonly cited is the well-known decision of the Court of Appeal in *ICLv St Albans Council* [1996] 4 All ER 481. The immediate issue there was whether a software contract contained a term that the software would enable the plaintiff council to compile an accurate return. This was first put on the basis of an express term and then, in the alternative, either the implied term as to fitness for purpose conferred by s14 of the 1979 Act, or if not, a term to be implied at common law. The Court of Appeal in fact held that the alleged express term did exist and so it became unnecessary to consider the matter further. However, Sir Iain Glidewell did so and the other two members of the Court of Appeal agreed with him.

51. He dealt first with the implied term under s14. This required the software to be considered as “goods”. As to that, he said that while a computer disk containing a program would amount to goods, the program itself would not, having regard to s61. So, had the program been supplied on a disk then, if either the disk or the program stored upon it was defective, he would have held that there was a breach of the implied term under s14. However, he found that the transfer of the program here, by an employee of the defendant, onto the plaintiff’s computer did not amount to a transfer in that way.
52. The first point to note is that these observations were clearly *obiter*. The second is that, whatever the perception may have been in 1996, 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, as noted above. Indeed, the view taken in *ICL* must entail the proposition that the software somehow becomes part of the disk so that a defect in the former must involve a defect in the latter. However that does not follow. Such difficulties in this decision were clearly articulated by, for example, Fullerton J in the Supreme Court of New South Wales in *Gammasonic v Comrad* [2010] NSW 267 at paragraphs 24-32. Furthermore, in his report on Consumer Rights in Digital Products made for the BIS in September 2010, Professor Bradgate of Sheffield University took the view that the definition in s61 did not necessarily exclude software even though it excluded some intangibles and made the obvious point that software was not in the minds of the legislators at the time of the original Sale of Goods Act 1898.
53. In *Southwark v IBM* [2011] EWHC 549, Akenhead J held that the supply of software pursuant to a perpetual licence with copyright being retained by the licensor could not be a “transfer of property” for the purposes of the threshold requirement of a contract for the sale of goods in s 2 (1) of the 1979 Act. I see the force of this in that context. Akenhead J then went on to deal with the issue of software being goods, though clearly *obiter* since he had already found the Act to be inapplicable. He saw no reason in principle why software could not be goods at least where they were transferred on a disk. This really takes the matter no further than *ICL*.
54. I accept that in the Scottish case of *Beta v Adobe* Outer House 14 December 1995, a dispute between the parties to a software supply contract, Lord Penrose considered that such contracts were neither wholly contracts for the sale of goods nor the supply of services but *sui generis*. But at best, this must be seen in the context to which it was applied, namely remedies for breach of the supply contract.

Cases on the Regulations

55. There are two cases dealing expressly with whether the supply of software can constitute the sale of goods for the purposes of the Regulations.
56. The first is *Accentuate v Asigra Inc* [2009] EWHC 2655. The immediate issue was whether the court had jurisdiction over the defendant in the context of service out of the jurisdiction of proceedings brought by the claimant for breach of a commercial agency agreement concerned with the distribution of a software product. On an appeal before Tugendhat J, a question arose as to whether this claim was within the Regulations at all. In relation to this, he found that the claimant had a real prospect of success on the merits because the supply obligation included the supply of hardware. In that regard, he observed, in paragraph 56, that “Software is intellectual property not a chattel, but hardware is a chattel”. In a context where it was not necessary for the Judge to pronounce upon the software question finally or indeed at all, and given the brevity of the point made, I do not consider it to be of any real assistance here. Further, and as noted above, I would respectfully disagree that software is simply intellectual property.

57. The second case, is *Fern Computer Consultancy v Intergraph* [2014] EWHC 2908, a decision of Mann J. Again, the actual issue was whether the court should have granted permission to serve out of the jurisdiction. So far as the merits were concerned, therefore, the claimant had to show a good arguable case. The claimant was the agent of the defendant to sell its software products. Strictly, the merits did not arise here because Mann J found that the claimant's claim did not pass through any of the jurisdictional "gateways" being the logically prior question. But since he heard full argument on the applicability or otherwise of the Regulations, he ruled upon it.
58. At paragraph 74 he found that there was no European guidance on the "software = goods" question and in particular the wording of the Directive did not shed any light on the meaning to be given to the word "goods". However, he did then observe this:
- "Having said that, however, it is apparent to me that there could be policy arguments which might persuade the European Court that, on a policy basis, "goods" should bear a wide interpretation, particularly bearing in mind that the present digital age has demonstrated a widespread use of the download of digital material which does not correspond to a traditional view of "goods" but which has the same net effect as the provision of physical media - downloads of books and music spring to mind. There would be sound policy reasons for extending to downloads the effect of provisions which would apply to physical carriers of the same material (books, vinyl records and music CDs). However, in the end I do not have to reach a decision on this point in the light of the decision that I reach below in the light of the provision of physical material."
59. Because the software in that case was transferred on a physical medium, he held that there was a sale of goods anyway, which is why the argument about "pure" software was academic. However, in paragraph 86 he drew a distinction between the definition in section 61 of the 1979 Act and the context of the Regulations, and said
- "..I bear in mind that the Regulations do not contain a definition of goods corresponding to the Sale of Goods Act, and that the analysis of the expression is not constrained by reference to the word "chattels", so it becomes easier to argue that such a supply is the supply of goods."
60. Given the context in which Mann J made his observations, there is certainly nothing in them which would count against my finding that software amounts to goods for the purpose of the Regulations. Indeed, he clearly had some sympathy with that view.
61. A further argument raised by CA is that since software cannot be "sold" (because it is inevitably licenced even if on a perpetual basis) that is itself another reason for deciding that it cannot amount to "goods". In my view, these are separate questions and I deal with the "sale" issue below.

Is there a "sale" of the Product here?

62. In a commercial functional sense, there can be no doubt that there is a sale because for the vast majority of customers for the Product the aim is that they receive a perpetual licence subject only to particular conditions in relation to breach etc and otherwise subject only to questions of upgrades and maintenance. The intention, as with the sale of any product is that the purchaser has the unfettered ability to use it forever subject to copying restrictions and so on. The Agreement itself refers to sales as noted above.
63. Some guidance here is obtained from the ECJ decision in *Usedsoft v Oracle* [2012] 3 CMLR 44. The case concerned the EU Directive on the protection of computer programs so the context was different. The licences in question allowed customers to download from Oracle's website the databank software in question, for permanent use by them and certain other

defined users. Usedsoft's business was to acquire "used" licences for the software, for example from a customer who had a licence to use the software for a number of persons but where the maximum number had not been used up. Usedsoft would then resell those "used" licences to other customers who would then download the software from Oracle's website. However, a term of the original licences granted by Oracle was that they were not transferable - only Oracle had the right to distribute and make copies. Accordingly, it brought infringement proceedings against Usedsoft on the basis that neither it nor its customers had any right to use the software since the original customers had no right to transfer the "spare" licences. Usedsoft countered by saying that its customers had lawfully acquired the software because Article 4 (2) of the Directive applied. This stated that the distribution rights would not be exhausted within the EU except where there was a "first sale or other transfer of ownership" in the EU made by the right holder or with its consent. Usedsoft contended that the online transfer of the software by Oracle to its customers amounted to such a sale, which Oracle denied.

64. The ECJ decided first that the concept of "sale" here must be regarded as an autonomous EU concept and interpreted uniformly. Second, it held that Article 4 (2) must be interpreted to mean that the distribution rights would be exhausted if the copyright holder had authorised the downloading of the copy from the Internet onto a data carrier and had also conferred in return for payment of a fee corresponding to the economic value of the copy of the work, a right to use that copy for an unlimited period. Put shortly, an unlimited licence in this context amounted to "sale".
65. In reaching that conclusion it stated in paragraph 45 of the judgment that the making available of a copy of the program and conclusion of a user licence agreement were intended to make the copy usable by the customer permanently in return for the payment of the fee designed to enable the copyright holder to obtain remuneration corresponding to the economic value of the copy. By paragraph 46, it held that these operations involved the transfer of the right of ownership. By paragraph 47 it observed that it made no difference whether the copy of the program was made available by means of a download or through a material medium like a CD. Finally, in paragraph 49 it stated that if the term "sale" was not given a broad interpretation so as to encompass all forms of product marketing characterised by the grant of a right to use a copy of a computer program for an unlimited period, in return for a payment of the fee, the effectiveness of Article 4 (2) would be undermined because suppliers would simply have to call the contract a "licence" rather than a "sale" so as to circumvent the rule of exhaustion.
66. I agree that the context in *Usedsoft* is different from our own. In particular, the Directive there was concerned specifically with software and had deliberately used the word "sale" - so that it must be given some real meaning, especially as it could be taken as read that typically, the intellectual property rights and software are not transferred absolutely but would be the subject of a licenced even if unlimited. Nonetheless, *Usedsoft* is important in my judgment for two reasons:
 - (1) it held that software could be "sold" using an autonomous definition of sale;
 - (2) it emphasised that it was considering the matter in the particular context of that Directive. So, one can infer, the fact that "sale" might be given a more limited meaning for example in the context of EU sale of goods legislation, or within the Recast Brussels Regulation, does not matter. In other words it supports the argument that context is important.
67. In that sense I would agree respectfully with the observations made by Mann J in *Fern* at paragraph 93 of his judgment to the effect that "sale and purchase" for the purposes of the

Regulations should have an autonomous meaning and second, that the observations made by the ECJ in paragraph 49 of *Usedsoft* might apply to the Regulations as well.

Conclusions on “sale of goods”

68. For all of the above reasons, I conclude that in the context of this Agreement and for the purpose of these Regulations, software as constituted by the Product does amounts to “goods”. To summarise:
- (1) It is permissible and indeed desirable to have an autonomous definition of sale of goods for the purpose of the Regulations; how software is treated within the “pure” law of sale of goods is of limited assistance;
 - (2) Where the “goods” in question here, software are treated in the agency agreement in the same way as other “tangible” goods, they should be interpreted in the same way when they are clearly a “product” and not, for example, a service;
 - (3) In the modern world, and in the case of the Regulations, there is no reason to require the Product to be tangible or a “chattel” in the traditional sense, especially when installed so as to operate in a physical (i.e. hardware) environment;
 - (4) There is nothing in EU or domestic legislation or case-law to prevent this interpretation;
 - (5) The fact that the proprietorial character of software is intellectual and not real or personal does not alter the position.
69. Further, and as stated above, I also conclude that the intended supply of the Product amounts to a “sale” of goods. The fact that sometimes, the Product might be supplied on a limited licence does not affect this conclusion because one has to decide whether TSI was a “commercial agent” in the round and having regard to the principal way in which the Product was supplied.

Secondary Activities

70. Regulations 2 (2) and (3) provide that they shall not apply to persons whose activities as agents are “secondary” and the latter is defined in the Schedule. By paragraph 1, the activities of the agent are secondary where it may reasonably be taken that the primary purpose of the arrangement with the principal is other than that set out in paragraph 2. Paragraph 2 covers the arrangement where the business of the principal is the sale or purchase of goods, the goods are normally individually negotiated and concluded on a commercial basis and procuring a transaction is likely to lead to further transactions in those goods so that it is in the interests of the principal in developing the market for those goods to appoint a representative. Examples of cases falling within and outwith paragraph 2 are then given in paragraphs 3 and 4 respectively.
71. Suffice it to say that given my conclusion above that the supply of the Product here (however delivered to the customer) amounts to a “sale of goods”, it must follow that the activities of TSI as commercial agent were not “secondary” for the purposes of Regulation 2 (3) and the Schedule. The only thing which it was appointed as agent to do was to sell the software. There was no associated hardware to be supplied or promoted (cf *Crane v Sky* [2007] 1 CLC 389).
72. Accordingly, the Regulations are engaged here.

INTERPRETATION OF CLAUSE 3.2 OF THE AGREEMENT

73. It is plain that the Agreement was drafted in such a way that it could not in any sense be taken to be a contract of employment. See, for example, Clauses 3.7 and 3.8. But more than that, this was a non-exclusive agency; it was open to CA to employ other agents or to negotiate sales through its own staff, which to some extent it did. Indeed, following TSI's departure it has apparently not used any external agents.
74. Against that background, in my judgment, Clause 3.2 means what it says. Mr Dainty (through TSI) was not obliged to spend all of his time in performing the services but simply a substantial amount of time and effort. I do not accept the contention that despite the careful wording of Clause 3.2 this was, as a matter of contract, a full-time appointment. I agree that the Schedule in Appendix A describes TSI as "Director, Solution Sales" and that the remuneration, especially the commission, was potentially very large. If Mr Dainty wanted to earn the maximum amount of commission he may have felt it necessary to devote himself full-time but that does not turn the Agreement into a full-time appointment. I also agree that at least initially, Mr Dainty said in evidence that he saw the engagement as full-time but again that in and of itself does not alter the clear words of Clause 3.2. The same goes for the somewhat forensic point that TSI's expert, Mr Lazarevic was to assume, when calculating compensation, that Mr Dainty would work full time. Similarly, the view of Mr Grotefeld, that TSI was to work solely for CA, whether as a matter of contract or practice, is simply wrong.
75. I agree that Clauses 3.7 and 3.8 do not of themselves say that TSI's appointment was not full-time. But nor do they say that it is. They are, in my judgment, at least consistent with the express words of Clause 3.2, as one might expect. Provided TSI devoted at least a substantial amount of time how it rendered the services was up to Mr Dainty to decide as an "independent professional".
76. CA relies upon Clause 3.6 in support of its claimed interpretation of Clause 3.2. But all this does is provide a warranty that TSI had no other agreement or obligation that "is or will be in conflict with any of the provisions of this Agreement, or that would preclude Consultant from complying with the provisions hereof;". Quite so, but that suggests that provided there was no such conflict TSI could have such other agreements and obligations, not that it could not. Equally, the obligation in Clause 8.1 to perform services with all due care and attention is irrelevant to the question of substantial or full-time. It goes to quality not quantity.
77. I agree that a construction of the Agreement which would allow TSI to devote a substantial amount of time and effort to two different clients would be unworkable or uncommercial. But that is not the issue here, which is simply whether, subject to the other restrictions in the Agreement, TSI could do some other work provided that TSI at least devoted a substantial amount of time and effort to CA. It is worth noting here that Mr Dainty clearly had the capacity for doing some work otherwise than for CA. His working day could start as early as 5.30am and end as late as 11pm, and he would often work over 60 hours per week.
78. I also consider that I am entitled to take into account the fact that (subject to the proviso in Clause 3.6) there was no express restriction on TSI working for anyone else. I can see no reason in principle here not to take into account the fact that in the Nolio Agreement there was a qualified restriction of this kind in its Clause 3.2. The point is not that this shows that the parties agreed specifically not to have such a restriction here (though that is probably the case) but that the Agreement could easily have incorporated such a restriction - but it did not. Further the notion that because there was no express restriction in Clause 3.2 of the Agreement it actually meant that the parties impliedly agreed that TSI could not work for anyone else at all

(cf the end of paragraph 6 of CA's written closing submissions on the evidence) is clearly wrong.

79. Had TSI been spending some time working for someone else that CA did not feel sensitive about (as it clearly did with Intigua) I do not accept that it would have reacted by alleging that TSI was not so entitled. The real battleground here in my view, is whether in fact TSI did devote a substantial amount of time to CA and if not, whether that failure was repudiatory and whether, apart from that, or in addition to it, the dealings with Intigua amounted to a repudiatory breach of the contract by reason of the non-competition provision in Clause 12.1.

THE FACTS

Competing Products?

80. A major part of CA's case on repudiation as against TSI is that it was in breach of Clause 12.1 because such activities as Mr Dainty had with Intigua, as at 9 October 2013, involved competing with CA since the products of both companies competed with each other on the basis that they were similar products. It is sensible to deal with this issue at the outset.
81. Although CA's case is not that the Intigua product is itself the same as the Product and it accepts that there are real differences, it alleges a somewhat more nuanced case of competition which means that it is still necessary to start with a brief description of each product. CA's Product, RAS, is concerned with installing or upgrading complex applications (produced by others) that are required to operate within a customer's IT infrastructure which could involve the use of thousands of different servers. That process of installation, if done manually, could be extremely time-consuming. The applications themselves will have various layers - data storage, processing the business conducted through the application, and a user interface, for example the software dealing with Tesco Clubcard points. The Product automates this process by installing or upgrading the applications in the most efficient way and accessing all the relevant servers so as to minimise the disruption to the service overall.
82. The Intigua product, on the other hand, is software which monitors the performance of the IT infrastructure of a customer's network of servers. Such servers have software running on them called agents which report on the "health" of the servers - their speed, security, performance etc. The purpose of the Intigua product, which is "management stack" software, is to integrate the performance of all of the individual pieces of agent software with the result that the performance of the infrastructure is more efficient, the ultimate result being the consumption of less CPU time, or memory. While, as with RAS, the ultimate aim is the saving of a substantial amount of time, the products themselves do different things. I take these points from Mr Dainty's evidence in court and also paragraph 121 of his witness statement as well as Mr Cherry's witness statement at paragraphs 12, 16 and 17. I also take the difference between the two products from the evidence of Mr Van de Sompele called by CA who said that he was "very clear" that as at October 2013, Intigua's product did not compete with CA's. He accepted that the Intigua product would be sold to an organisation's infrastructure team where as the Product would be sold to the organisation's applications team.
83. CA's case is that while the products themselves are different, the Intigua product could be made to compete with the Product by: (a) the addition to it of free software known as "Puppet" and (b) Mr Dainty's general know-how once he started to work for Intigua. That proposition in and of itself demonstrates that the products did not actually compete with each other anyway but I go on to consider the merits of the proposition as advanced by CA.

84. Mr Van de Sompele agreed that while Puppet had some of the features of RAS and did deal with application deployment, it was much simpler and could not satisfy the complex and substantial demands of a very large organisation - the kind of customer that CA was trying to sell to. He said that Intigua software could work alongside Puppet in the sense of being compatible with it but agreed that he could not say it would be any more compatible with Puppet software than similar software produced by others. Moreover, if an organisation did not already have RAS, the fact that it could purchase the Intigua product as management stack software, and also Puppet so as to give it some RAS functionality, so as to enhance the basic package, does not mean that Intigua now competes with the Product. An organisation could just as well add the Product to the Intigua software.
85. While Mr Cherry accepted in evidence that some customers might choose a combination of Intigua software and Puppet as opposed to the Product he was quite clear that Intigua itself does not enhance the Puppet software. Rather, that would simply be a useful package for an organisation that does not yet possess management stack software like Intigua and wants some RAS functionality as well. As Mr Cherry said, the customer would still have to assess Puppet as against the Product as to which was more suitable for its needs at the level of RAS. Put another way, the fact that Intigua can “coexist” with Puppet does not make it a product competing with the Product. On the key points I accept the evidence of Mr Cherry. I of course bear in mind that it could be said that he is not independent since he is a colleague of Mr Dainty and he also left CA to join Intigua. Nonetheless, I thought he was a straightforward and reliable witness. Moreover while noting the differences on the functionality tables which both he and Mr Van de Sompele deployed so as to compare the various products, I do not believe that on the key issues there was any real difference between them.
86. As for Mr Dainty’s contribution so as to convert as it were, the Puppet element of the supposed Intigua package to mirror more directly the Product, there was really no evidence to support it. Mr Van de Sompele’s evidence on this point came down to saying that Mr Dainty’s experience would enable him to sell “the package” effectively, but as already noted, Puppet is not appropriate for very large organisations (if it was, Nolio would have been out of business). Nor was Mr Dainty really cross-examined on this point.
87. Furthermore, there is absolutely no evidence that after Mr Dainty and Mr Cherry joined Intigua it ever was marketed as a package with Puppet and there was no independent evidence to suggest that there was any competition between Intigua and the Product.
88. Furthermore, and very tellingly, CA made no attempt to enforce any of the non-compete restrictions in Clause 12.1 of the Agreement as against TSI or Mr Dainty or Mr Cherry and his consultancy company, after they left.
89. It is plain that Mr Kudale’s view as expressed in evidence, that the products were competing, was simply wrong.
90. I now turn to the general question of repudiatory breach and before making my findings, I set out the relevant evidence in chronological order, below.

The Chronology

91. By 21 June 2013, Mr Dainty was looking for other opportunities than CA with which he was disillusioned because there was a very different way of working than at Nolio - much more structured and, as he would see it, more bureaucratic. On that day, he had spoken to Shimon Hason of Intigua. He asked him to use his personal email address because it was “probably

best to discuss opportunities" that way. That he wanted to keep such discussions private is understandable, as might be the case with any employee or agent thinking of leaving-but it does not necessarily indicate any actual or intended breach of contract. In late June, Mr Dainty was introduced to other Intigua personnel and by 1 July he had received a non-disclosure agreement from Intigua in relation to information imparted to him during these discussions.

92. Mr Cherry was also interested in joining Intigua. On 13 and possibly part of 14 August, he and Mr Dainty met Intigua at their offices in Boston, having previously attended a meeting with DB in New York on Monday 12 August in relation to the Product. In evidence Mr Dainty accepted that this meant he had been unable to attend one of Mr Kudale's monthly Wednesday calls with various members of staff and representatives of CA and that this failure to do so was not in CA's interest. However he denied that this meant he was doing nothing on, say 14 August for CA because he was attempting to make calls, for example to Ms Mahandru as shown by her email to him on that day. He also forwarded an email from his contact at Nationwide and said he had asked further questions and was awaiting replies, as well as communicating with Mr Bartlett about DB.
93. By 15 August he had decided in principle to leave CA and join Intigua and on that day he was corresponding with a potential customer of CA at Thomson Reuters.
94. On 20 August Mr Dainty sent to Intigua a copy of Mr Cherry's agreement which was in similar terms to TSI's and also made through a corporate vehicle, namely Cerasus Consulting Limited. On 21 August, Mr Hason asked Mr Dainty whether Mr Cherry would be needed by him "from day one" of the first quarter of 2014 or could it be later in that quarter or in the second quarter of 2014. Mr Dainty added that "I intend to start working on Intigua part-time during Q4 this year which should also give some traction in Q1 in the UK when we officially start working with Intigua".
95. I accept Mr Dainty's evidence that the official start date was 1 January 2014 because of the reference to "Q1". It was also the intention of Mr Dainty that if he left, he would give 3 months notice, which would end in December 2013 at the latest. Working "part-time" for Intigua in the period before was not in and of itself a breach of the Agreement though it could be if it meant that he was not devoting substantial time and effort to CA.
96. Then, on 9 September, there was an exchange of emails about the VMworld trade fair which was to take place in Barcelona on 15 to 17 October. Mr Hason asked Mr Dainty what his view was about this trade fair and whether potential customers from his territory (i.e. for CA) would go to it. He said that if this was the main event in Europe he assumed that the large customers would go. Mr Hason said that it would be a good opportunity to get him "fully immersed" and Mr Dainty said that he would attend. Mr Hason said that he knew that CA did not do VMWares any more and did not know if there was a conflict but wanted to check. Mr Dainty replied that there was no conflict and that "both Phil and I are up for it." I accept Mr Dainty's evidence that this was not a conflict of interest with CA since its products and the ones relevant to the fair were different and CA would not even be attending that fair. It is not surprising that some of CA's customers, being very large organisations would go but that is because their IT requirements were not confined to RAS.
97. Coincidentally, by that time, CA had resolved to give TSI 3 months notice. On 12 September, Ms Mahandru informed Mr Dainty orally on the telephone about this and it was put on the basis of CA's need to reduce resources. On the same day, Mr Dainty chased up Mr Hason to see where they were on contracts and said that he wanted to "start positioning Intigua with prospects but need to have agreements in place before I do this". Also, in response to an email

from a colleague who said that it was very sad that he was given notice, Mr Dainty replied “no it’s not!!! I didn’t know that I could still do cartwheels.” In another email, he described himself to colleagues as “ex-regional director” though it was later removed. While this might be regarded as somewhat petulant or flippant, it is not of any real significance here.

98. On the same day, he also said that he could not attend an internal meeting on 19 September although previously he had said he would be available. He explained this by saying that he had just been given notice verbally and wanted to see what terms were in the termination letter before committing. The organiser of the meeting, Mr Reynolds, was sympathetic to this. It was submitted on behalf of CA that this was Mr Dainty being disingenuous and in truth he now wanted to avoid his responsibilities to CA, but I do not accept that. For example, it might have been that he was put on garden leave by any letter which gave him notice.
99. On 13 September, Mr Dainty received the written notice as set out above. On the same day he emailed Mr Mahajan, the principal contact at DB for the purpose of the negotiations to sell to it the Product, stating that he would now be taking a backseat on the engagement with DB because he was now serving out his notice period. He then said “Gregg Swensen will be the main point of contact moving forwards. Do you have availability to meet with Gregg in NJ next week?” He forwarded a copy of this email to Ms Mahandru.
100. This has been characterised by CA as a deliberate step taken without authority which could have undermined CA’s relationship with DB, demonstrating Mr Dainty’s intention no longer to devote substantial time and effort to CA. I disagree. As he said in evidence, Mr Mahajan was an important contact for Mr Dainty and indeed CA recognised later that Mr Dainty was the only person with whom he would speak, despite many other attempts. Mr Dainty had built up a good relationship with him and wanted to let him know the position and indeed give details of a new contact. I accept that, as he saw things, he was now out of the loop to some extent in respect of the internal discussions about DB so that he could properly say that he was taking a backseat. This is backed up by emails sent (coincidentally) just before he was given notice on 12 September 2013.
101. He wrote to Mr Kudale, having been given oral notice and set out in the letter the work that he had done in relation to DB. He said that his position was now somewhat compromised because of the decision to terminate the contract. And he then asked that with the recent changes made to the opportunity strategy and personnel “please advise on what capacity you would like me to be involved in the opportunity now. All I am asking for is clarity. It is disrespectful to ignore this email for a 3rd time. Please advise.” Ms Mahandru accepted that if he had been writing to her in this vein, she would have replied at the outset.
102. Indeed, later on, for the period up to 9th October, there is no evidence of any particular task allocated to him in respect of DB which he did not undertake. And of course, it was entirely in TSI’s interest to persuade DB to buy the Product because it would then lead to a very substantial commission.
103. In an email dated 15 September 2013 to a former Nolio colleague Uri Scheiner, Mr Dainty said that he was going to resign at the end of the month anyway so the notice from CA was “no big loss”. He said that he had lost his “mojo” with all the CA “bullshit and bureaucracy” and was looking forward to starting something new. I do not read much into this. He would not have been thinking of resigning if he was perfectly happy working with CA, but it does not mean that he was going to break the contract in the notice period.

104. Mr Dainty was also cross-examined about the fact that he agreed to have some training about the Intigua product before the Barcelona trade fair which would take 4-6 hours spread over some weeks. But that does not mean that he could not, or did not, give a substantial time to CA over that period. At its highest he said that this would take 20% or less.
105. Mr Grotefeld then emailed Mr Dainty on 16 September to say that CA did want to keep him engaged but that the critical tone of his emails to staff and the timing of his email to DB had caused concern; he was also told to liaise with Ms Mahandru going forward.
106. On 16 September Mr Dainty also emailed Mr O'Dwyer of HSBC in these terms: "... I will shortly be leaving Nolio to join a new Israeli start-up... The new company, Intigua, is probably more relevant to you than Nolio as it virtualises the management layer allowing better control and policy-based management of the management stack on virtual and cloud environments. I can tell you more when we meet..." This was put to him as an example of approaching potential customers of CA but instead pushing them towards Intigua. I do not accept this and I accept Mr Dainty's explanation in evidence. Mr O'Dwyer's principal role as an infrastructure architect at HSBC would have been to look at management stack products like Intigua as opposed to RAS, hence the former being "more relevant". There is no evidence that Mr O'Dwyer was dealing with the negotiations with CA over a possible purchase of the Product and indeed their earlier emails for example on 10th September, show that Mr O'Dwyer was indeed someone whom Mr Dainty already knew and the meeting referred to was to catch up over coffee after Mr Dainty had asked him whether he would be going to the VMworld trade fair. So it was not about diverting him from the Product as it were.
107. There are other examples given of Mr Dainty writing to potential customers of CA for the Product like Barclays and BT but the reality is that unless those approaches prevented him from spending a substantial amount of time with CA up to (as it turned out) 9 October, they are irrelevant.
108. On 16 September, a number of CA personnel (not including Mr Dainty) were invited to join a telephone call about the DB pitch. This was fixed for 1:30pm UK time on 18 September. On that day, Ms Mahandru emailed Mr Dainty (i.e. with less than 2 hours notice) to say that he should join the call if he could. He said that he could not due to a sporadic signal.
109. In fact, on 17 September Mr Dainty had agreed to join in an Intigua conference call on 18 September at 3pm UK time. This may or may not have rendered his participation in the earlier CA internal call impossible but I think it is a fair point that he was only given a short amount of notice about it. And although Mr Dainty could not say, he could indeed have been travelling at that time. So I do not regard that particular matter as being of any real significance save that it does show the extent to which he was being kept out of the loop.
110. However, after he had arranged to take part in the Intigua call, he cancelled a pre-arranged meeting for the morning of 18 September with a potential CA customer, "Hotels for U", and it is not clear if this was ever rearranged although he had told a colleague earlier in the day that it should be postponed. On this occasion, Mr Dainty was somewhat reluctant to accept at first that this was because of the Intigua conference call and second that in this instance he had preferred his interest in getting acquainted with Intigua business to CA's interests in maintaining a client meeting.
111. On 16 September, Mr Dainty signed, for TSI, the agreement with Intigua ("the Intigua Agreement") which was in similar terms to the Agreement. It had a start date of 1 October but the fixed monthly fee was payable only from 1 January 2014. However, there was a

commission entitlement on deals done in 2013 and not just 2014 although Mr Dainty thought it unlikely he would get commission in respect of any 2013 deals.

112. In fact, by 17 September Mr Kudale had formed the view that if possible, TSI should be terminated immediately; Mr Grotefeld and Ms Mahandru considered this but she then sent a copy of the Agreement to Mr Grotefeld, saying that there were not really the grounds to do so, having reviewed it.
113. CA contends that in truth, Mr Dainty was working full time or for a substantial amount of time for Intigua, really from 17 September onwards. I accept that he was doing emails and making calls and must have spent some time getting himself up to speed on Intigua-but I do not accept that it was a substantial amount of time, or time which, overall, prevented him from working for a substantial time for CA. I accept that if one takes the terms of the Intigua Agreement at face value, so that he was obliged to and did spend a substantial amount of time on Intigua, it would make it unlikely that he could do the same for CA but in my view this did not happen. Moreover, an “official” start date of 1 January 2014 is supported by the absence of any fee due prior to that point. I accept Mr Dainty’s evidence that while he was obviously preparing for his new role he was not actually performing it to anything like the extent he would do once the notice period had expired. That he clearly on occasion did some work of Intigua did not mean that he had now commenced his engagement proper.
114. On 26 September, Mr Dainty, along with many other CA operatives, was sent a report by an IT analyst company called 451, external to CA, about the Puppet software. The covering email said that the report was for internal use only and not for clients and that permission was needed to quoted externally. However, Mr Dainty forwarded it to Intigua saying that it was not directly relevant from a competitive angle but if there was a “strong coexistence story” it would be good to get it in front of Puppet’s 800 paying customers.
115. I agree that as this was a document treated as confidential by CA he should not have sent it on to Intigua but in truth it was a report that could have been obtained anyway from 451. In addition, I accept Mr Dainty’s evidence that while the co-existence idea might attract some customers who wanted some RAS as well, it would not be competing with the Product because that was a much larger and more complex market.
116. A further example of what was said to be Mr Dainty’s now lack of interest in promoting the Product against the interests of CA was his reaction to a proposal by Mr Reynolds to Mr Cherry and another on a pitch to Hiscox. He said when asked about this proposal and what were his thoughts, “not a lot really. I’ve had a number of discussions with Hiscox over the past 18 months or so and have been waiting for them to prioritise and fund investment in this area...”
117. It is said that Mr Dainty was frustrated at the time hence the lack of interest in the Product here. But his evidence in fact was that he had done a lot of work in that last 18 months on this potential customer which had not come to fruition and that was what he was frustrated about. I do not accept that he was required to say more than he did or that it betrayed a lack of interest in the Product.
118. On 7 October, Mr Dainty met Mr Mahajan in London. He reported on this to say that DB was still proceeding with IBM and expected to conclude in the next couple of weeks. They would then let CA know what the next steps were but the focus at the moment was on IBM. IBM was another supplier of RAS. He added that Mr Mahajan had said that the “constant barrage” from various quarters is not showing CA in a good light. Exactly the same story as at

Nationwide and exactly the same outcome-it pisses the customer off and makes them less likely, not more likely, to discuss business with the company”.

119. Ms Mahandru’s response was to say that this was not very conclusive but Mr Mahajan had declined to meet anyone else from CA and Mr Grotefeld thought that Mr Dainty’s email was “so provocative”. However, I see no reason not to believe Mr Dainty’s evidence that this is what Mr Mahajan told him. CA’s evidence was that it was very common with a very large prospect like DB to have people contact counterparties at different levels so there may be many strands of communication. But here, to judge from the emails sent to Mr Mahajan from various people at around the same time I can see that he might have got irritated especially as in truth DB was unlikely to go with CA anyway. In response to an email from Ms Mahandru saying that she did not think Mr Mahajan was right to feel barraged, Mr Dainty responded that “there are none so blind as those who will not see” which again produced an adverse reaction from Mr Grotefeld. In fact the reference to the same story at Nationwide is borne out by the latter’s email dated 14 June whereby it effectively told CA to calm down and await further events instead to making numerous calls to it.
120. All of this seems to me to be a simple disagreement as to how to deal with DB and whether CA’s approach thus far had been the right one.
121. Later, on 8 October, Ms Mahandru said that Mr Dainty had reached out to Mr Mahajan who had agreed to meet him. They could not stop Mr Dainty meeting him and needed some feedback. That, to my mind shows that CA was not itself sure what tack to adopt with Mr Dainty now that he had been given notice. It is not clear to me that they actually wanted him fully engaged on DB especially when others like Mr Bartlett were already querying who would get the commission if a deal was later closed. Ms Mahandru said at one point that they could not always keep everyone in the loop, and she knew that Mr Kudale did not want Mr Dainty too involved in DB. Again, I cannot see any particular task on DB that Mr Dainty was asked to do which he did not.
122. At one point in her evidence Ms Mahandru was critical of the fact that Mr Dainty seemed too interested in earning commission and did not devote enough time to broader issues at CA – but if so that would suggest he was as keen as he could be to conclude the deals at DB and Nationwide if possible, as opposed to disengaging from them.
123. Following the exchange of emails concerning DB, Mr Kudale wrote on 8 October to say that he did not believe Mr Dainty was helping them here. “I have no idea details of his tone and discussion with our customers. It’s time we ask him to stop representing CA and part away now. Your thoughts.” On 9 October Mr Kudale added that he was being told that they both (i.e. presumably Mr Dainty and Mr Cherry) had some other contract already. Mr Grotefeld responded, agreeing with Mr Kudale. He added that they saw yesterday on LinkedIn that Mr Dainty was also saying that he was representing Intigua. His entry said that he had been with Intigua since October 2013 and then there was text about the success of its software. He described himself there as “Regional Director”. Underneath that entry was the entry for CA where he described himself as having been there since March 2013 and where he was a “Director”. Mr Grotefeld added that he had asked Ms Mahandru to speak with HR and legal to have his contract terminated and prevent further access to CA systems.
124. That then led to the Termination Letter. According to Ms Mahandru’s unchallenged evidence she, Mr Kudale and Mr Grotefeld worked with the legal team to draft the letter with general input from Mr Kudale and Mr Grotefeld, although Mr Kudale’s oral evidence as to the extent which he personally was involved in taking legal advice was somewhat unclear. It is clear

from the evidence of Ms Mahandru and Mr Kudale the principal reason why the Agreement was summarily terminated was because they regarded him as working for a competitor. In fact this was not so, for the reasons given above.

125. A final matter is the transmission by Mr Dainty to Intigua of a copy of his contract and that of Mr Cherry. This was not referred to in the Termination Letter but was not known by CA at this stage, and I consider that they are entitled to rely upon it. There was here a clear breach of Clause 11 of the Agreement but it was minor-there was nothing, per se, confidential in these agreements save the expenses and payment provisions but Ms Mahandru accepted in evidence that she would not have had a problem in Mr Dainty disclosing them for the purpose of a new engagement (as would have been expected when TSI was already in its notice period).
126. I should add here that it was alleged that TSI had enticed Mr Cherry away from CA in breach of Clause 12.1 (b). This was a new allegation and while CA was not permitted to allege it as a separate breach, it was permitted to cross-examine Mr Dainty on the point. In the event, there was nothing in this point in my view. Mr Dainty certainly assisted Mr Cherry by sending to Intigua a copy of the latter's agreement with CA and suggesting he seek more money from Intigua. But the reality is that both wanted out from CA and both effectively approached Intigua.
127. Clause 10.2 provides for a contractual right of immediate termination either where the breach is remediable but is not remedied within 14 days or where it is irremediable. While CA is not relying upon either limb of this contractual right to terminate because it alleges repudiatory breach at common law (as it is entitled to do) it is nonetheless worth noting that Mahandru's evidence was that she regarded all of TSI's breaches as non-remediable. As it happens, I do not agree - he could have been asked to ensure that he comes to all future arranged meetings and reduce his activities for Intigua to a minimum until the notice period ran out. Provided that was done, his mere association with Intigua would not have been a breach since there was no competition involved. That would, in my view, have been a way to keep them on board. CA would have to decide whether they really did or did not want him to continue to work with DB and if so, and if a deal with DB later closed, there would have to have been an agreement as to whether he was entitled to commission and if so how much - but that issue would arise anyway, whether there was a summary termination or not.

ANALYSIS

128. In my judgment, having considered the evidence as whole:
 - (1) There was no breach of Clause 3.2. In particular I would not regard the isolated examples of a cancelled meeting or telephone conference or planning to attend the VWworld conference (which took place after termination) as amounting to such a breach. But if they did, they were minor;
 - (2) There were breaches of Clause 11 in relation to the provision of copies of the Agreement and Mr Cherry's agreement to Intigua and also the 451 report; but these were minor;
 - (3) There was no breach of Clause 12.1;
 - (4) Whether such breaches as there were are taken individually or all together, there was no repudiatory breach. They simply were not substantial or serious enough.
129. It is also said that there was a conflict of interest here due to TSI's activities with Intigua quite separate from, and not dependent upon, the existence or otherwise of any competition between

the respective products. I accept the 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 the principal with full knowledge consents. And also that such a duty does not completely prohibit the adoption of a position or transaction in which such conflict might occur. It rather prohibits doing so without disclosure of all material facts so as to obtain the consent of the principal. See *Bowstead on Agency* at paragraphs 6-055 and 6-057. Various examples of where there has been a conflict were given by Mr Dhillon QC for CA, as found in the cases of *Cureton v Mark* [2006] EWHC 2279, *Nigel Fryer v Ian Firth* [2008] EWHC 767, and *Rosetti Marketing v Diamond Sofa* [2013] 1 AllER 30. But whether there is a breach of that duty to avoid conflict of interest and if so, how serious a breach it is, is largely a factual question. See here paragraphs 23-25 of the judgment of the Court of Appeal in *Crocs v Anderson* [2012] EWCA Civ 1400.

130. In *Cureton* the defendant who had an obligation to work for the claimant full-time went to see potential customers of the claimant which provided insulation materials but then at the end of such a visit sought to promote a separate business for the supply of windows. The particular problem here was said to be a risk to the reputation of the claimant because of the other products being offered over which it would have no control. But here, there was no full-time obligation and there was no such risk because to the very limited extent that Mr Dainty spoke to companies who were actual or prospective customers of CA, either he was referring to different personnel or the product concerned i.e. that made by Intigua was manifestly from a different but well-known source. And in *Rosetti* the conflict was the promotion of two ranges of furniture one from the principal and the other not, where the retailer purchaser could be indifferent to either. That is obviously not this case either. And in *Nigel Fryer* the defendant had to work exclusively for the claimant unless the claimant agreed in advance that he could work for someone else. It turned out that he was spending 30% of his time not working for the claimant and there was an issue here as to competing products and conflict. In addition he had been warned about his consistent failure to produce reports as to sales and his activities which he was contractually required to do. Taken altogether, the court there held that there was a repudiatory breach. Yet again, this is different from the case before me.
131. I would conclude that overall, there was no breach of the conflict of interest rule here. But if there was, it could only be because of particular occasions when Mr Dainty cancelled a meeting or did not attend a telephone conference or planned to attend the VMworld conference. And again, this would be a minor breach. Contact with Intigua or communicating with others on its behalf *per se* was not a breach. Moreover, any breach here, whether taken by itself or together with the other breaches referred to above was not repudiatory.
132. For the sake of completeness, I have considered whether the conduct of Mr Dainty (through TSI) was such that even if individual elements thereof did not amount to breaches at all, when taken with other conduct it could constitute a repudiatory breach overall. In my view it clearly could not.
133. Accordingly, there was no lawful basis for CA's termination on 9 October. This means that it was itself a repudiatory breach of contract entitling TSI to damages which are limited here to the earning of the consultancy fee, for the balance of the notice period.
134. Moreover, TSI has a claim under Regulation 17 (2) for compensation. Had there been a repudiatory breach on the part of TSI, that would have enabled CA to argue that it could rely upon Regulation 18 (a) so that no compensation award should be made. But in the event, this does not arise.

QUANTUM

THE REGULATION 17 (3) CLAIM

The Law

135. Regulation 17 provides for two remedies for the agent upon termination of the agency. Regulation 17 (3) sets out the right to an indemnity and Regulation 17 (2) and (6) sets out the right to compensation, which is what TSI claims here. 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”. Regulation 17 (7) states that “such damage shall be deemed to occur particularly when the termination takes place in... Circumstances which... (a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent...”
136. The determination of such compensation was the subject of the well-known judgment of Lord Hoffmann in *Lonsdale v Howard* [2007] UKHL 1338. At paragraph 8 he noted that the agent was thereby treated as having lost something of value due to the termination and was entitled to compensation for that loss. At paragraph 11 he stated that 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.
137. He then stated as follows:
- “12. Like any other exercise in valuation, this requires one to say what could reasonably have been obtained, at the date of termination, for the rights which the agent had been enjoying. For this purpose it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract. He must be assumed to have been able to take over the agency and (if I may be allowed the metaphor) stand in the shoes of the agent... What has to be valued is the income stream which the agency would have generated.
13. On the other hand, as at presently advised, I see no reason not to make any other assumptions contrary to what was the position in the real world at the date of termination. As one is placing a present value upon future income, one must discount future earning spine appropriate rate of interest. If the agency was bite terms or in fact on assignable it must be assumed, as I have said, that the hypothetical purchaser would have been entitled to take it over. But there is no basis for assuming that he would then have obtained an assignable asset... Likewise, if the market for the products in which the agent was rising or declining, this would have affected what a hypothetical purchaser would have been willing to give. He would have paid fewer years purchase for a declining agency than one for an expanding market. If the agent would have had to incur expenses or do working earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything....
- 17.... The provisions of article 17 (3)... Are perfectly plain. It is the damage which she suffers as a result of the termination. The French domestic law... Says exactly the same. Where French and English Courts differ is the method by which that damages calculated. But the Court of Justice has made it clear that the method of calculation is a matter for each member state to decide...
28. I agree that this [... It is really a question of compensating for the notional value of that agency on the open market...] Is what compensation in article 17 (3) means. My only caution is that one must be careful about the word “notional”. All that is notional is the assumption that the agency was available to be bought and sold at the relevant date. What it would fetch depends upon circumstances as they existed in the real world at the time.: What the earnings prospects of the agency were and what people would have been willing to pay 4 similar businesses at the time...

38. .. The hypothetical purchase of the agency does not involve an assumption that the agent gives a covenant against competition. If the situation in real life is that the hypothetical purchaser would be in competition with the former agent and could not have any assurance that the customers would continue to trade with him that would affect the amount he was prepared to pay. If it appeared that all the customers were likely to defect to the former agent (or, for that matter to someone else) he would be unlikely to be prepared to pay much for the agency.

39. What matters, of course, is what would have appeared likely at the date of termination and not what actually happened afterwards. But I do not think that the court is required to shut its eyes to what actually happened. It may provide evidence of what the parties were likely to have expected to happen.”

Product Sales

138. Before considering the expert evidence I set out the facts as to sales of the Product. First, there is a list of sales starting in 2010 on which TSI or Mr Dainty earned a commission. They are set out in appendix 3 to the report of Mr Lazarevic for TSI and reproduced by Mr Ryan, for CA as appendix I to his report. Mr Ryan has, correctly in my view, excluded the last two deals worth something over £40,000 involving TUI and City Index because they were for consultancy services not sales of the Product. I have summarised those figures in paragraph 13 above.
139. As for actual sales following the termination date, Mr Ryan was provided with figures from CA although they were based on gross contract value rather than net contract value so the actual commission that could have been putatively earned by TSI, had the agency continued, may have been less. The figures are set out in Mr Ryan’s Appendix H
140. They show the following, with rounded figures:
- | | | |
|------|----------------|--------------|
| (1) | December 2013: | \$147,000; |
| (2) | March 2014: | \$233,000 |
| (3) | June 2014 | \$377,000; |
| (4) | September 2014 | \$81,000; |
| (5) | December 2014 | \$59,000; |
| (6) | March 2015 | \$728,000; |
| (7) | May 2015 | \$111,000; |
| (8) | October 2015 | \$39,000; |
| (9) | November 2015 | \$32,000; |
| (10) | December 2015 | \$1,300,000. |
141. Accordingly, total sales for 2014 was \$750,000, say £500,000 and for 2015 they were \$2,200,000, say £1,470,000. Total sales in 2013 had been £5,600,000.
142. Most of the large 2013 deals arose out of the work which Mr Dainty/TSI had done under the Nolio Agreement. But, as noted above, CA had agreed to pay the commission thereon and count the sales towards 2013.
143. CA produced a forecast dated 25 September 2013 for the second quarter of its financial year 2013-2014 i.e. to the end of September, being sales of £61,000 to Next and £180,000 to Credit Suisse. CA also produced a “pipeline” for that quarter which included as potential customers, DB, Nationwide and HSBC. No revenue was attributed for DB but there was a figure of

£500,000 under “Gregg”. As to these, by the termination date, it seems to me there was no real prospect in the near future of DB buying the Product. Its present intention was to go with IBM, a rival provider. Equally, by this time, there was no scope for a Nationwide deal. HSBC was an existing customer using CA’s LISA software so there was some scope for further deals. However, in her email dated 25 September 2013 giving a forecast for the 3rd quarter and an overview for the 4th quarter Ms Mahandru described the deals with DB as £500,000 and HSBC as £300,000 but being “outside” so there was no actual deal forecast. Otherwise overall, therefore, the forecast as at late September 2013, just before the termination date was not exactly promising for the Product. And so it proved to be in 2014 - see the figures above. 2015 was significantly better but still below 2013.

144. The calculation of compensation is particularly difficult in this case for the following reasons:

- (1) the Product was itself relatively new and its future prospects as at October 2013 were uncertain although there can be no doubt that the industry and particular key players like CA saw that it had significant potential;
- (2) the Agreement itself was terminable on 3 months notice and was non-exclusive; while TSI was in fact credited with deals brought about wholly or partly by CA’s own staff, this was not documented in writing and in my view any notional purchaser of the agency would discount this benefit; there was therefore in theory the prospect of competition in selling the Product from another non-exclusive agent or from CA itself. While CA would not want to spend £120,000 per annum on guaranteed fees without being sure of some benefit, it does not follow that it might not in fact see value in appointing another agent as well as in addition to maintaining its own sales force as it did while the Agreement was in place;
- (3) 2013 was a particularly strong year because a number of deals which had been worked on for a long time beforehand finally closed. 2012 was a very weak year for the opposite reason;
- (4) the pipeline deals as at October 2013 thought likely to close were small in number; neither side sought to adduce evidence of CA’s own forecasts as at the termination date. In this and other respects, where further information setting out forecasted or actual sales from 2013 might be relevant, the burden was on TSI to adduce and analyse it. This is because it bears the burden of proof of the amount of compensation. The fact that that information was in the possession of CA is irrelevant. TSI could have asked for it and obtained it.

The Expert Evidence

145. Bearing those uncertainties in mind, I turn first to set out and analyse the approach taken by each expert and then to give my views thereon.

146. Mr Lazarevic had a starting point which was a set of industry forecasts based on two reports dealing with the expected growth of RAS. The first was produced by Forrester in June 2015 and the second by Gartner dated 20 July 2015. The effect of both was to predict very substantial growth in this market but with such products having an ultimate life of no more than 10 years hence.

147. From this and other statistical information, Mr Lazarevic opined as follows:

- (1) 50% of the world’s 25,000 “large enterprises” will be interested in this technology;

- (2) based on Forrester's total estimated global spend on all IT purchases in 2015, and the UK share of that spend, being £150.5bn, this means that in percentage terms, the UK share of global IT spend is 6.54%;
- (3) applying that percentage to the 25,000 large enterprises around the world interested in this software, 1635 could be expected to be found in the UK;
- (4) the Forrester report suggests that CA's share of this market in the UK in 2015 was 18%. Applying that percentage to the total number of UK large enterprises would yield 294 customers;
- (5) since, according to Mr Dainty, TSI was promising commission on sales made not just by TSI but also the 3 sales staff at CA who would spend 25% of their time promoting the Product a purchaser of the agency should assume that over the course of 12 years from October 2013 (being the assumed shelf life of the Product) it would earn commission on the revenue obtained from those 294 customers;
- (6) the average customer spend since Mr Dainty/TSI started to promote the Product in 2010 was £625,000. Accordingly, over the next 12 years total receipts for CA would be £183.5m or £15.293m per annum on a straight-line basis;
- (7) using the commission rates in the Agreement (principally here 10%) the total commission due each year would be £1.343m with a total over 12 years being £16.12m;
- (8) after adding in the fixed fees of £120,000 per annum but deducting a notional salary of £83,000 and costs of £32,000 per annum, the pre-tax profit for TSI would be £1.383m pa;
- (9) alternatively if it could not be assumed that TSI would get commission on sales made by CA's own staff the pre-tax annual profit would be £727,918;
- (10) in such circumstances, a valuation would not be based upon the usual calculation of net earnings multiplied by a multiplier. Instead both Mr Lazarevic and Mr Ryan accepted that the right valuation method was the discounted cash flow approach ("DCF"). On that footing a 20% discount should be applied to take account of the time value of money and the risks of the business this would yield, as of October 2013 a value of £6.141m or (without commission on CA's own sales) £3.323m. This assumes that the agency would last as long as the product i.e. 12 years from October 2013.

148. In my judgment there are a number of very serious problems with this set of calculations:

- (1) First, there is a fundamental flaw because Mr Lazarevic is using hindsight information namely the predictions made by the two reports in mid-2015. He accepts that it would have been "preferable" to have such information as at October 2013 but went on to say that there was no evidence that had such reports been commissioned in 2013 they would have been any different. That is a hopeless suggestion when one is talking about an immature market in 2013 with all the uncertainties which that brings (embryonic and not developed as Mr Ryan put it), even if, anecdotally, it could be thought to have great hope value;
- (2) in that regard, Mr Lazarevic and TSI in its submissions placed great emphasis on the fact that CA itself had seen fit to purchase Nolio for \$40m in March 2013, therefore it should be assumed that the Product had enormous future value. I do not agree. First, that was the price for the global Product and not merely UK rights to it. If one wanted to apply Mr Lazarevic's UK percentage of the total IT spend to that figure, i.e. 6.54% the UK "part" of that price could be said to be only \$2.6m. Moreover, TSI could have

sought from CA information as to how that sum had been arrived at; it did not do so. Finally, it is well-known that in the IT industry very large sums are paid by large companies like CA for new or relatively new products or applications because they may prove to be extremely successful. Some are and some are not. But the simple purchase price paid for the Product here has very little relevance as to how a prospective purchaser of the agency would value it;

- (3) the basic tenets of the underlying calculation are simplistic. The fact that in money terms, UK spend on all IT purchases was 6.54% does not necessarily inform what the percentage of large enterprises is which are expected to purchase the Product. What we do know is that in the period 2010-October 2013, there were 6 large enterprises who continued to purchase the Product to some extent, namely Tesco, BUPA, Nationwide, TUI, Barclays and Thomson Reuters (perhaps one might include Ladbrokes and City Index as well); but as the figures also show, the spend for each customer varied a great deal. The 3 “big spenders” were Tesco Barclays and Thomson Reuters each with over £1,000,000; moreover, while Mr Lazarevic saw fit to adopt Forrester’s market predictions he failed to employ another of its predictions which was that each customer could be expected to spend \$200,000 only on the software. Far less than Mr Lazarevic’s customer spend of £625,000. In that sense, he was “cherry-picking”; this factor alone makes much of his reasoning suspect in my view. Indeed customer spend might come down anyway according to Mr Ryan, due to increased competition as the market moves forwards;
- (4) if Mr Lazarevic chose to use hindsight (as he did) it is remarkable that he did not even take into account CA’s actual sales up to December 2015 and also, what was predicted then and what sales were said to be in the pipeline then. That is not a rational or reasonable approach in my view. Had he done so, (as Mr Ryan did for the actual sales figure) he would have seen that his predicted sales on a straight-line basis for 2013-2015 were massively overstated; indeed they were massively overstated when compared with Forrester’s own predictions of growth which was on a bell-curve and not a straight-line basis. And if the bell curve analysis was right then later on, the assumed sales would appear to be far more than TSI with its present resources (as assumed by Mr Lazarevic) could undertake (see para. 4.6.6 of Mr Ryan’s report);
- (5) while Mr Lazarevic has taken some account of the risks associated with the non-exclusive agency in his discount factor he has not otherwise taken account of the fact that the Agreement might have terminated long before 12 years, including in circumstances where no compensation award at that point would arise for example because the agent itself terminated. As will be seen below, I do not accept that as a matter of law or valuation, no account is to be taken of early termination so that when the Product is expected to have a life of 12 years as at 2013, one assumes that the agency will simply continue for the whole of that period. So if the product had a life of 20 years, the assumption was that the agency would last for 20 years;
- (6) where there is no documented agreement to take commission on sales achieved by CA’s own staff no purchaser will take that into account so at best it is Mr Lazarevic is alternative figure of £3.323m which represents the true highpoint of TSI’s case.

149. For all those reasons, I do not consider it possible to place any real reliance on Mr Lazarevic is calculation at all. It did not surprise me to learn that at the CMC, prior to the production of his report, TSI’s own legal team’s estimate of the “highest sensible level” at which the compensation award could be put was £600,000.

150. I therefore turn to Mr Ryan. He agreed that, given the nature of the Product and the market, the appropriate valuation approach was DCF. However he said that one should not assume that the agency would last more than 12 months. This is based on CA's right to terminate on 3 months notice and the primary rolling period of 12 months. Moreover he did not consider sales to new customers as opposed to those to existing customers, as at October 2013 on the basis that a putative purchaser of the agency would regard it as too speculative to place any value on future sales to new customers. Instead he based his calculations on further spending by existing customers. On that footing, and because of certain other more minor adjustments to the primary figures, and assuming that each customer would have an average spend of £200,000 per annum his total value is radically less than Mr Lazarevic's. If the Agreement was assumed to last one year, the figure was £56,000 and if it was assumed to last for 12 years it would be £208,000.
151. But, as with the report of Mr Lazarevic, there are real problems here also:
- (1) given the immature nature of the market but the predicted limited shelf-life of the Product, there is no reason to assume that CA would not over time gain new customers. Indeed, for those of its customers who had acquired the Products with a full i.e. perpetual licence, their only future spend would be maintenance and upgrades; this is not comparable to a mature market for a product which has (subject to revision and improvements) a much longer shelf-life as a product, for example cars or washing machines but with frequent replacement. If it had been that type of market, then the usual multiplier method of valuation would be adopted;
 - (2) just as it is in my view absurd to assume a 12 year agency simply because the Product will last for 12 years, it is equally absurd to assume that the agency would end after only 12 months. The contractual rights to termination and the prospect of the agency being terminated by the agent are certainly relevant in my view but they cannot set the limit directly;
 - (3) accordingly, that means that I cannot rely on Mr Ryan's primary calculation of value. However, he usefully provided an alternative calculation assuming (a) a longer period and (b) the introduction of new customers in his Appendix L. While this was done essentially to show the position if a 12 year term was assumed, it is also useful because it shows the assumed net income for each of the years leading up to 12.
 - (4) If one adds up the total for each year, then if the assumption is that the Agreement will last for 3 years, the total value is £285,000; for 4 years it is £404,000; and for 5 years it is £499,000.
152. In my judgment it is a calculation of that kind which provides a more logical and reasonable foundation for the actual value. I agree with Mr Ryan's method of proceeding on the basis of the average value of each deal done rather than the average value of business done with each customer which had produced the figure of £625,000 the deal average was £403,000. Mr Ryan then assumed that a customer would spend £200,000 per annum over 4 years. His spreadsheet discounts the predicted new customer base to some extent because some of those customers may not in fact buy from CA. Even then, his predicted figures are considerably more than the actual figures for 2014 and 2015 if one did use hindsight.
153. At this point I deal with some of the more modest differences between the experts which I need to resolve.
154. First, the discount factor. Mr Ryan has chosen 25% not 20%. Given all the uncertainties about the Product and in my view the fact that the non-exclusive nature of the agency should be

given real weight, I accept his route to the 25% figure being based on a purchaser investing in a business in the “3rd stage of development” may be open to question as not a direct parallel, but nonetheless I agree with him that the risk profile is greater than that allowed for by Mr Lazarevic. In fact, the latter’s calculated percentage was somewhat more than 20%, being 21.1%. As it happens, because of the way in which such discount factors work after the first few years, there is not a great deal of difference between their effect.

155. Second, the costs of the agency. Mr Ryan assumes that the entirety of the £120,000 per annum fixed fee would be spent on the salary of the professional employed to run the agency. I do not think that there was a necessary correlation. On the other hand, I think that Mr Lazarevic’s figure of £48,000, based on a lower level employee, namely an “IT Specialist Manager”-as opposed to the role of Mr Dainty personally, is much too low. Doing the best that I can I ascribe a value of £90,000 per annum;
156. As to annual costs, based on the figures for TSI’s costs in its latest accounts, Mr Lazarevic chose a fixed cost figure of £32,000. But I agree with Mr Ryan that a proportion of these are likely to be variable and I adopt his costs figures which in fact are lower generally than those used by Mr Lazarevic.
157. Finally there is the question of tax. As a general rule any valuation will take account of the incidence of tax since it reduces the real revenue on which any calculation of value is based. However Mr Lazarevic says that tax (at a notional rate of to 20%) should not be deducted here because the recipient of the compensation award, based on a notional value, will have to pay tax on it as with other damages, so this means that it would be paying tax twice. This is really a matter of law not valuation practice and there is no authority directly in point.
158. In my view, however, tax must be taken into account at the valuation stage. Neither the Regulations nor the case law suggests that tax should not be deducted and the compensation is meant to be calculated by reference to a notional valuation. That conclusion would accord with the position had the valuation been conducted on a multiplier basis where the post-tax profits are usually employed and where claimants do not make an allowance for tax simply because the award may then be taxable in the hands of the recipient.

The Basic Quantification of the Regulation 17 (3) Award

159. Because the positions of the experts are so polarised with each erring in some significant way, I have had to do the best I can on the materials before me. I conclude as follows:
 - (1) I should assume a notional term of the agency of 4 years. I use Mr Ryan’s net figures to produce a value but I add to them, a sum representing the further saving of costs due to a salary figure of £90,000 not £120,000;
 - (2) I adopt Mr Ryan’s other variables for the reasons already given;
 - (3) That would produce a total award (after tax and the discount factor) of £475,000 in round figures.

Arguments as to the reduction of the basic quantification

160. Having dealt with the basic quantification, as it were, I now turn to deal with a number of arguments advanced by CA as to why the sum otherwise due by way of a Regulation 17 (2) award should be reduced.

161. First, Mr Dhillon QC submits that no account should be taken of the commission paid in respect of the Nolio Agreement prior to its agreed termination on 20 March 2013, on the basis that the present claim is made in relation to the termination of the Agreement. Accordingly, he said that the period of the earlier Nolio Agreement should be ignored otherwise TSI is obtaining compensation for the loss of the Nolio Agreement as well. There is nothing in this point. The only purpose of examining the history of dealings in the Product from the earlier period by effectively the same agent, was to assist in ascertaining the likely cash-flow going forwards i.e. after October 2013. Indeed Mr Ryan looked at the earlier history as well as Mr Lazarevic.
162. Second, and as a matter of law, it is said that going forward, the assumed agency must be supposed to end on 31 December 2013 because if CA had not terminated it then TSI certainly would have done. While I take on board the unusual situation here where it could be said that TSI has achieved a windfall by the “accident” of CA beating TSI to it on termination, I do not see how this can affect the valuation of the agency, assuming it is bought by (and thus operated by) someone else. Otherwise, one could say that any Regulation 17 award should be reduced if, for example, the day after the agency has been terminated by the principal, the agent found another lucrative agency to perform straight away. Right or wrong, there is no operative concept of mitigation of loss in the calculation of a Regulation 17 award.
163. Third, it is said that if (as I have found) the court decides that there was some breach of contract on the part of TSI but not so serious as to make it repudiatory, that breach should somehow be taken into account at the valuation stage. This, as I understood it, was the on the basis that there was little real goodwill in the agency as generated by TSI. However, while notional valuation is obviously of the agency “as is” it is on the assumption that it will be properly performed going forward. Neither expert sought to take account of any default on the part of TSI when making their reports.
164. In respect of some or all of the above points, CA placed reliance on what Lord Hoffmann had said in paragraphs 38 to 39 of *Lonsdale*, as set out in paragraph 137 above. But I do not see how this helps CA here. All Lord Hoffmann was saying was that a “real-life” valuation would have to take account of the risks of competition from the former agent or someone in a similar position. This does not mean that the former agent’s own intention to terminate the agency, or its prior conduct or any prior agreements, are “per se” relevant.
165. Third, as a matter of law, it is said that no account can be taken of the fact that at some point in the future, the Agreement might be terminated either by CA or indeed by the agent-in the latter case, of course, no right to a Regulation 17 award would arise. I accept that one cannot say that any valuer must proceed on the basis that the principal for example will take immediate steps itself to terminate at the first available opportunity here on 3 months notice. But nor do I accept the converse which is that the valuer cannot take into account the prospect of a lawful termination on notice at some point in the future. Otherwise, subject only to any shelf-life of the product any notional valuation would have to assume that the agency would last forever. I do not believe that this is realistic.
166. On this point, Mr Dhillon QC referred me to *McQuillan v McCormick* [2010] EWHC 112. Here, HHJ Behrens held that the principal’s supply contract was determinable on one year’s notice either without any preconditions or if sales fell below a particular maximum. He considered the risk of termination was critical and awarded £150,000 which was on the basis of a multiplier of 1 applied to an income itself set at 1.5 times the actual income. I accept that this case does not assist here because the risk of termination was considered in relation to the agreement supply products to the principal and not to the agency agreement.

167. In *Ramsay v Typhoo Tea* [2016] EWHC 486, however, Flaux J had to deal with a similar submission that a “real world” valuer would have to take into account the fact that the agency was determinable after 12 months. He rejected this. First he referred to the dicta of Lord Hoffmann’s judgment in *Lonsdale* at paragraph 12 set out above. As to that it is not in fact clear to me that Lord Hoffmann was dealing with a notice point. In context it seems to me that he was making the more basic point which was that although the agency had in fact terminated (otherwise there would be no Regulation 17 claim) in fact it must be assumed to continue and be properly performed. Second, Flaux J relied upon the decision of the Court of Appeal in *Page v Combined Shipping* [1997] 3 All ER 656. This was a case involving an injunction and so all the Court of Appeal had to do was to find there was a good arguable case on the merits in favour of the agent claimant. One submission was that the agent could not show that he would suffer any substantial loss because, even if the agency was not terminated, it would in fact have been open to the principal not to give the agent any work over the next 3 ½ years (that is the period until the primary period of the agency expired). So the agent would earn nothing. Staughton LJ did not accept this argument at least to the extent of saying that there was a good arguable case that he would earn a substantial sum because the language of Regulation 17 refers to the commission which “proper performance” of the agency would have earned, noting that the French German and Italian versions used words equal to “normal performance”. It was then said that this assumption would arguably exclude the possibility of the principal providing no work at all. I see that but the Court of Appeal there was (on a provisional basis only) dealing with a different scenario going forward and one which might be said to be unexpected i.e. the principal exercising its right to provide no work at all. Just as in the real world that might be unrealistic, so it seems to me that in the real world some account has to be taken of the prospect of the agency terminating especially where it is not a fixed term agreement.
168. And in practice, a standard net earnings valuation must in effect assume that the agency would not last forever. Hence, for example, in *Ramsay* itself Flaux J adopted a multiplier of 4. For those reasons, I would respectfully differ from his observations, if by them, he was intending to lay down a hard and fast rule that no account whatsoever can be taken of the prospect of a termination in the future.
169. I add two footnotes to this: First, I accept as a matter of logic that the agency deemed to be available for sale if later terminated, would itself contain a right to compensation under Regulation 17 (again) once bought by the notional purchaser. But again, one has to be realistic. I do not accept that that notional right in the future means that the notional valuation would have to regard the agency, again, as being of infinite duration or with equivalent compensation.
170. Second, Mr Dhillon QC submitted that the reasoning in *Page* would now be regarded as wrong anyway because, as Lord Hoffmann made clear in *Lonsdale* at paragraph 17, it is for Member States in their discretion to decide what method to use when assuming the value of the indemnity (and by inference also the compensatory award) in relation to which they enjoy a wide margin of appreciation. On that footing, he says that today, *Page* would be decided the other way because the Court should make the common law assumption (as per a damages claim) that the party in breach must be assumed now to have exercised his contractual rights to the greatest advantage to him. I do not go so far, not because I do not follow paragraph 17 of Lord Hoffmann’s judgment but rather because it is plain that a valuation exercise is not the same as a pure damages claim at common law anyway and that difference has to be respected. The better way, therefore, to consider rights of termination is, in my view, to say that they can be factored into account in a valuation which has to be conducted on a “real-world” basis.

171. In truth the point has only assumed acute importance in a case like this because both experts have agreed not to use a conventional net earnings/multiplier basis but a DCF basis where the question arises as to what length of cash flow to assume.
172. Accordingly, the award here is £475,000.

THE REGULATION 8 CLAIM

173. Regulation 8 states as follows:

“Subject to regulation 9 below, a commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if—

- (a) the transaction is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or...”

174. First, I analyse the claim on the footing that it has not been excluded by Clause 10.2 of the Agreement. Then I deal with that issue.
175. In the end, TSI’s claim under this heading is in respect of two customers only, namely Lloyds and Credit Suisse. As for Lloyds, the relevant transaction was in December 2013 when it made a large purchase from CA of other software known as “LISA”. But within the package was a number of licences for the Product where the total value was about £50,000. In the case of Credit Suisse there were 2 relevant transactions. First the supply in March 2014 of 100 product licences worth about \$98,000, but for which Credit Suisse did not pay because instead it used some software credits available to it pursuant to another agreement with CA. But then, in March 2015 there was a much larger transaction worth about \$700,000.
176. TSI says that a reasonable period here would be 18 months given the long lead-in time for the sale of the Product while CA contends for 6 months having regard in particular to the fact that the Agreement had only been running 6 months. I think that 9 months is a reasonable period. It reflects what Mr Dainty said in evidence about the minimum lead time but also the short duration of the Agreement as at the date of termination and also the fact that if a Product’s sale was going to be found to have been “mainly attributable” to the efforts of TSI, those efforts must have already been going on for some time prior to termination.
177. As to Credit Suisse, this was a relatively small deal and in evidence Mr Bartlett, for CA, accepted that up to September 2013 Mr Dainty was involved in trying to fix a purchase by Credit Suisse for about 500 product licences. Credit Suisse had already been a user of the Product before. See for example the emails at pages 3057-3063 of D4. This ended with Mr Dainty agreeing to get paperwork for 125 licences at that stage. He then handed over to Mr Bartlett and others. Although some months later, the March 2014 transaction really followed on from this. CA’s main argument as to why TSI should not get commission here is because Credit Suisse did not actually pay for it with cash. I do not accept that this is a valid distinction. Mr Bartlett accepted in evidence that if money had actually been paid over he would indeed have expected that both he and TSI would get commission.
178. Accordingly, TSI is entitled to commission on the sum of \$98,000 at the rate of 3.8% namely \$3,724. As a reasonable period does not extend to March 2015 there is no claim in respect of the later transaction.
179. In respect of Lloyds, the Product was only a very small element of a much larger package sold in December 2013. In evidence, Mr Doherty for CA accepted that in so far as Lloyds had

agreed to buy the Product as a small add-on, they must already have been satisfied about its usefulness from earlier discussions with Mr Dainty. By an email dated 23 September 2013 to Mr Keefer at CA, Mr Dainty reported back on a meeting he had had with Lloyds about it. Within a month of that communication, CA began negotiations with Lloyds on the package which ultimately included the Product. In those circumstances, again, I consider that the sale of the Product was mainly attributable to TSI. The value of the commission here, based on a sale of £50,000, at the rate of 10% since this was to be applied in 2013, is £5000.

180. A question arises as to whether credit should be given in the Regulation 17 award for any award under Regulation 8. Intuitively, one might think it should since in both awards, the actual estimated further income streams are taken into account. However, one award is based on a valuation representing the “statutory” award and the other is a defined right akin to clauses in relation to future sales that one might normally see in agency contracts anyway. In *McQuillan* it is true that HHJ Behrens said that credit would have to be given in respect of the Regulation 8 award but that was in the context of a contractual claim not the Regulation 17 claim - see paragraph 171 of his judgment.
181. In the chapter on Valuation of Commercial Agents in *Commercial Agency Agreements: Law and Practice 4th Edition*, written by Mr Lazarevic, he suggested there that commission payable under Regulation 8 may have an impact on the question of compensation under Regulation 17 because the hypothetical purchaser would not receive that particular pipeline commission - so this fact could lead to a reduction in the valuation. In evidence, Mr Lazarevic sought to disavow that view saying that it was actually a matter of law and that he had got it wrong in the book. I did not find that very persuasive - in truth I think there is something in what he said because the removal of a pipeline commission might affect the value given to the agency as a whole. However it is a question in each case whether it would. The difference may be *de minimis*, for example when one compares the award under Regulation 8 and the size of the valuation. That, I believe, is the case here. I do not believe that the modest Regulation award here would affect the notional value placed on the agency and indeed there is no real evidence to the contrary, as a matter of valuation. Accordingly, I give no credit against the Regulation 17 award because of the Regulation 8 award.
182. CA says that the wording of Clause 10 (a) of the Agreement has the effect of excluding Regulation 8. Although the wording purports to exclude all claims under the Regulations, it is common ground that Regulation 19 prohibits any derogation from Regulation 17 claims.
183. As a matter of construction, TSI says that the words are not apt to exclude a Regulation 8 claim since the first part of Clause 10.2 in effect preserves such a claim. I do not agree. I accept that Regulation 8 claim is similar to a claim based on an agent’s right to commission even after termination for sales of which he was the effective cause (and here see the decision of Fulford J in *PJ Pipe v Audco* [2005] EWHC 1904 at paragraph 135); but I think that the reference to “hereunder” in Clause 10.2 means the contractual right to commission including in respect of future sales and not a Regulation 8 claim. Thus the contractual right is preserved but any claim under Regulation 8 (among others under the Regulations) is not.
184. On that footing there has been a valid exclusion of the Regulation 8 claim. However, TSI’s answer to this point (itself not pleaded and taken for the first time at trial) is to seek to amend its claim at paragraphs 4 (D) and 9 so as to include a similar claim at common law since the Agreement either impliedly or expressly contained a right to commission on deals which emerged after termination but whose effective cause was the agent while the agency was on foot (“the Common-Law Claim”). On that basis, TSI would be entitled to the same sums as referred to above. CA did not object to that amendment as a matter of form. As to the merits

of the claim itself, I have already resolved above the factual questions about whether those deals were mainly attributable to or (in this context effectively caused by) TSI and found against CA on the facts here to the extent set out in paragraphs 178 and 179 above.

185. However, CA also contends that the Common-Law claim cannot be made because this is in effect for “referrals made by the Consultant in the period preceding the effective date of termination”. But if so details of the referrals had to be provided at least 5 days before the date of termination with a reasonable level of detail. Since that was not done, there is no Common-Law claim. However, in my judgment this part of Clause 10.2 applies only to cases of lawful termination on notice by either party. Otherwise (as here) TSI could not possibly comply with this requirement since CA in the event, terminated on 9 October (said by CA here to be the operative date) without notice. This interpretation is supported by the fact that the relevant words refer to the “effective” date of termination which must be when the notice expires.
186. Accordingly, the Common-Law claim must succeed and TSI will receive the same sums.

THE CONTRACTUAL AWARD

187. Since I have found that CA wrongfully terminated the Agreement summarily, TSI is entitled to damages for such period as it should have been given by way of notice. Here, if one ignores the termination letter, TSI was already serving out the notice period and so it would be entitled to the £10,000 per month fee down to and including 13th December. It is agreed between the parties that after giving credit for saved expenditure in this period, the quantum of this claim is £15,631.06.
188. However, CA makes the following points:
- (1) First, it says that there can be no separate claim here because of the successful claim for compensation under Regulation 17 (2). But in my view, one cannot make a direct comparison between the contractual claim here and the valuation-based award under Regulation 17 (2) for the same kind of reason which I gave in paragraph 180 above. The most that one might do would be to see if the valuation overall was affected by the fact that CA, the notional seller was paying out a separate damages claim. But even if so, then, as with the Regulation 8 award, it would depend on the relative size of the awards (see paragraph 181 above) and here, again I think it would be *de minimis* as against the Regulation 17 award. In addition in *Ramsay*, Flaux J made a contractual award on this basis in addition to the Regulation 17 award without deduction. I accept that in *Vick v Vogle-Gapes* [2006] EWHC 1665, Sir Richard Seymour refused to allow the additional claim for damages for lack of notice on the basis that the valuation would have included this but I respectfully consider that the approach taken by Flaux J was the right one;
 - (2) CA then says in the alternative, that this claim is excluded by the release provisions in Clause 9 or Clause 10.2, as set out above. As to Clause 9, I do not consider that this damages claim in respect of the basic monthly fee, payable in any event, can properly be described as any of the forms of loss described in the first part of Clause 9. Put simply the loss claimed here is a direct loss and the expression “loss of revenue” in Clause 9 has in my judgment to be read in context and *eiusdem generis*. Further, if it were otherwise it would deprive the right to 90 days notice of all meaning, from TSI’s point of view. That is such an absurd and commercially odd conclusion that one must interpret Clause 9 so as not to bar a simple claim for the fees payable in the notice period. The further words “even if foreseeable..or CA has been advised of the

possibility of such damages” add nothing here since they are directed to the stated forms of damage which in my view do not cover this claim anyway;

- (3) As for Clause 10.2, again, it would in my judgment be very odd if this was intended to exclude the claim for direct losses here due to proper notice not being given. Moreover, if (as I have found) Clause 9 does not prevent such a claim, it would be odd if, again, the basic right to 90 days notice is then undermined instead by a different provision. Accordingly, and despite the width of the wording in this part of Clause 10.2 I do not accept that this particular claim is released.

189. Therefore there is no obstacle to my awarding to TSI the agreed sum of £15,631.06.

CONCLUSIONS

190. Accordingly I award the following to TSI:

- (1) £475,000 by way of a Regulation 17 (6) award;
- (2) \$3,724 and £5,000 by way of further commission due, and
- (3) Damages for breach of contract of £15,631.06.

191. All further and consequential matters will be dealt with at a hearing to be arranged.

192. I am extremely grateful to Counsel for their most helpful oral and written submissions. I have taken account of all of them although it has been neither necessary nor proportionate to deal specifically with every one of them above.