Neutral Citation Number: [2024] EWHC 2278 (Comm)

Case No: CL-2018-000802

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/09/2024

**Before** :

**CHRISTOPHER HANCOCK KC SITTING AS A JUDGE OF THE HIGH COURT**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **KOMPAKTWERK GMBH** **(a company incorporated under the laws of Germany)** | **Claimant** |
| **- and -** | |
| **LIVEPERSON NETHERLANDS B.V.** **(a company incorporated under the laws of the Netherlands)** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Philip Moser KC** (instructed by **DWF Law LLP**) for the **Claimant**
**Alexander Brown** (instructed by **Kirkland and Ellis LLP**) for the **Defendant**

Hearing dates: **May 14 and 15 2024**

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.30am on 4 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.............................

## CHRISTOPHER HANCOCK KC :

## Introduction

1. This is the Claimant's application by Application Notice dated 12 August 2023 to re-amend its Claim Form and its Particulars of Claim (the "**POC**") to introduce a claim under the Commercial Agents (Council Directive) Regulations 1993 (the "**Regulations**"). The only issue between the parties is whether that claim has any real prospect of success. As such, this is also an application by the Defendant for reverse summary judgment.

## Factual Background

2. The factual background is common ground between the parties, and is set out in the following paragraphs.

3. On 26 August 2013, the parties executed a Master Partner Agreement (the "**MPA**"). Later, on 18 September 2013, the parties executed an Addendum to the MPA which incorporated a referral partnership into the MPA (the "**Referral Exhibit**").

4. Clause 1 of the Referral Exhibit outlines that the Claimant was expected to introduce clients to the Defendant in order to "*explore a sale by LivePerson of its products or services ("LivePerson Services")*". The subject of these sales was LiveEngage, "*a software package which is licensed on a subscription basis and is centrally hosted (SaaS product)*". While the exact nature of LiveEngage is disputed, the broad outline is that:

    (1) LiveEngage is a "*Digital Engagement Platform*" which allows businesses to communicate with consumers on the businesses' own websites. While web-communication is "*the heart*" of LiveEngage, the Defendant also offers ancillary services (e.g., helping businesses to optimise their usage of LiveEngage, tech support, etc).

    (2) Businesses access LiveEngage by purchasing licences that last for 12 months at a time and, afterwards, automatically renew for 12 month terms unless terminated. Once a business has purchased a licence, they get access to LiveEngage through a web-based dashboard. This not only allows businesses to make use of the "*Live Chat*" functionality, through which customer care agents can engage with end customers, but also enables the businesses to configure how they want LiveEngage to function.

    (3) In order to facilitate access to LiveEngage, businesses are sent a bespoke piece of computer code via email, or downloaded via FTP or HTTP, which must be embedded within their own website code. The code allows websites to connect to the Defendant's servers, where LiveEngage is hosted. LiveEngage functionality, as configured on the dashboard, is then made accessible on the businesses' websites.

    (4) The evidence before me showed there to be two types of arrangement between the parties. The first was a referral agreement, whereby the Claimant introduced, or referred, third parties to the Defendant. The second was a resale

agreement, whereby the Claimant purchased the Defendant's product and resold it to third parties. My use of the phrase resale is not intended to prejudge any of the arguments made before me. Each type of arrangement was governed by a different type of contract, one being a referral agreement and the other being a resale agreement. Each of these two types of agreement is exhibited to the MPA between the parties.

5. The POC was filed in December 2018. The claim was not progressed beyond June 2019 pending the outcome of the Supreme Court's request for a preliminary ruling in the '*Software Incubator*' matter, which I deal with below.

6. The CJEU gave judgment on 16 September 2021. In *Software Incubator,* the CJEU noted that: (i) "*sale of goods*" is an "*autonomous concept of EU law*", the scope of which cannot be "*determined by reference either to concepts known to the laws of the Member States or to classifications made at national level*"; and (ii) its meaning should be determined by reference to the words' "*usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part*".

**The proposed amendments.**

7. In essence, the draft re-amended POC (the "**DRPOC**") adds three elements:

(1) A compensation claim, based on the assertion that the Claimant was engaged by the Defendant "*to negotiate the sales of the Defendant's product to customers of the Defendant within the meaning of Regulation 2(1) of the Regulations*", so that it was a "commercial agent" and, upon termination, entitled to compensation under Regulation 17 (**"the Compensation Claim**").

(2) A commission claim under Regulations 7 and 11 ("**the Commission Claim**").

(3) A "Resale Partnership Terms and Conditions Exhibit" executed on behalf of the Defendant on 26 August 2013 ("**the Resale Exhibit**").

**The Provisions of the Regulations.**

8. The relevant parts of the Regulations which are engaged are:

> ***Regulation 2(1)****: In these Regulations—*
>
> *"commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal; […]*
>
> *"commission" means any part of the remuneration of a commercial agent which varies with the number or value of business transactions; […]*

***Regulation 7:*** *(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract—*

*(a) where the transaction has been concluded as a result of his action; or*

*(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.*

*(2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.*

***Regulation 11:*** *(1) The right to commission can be extinguished only if and to the extent that—*

*(a) it is established that the contract between the third party and the principal will not be executed; and*

*(b) that fact is due to a reason for which the principal is not to blame.*

*(2) Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.*

*(3) Any agreement to derogate from paragraph (1) above to the detriment of the commercial agent shall be void.*

***Regulation 17:*** *(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.*

*(2) Except where the agency contact otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.*

*[…]*

*(6) Subject to paragraph (9) and to regulation 18 below, 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.*

> *(7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely 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; or*
>
> *(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.*
>
> *[…]*
>
> *(9) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.*

9. Regulation 17 compensation falls to be assessed in accordance with the principles in Lonsdale (t/a Lonsdale Agencies) v. Howard & Hallam Ltd. [2008] Bus LR 788. In that case, Lord Hoffman, with whom the rest of the House of Lords agreed, explained the rationale for compensation and the methodology for assessment of such as follows:

*"9. As this part of the directive is based on French law, I think that one is entitled to look at French law for guidance, or confirmation, as to what it means. Article 12 of the French law says that the agent is entitled to "une indemnité compensatrice en réparation du préjudice subi". The French jurisprudence from which the terms of the article is derived appears to regard the agent as having had a share in the goodwill of the principal's business which he has helped to create. The relationship between principal and agent is treated as having existed for their common benefit. They have co-operated in building up the principal's business: the principal by providing a good product and the agent by his skill and effort in selling. The agent has thereby acquired a share in the goodwill, an asset which the principal retains after the termination of the agency and for which the agent is therefore entitled to compensation: see Saintier and Scholes, Commercial Agents and the Law (2005) at pp 175–177.*

*10. This elegant theory explains why the French courts regard the agent as, in principle, entitled to compensation. It does not, however, identify exactly what he is entitled to compensation for. One possibility might have been to value the total goodwill of the principal's business and then to try to attribute some share to the agent. But this would in practice be a hopeless endeavour and the French courts have never tried to do it. Instead, they have settled upon compensating him for what he has lost by being deprived of his business. That is the "préjudice subi." The French case law makes it clear that this ordinarily involves placing a value upon the right to be an agent. That means, primarily, the right to future commissions "which proper performance of the agency contract would have procured him": see Saintier and Scholes,* op.cit*, pp. 187–*

*188. In my opinion this is the right for which the directive requires the agent to be compensated.*

*11. Having thus determined that the agent is entitled to be compensated for being deprived of the benefit of the agency relationship, the next question is how that loss should be calculated. The value of the agency relationship lies in the prospect of earning commission, the agent's expectation that "proper performance of the agency contract" will provide him with a future income stream. It is this which must be valued.*

*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, even if, as a matter of contract, the agency was not assignable or there were in practice no dealings in such agencies: compare* Inland Revenue Commissioners v Crossman [1937] AC 26 . *What has to be valued is the income stream which the agency would have generated.*

*13. On the other hand, as at present advised, I see no reason 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 earnings by an appropriate rate of interest. If the agency was by its terms or in fact unassignable, 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: compare the Crossman case. Likewise, if the market for the products in which the agent dealt 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 for one in an expanding market. If the agent would have had to incur expense or do work in earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything."*

## The relevant terms of the contract.

10. There were two relevant contracts, namely the MPA (the contract between Claimant and Defendant) and the MSA, which was the contract which was then entered into between the Defendant, LivePerson, and the end user of the software.

11. For present purposes, I only need set out the relevant terms of the MSA, which were as follows:

> *"1. **Services**. LivePerson will provide to Company (a) the professional consulting services ("Professional Services") as described on Exhibit A attached hereto and other mutually agreed written statements of work entered into by the parties from time to time (each, a "SOW"); and (b) the hosted services identified on the Order Form attached hereto ("the Hosted Services")….*

*2. **Fees and Payments**. Company agrees to pay the fees as set out on the Order Form attached hereto and as otherwise set forth herein in accordance with the payment terms in this Agreement. Invoices for Hosted Services will be payable in advance, and invoices for Hosted Services will be mailed on or about the first of each month for that month's Hosted Services. Invoices for Professional Services will be invoiced upon execution and payable as set forth in the applicable SOW…. LivePerson reserves the right to increase fees up to five (5%) percent per each Renewal Term (defined in Section 3 below) and/or modify its fee structure for the Services….*

*3. **Term**. The Initial Term of this Agreement shall be effective from the Effective Date set forth in the Order Form and continue for so long as the Order Form is in place between the Parties. Following the Initial Term, this Agreement shall renew for consecutive (12) month (each, a "Renewal Term") unless either party provides written notice to the other party at least (90) days prior to the expiration of the current term (the Initial Term and all subsequent Renewal Terms collectively referred to as the "Term"). Upon request, Company shall acknowledge the commencement of each Renewal Term in writing. …*

*5. **Use of Brands: Marketing.** Each party may use the other party's name, trade name, trademarks and icons (collectively, the "Brands") solely (a) in connection with the Services provided hereunder and only for so long as this Agreement remains in effect and (b) for certain marketing and promotional purposes as mutually agreed upon in writing by both parties….*

*6. **Licence Grant: Restrictions.***

***6.1**. Subject to Company's obligations herein, LivePerson hereby grants to Company during the term of this Agreement a limited, revocable, non-exclusive, non-transferable, non sub-licensable license to (a) access and use in the Territory the Hosted Services and any software provided by LivePerson to access those Hosted Services, solely for purposes of (as applicable) communicating with, engaging with and delivering offers to, visitors to Company's website; and (b) use any Professional Services deliverables provided by LivePerson pursuant to an Order Form or SOW solely in connection with the applicable Hosted Service referenced in such Order Form or SOW….*

***6.2**. Company acknowledges and agrees that Company's rights in and to LivePerson's Intellectual Property (as defined in Section 9) are solely as described in Sections 5 and 6.1 above and do not include any rights of ownership in any of LivePerson's Intellectual Property. Company is not permitted* *to change or modify LivePerson's Intellectual Property. Without limiting the foregoing, in the event of any change, modification, extension or correction thereof, Company hereby irrevocably assigns to LivePerson by way of present and future assignment with full title guarantee any and all rights it may be deemed to have in any such change, modification, extension or correction, and agrees to execute all documents necessary to implement and effect such assignment…. Company shall not misappropriate any of LivePerson's software, technology or other services or use the Services, or permit enable or assist and third party, to create competing products or services, or modify LivePerson's Intellectual Property or use any of LivePerson's Intellectual Property unless otherwise agreed to by LivePerson in a signed writing.*

*7. **Acceptable Use of the Services.***

***7.1.** Company agrees that it will not (a) modfy, copy, decompile, disassemble or reverse engineer, or cause any other party to modify, copy, decompile, disassemble or reverse engineer, LifePerson's software, technology and/or other services; (b) sublicense any of LivePerson's intellectual Property to third parties or sell, resell, rent, sublicense or lease the Services to third parties; (c) otherwise violate the license grant or restrictions set forth in section 6 above; (d) use the Services to store or transmit malicious code; (e) interfere with or disrupt the integrity or performance of the Services or third party data contained therein; (f) attempt to gain unauthorised access to the Services or their related systems or networks; (g) alter, copy, move or delete any tags or code placed as part of the Services except as provided for in Section 4; (h) place tags on website pages not pre-approved by LivePerson in writing; or (i) misappropriate any of LivePerson's software, technology or other services or use the Services or permit, enable or assist a third party to create competing products or services…*

***9. Intellectual property rights**. Company shall retain all rights to the intellectual property provided to LivePerson by Company, including all of its rights to its Brands, technologies, trade secrets, know how, and other intellectual property created by Company, including without limitation any modifications, enhancements and derivatives thereof (but specifically excluding any of LivePerson's Intellectual Property). LivePerson shall retain all rights to Services and software (including without limitation any materials or code provided as part of the Professional Services), Brands, technologies, information, trade secrets, know how, intellectual property, information and data generated by LivePerson or LivePerson's systems, whether pre-existing or created after the Effective Date, including any modifications, enhancements and derivatives thereof (including,*

> *without limitation, metrics, data and information generated by such Services and software)(collectively, "LivePerson's Intellectual Property"). No implied licenses are granted herein."*

12. In addition, it may be of assistance to consider the Order Form referred to in the contract. An example of one such, involving Deutsche Telekom, is annexed to this judgment. Of particular note is the term of the contract in the Order Form. As presaged in the MSA, there is an Initial Term of 12 months from the Effective Date (with a right to terminate during that Initial Term), followed by Renewal Terms. The contract automatically renews for twelve months at a time unless terminated at least 90 days before the end of the relevant period. When it renews, a further payment is due from the customer.

**Permission to amend: the legal test**

The Claimant's submissions.

13. The Application is made pursuant to CPR 17.1(2)(b), i.e. an amendment requiring the permission of the Court (and thus also engages CPR 17.3 insofar as required), and/or CPR 17.4(2).

14. The test for amendment under the applicable rules of the CPR is well-known. The Court has a broad discretionary power to grant applications to amend. In summary, where (as cannot be in dispute here) the new claim arises out of the same facts as the extant claim, the Court ought only to refuse permission to amend where the applicant seeks to raise a case which has no real prospect of success.

15. The Claimant contended that this is the same as the test which applies to applications for summary judgment, citing CNM Estates (Tolworth Tower) Ltd v Simon Peter Carvill-Biggs Freddy Khalatschi [2023] EWCA Civ 480 ("***CNM Estates***"), §75, and further contended that this "*imposes a comparatively low burden*" on the party seeking permission to amend their statement of case: see CNM Estates at paragraph 19.

16. The Claimant also accepted that various of the usual factors applied in amendment applications would apply equally here. Thus:

    (1) It is not enough for the claim to be merely arguable; it must carry some degree of conviction: see Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33 ("***Kawasaki***"), §18.

    (2) "*The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes*." see CNM Estates at paragraph 77. In particular, factual averments should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable.[1]

    (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test: "*there must be evidential material which establishes*

[1] Okpabi v Royal Dutch Shell Plc [2021] UKSC 3 ("***Okpabi***"), §107. While the context in *Okpabi* is different (a jurisdiction appeal), the judgment is cited in *CNM Estates*, and it concerns the same test.

*a sufficiently arguable case that the allegations are correct*": see Kawasaki at paragraph 18.

(4) The general rule is that once the applicant has satisfied this threshold it is inappropriate for the court to take the strength or weakness of the claim into account when exercising its residual discretion.[2] In particular, the threshold does not become stricter in cases of 'late' amendment.[3]

(5) Further, in the present case there can be no issue as to unfairness or disadvantage in relation to the timing of the amendment, which has at all times been the subject of mutual understandings.[4]

The Defendant's case.

17. Under CPR 17.1(2)(b), the Court may give permission for a party to amend its statement of case where the amendments have a real prospect of success, i.e. the same test as applies to summary judgment applications under CPR 24.3. In this regard, the Defendant also relied on the CNM case.

18. Where such an application turns on a discrete point of law or construction, the Court should decide that point: see Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) ("Easyair"), *per* Lewison J (as he then was) at [15(vii)]:

> *"...it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."*[5]

19. Where the Court decides a point of law on such an application, the usual balance of probabilities test applies: see On the Beach Ltd v Ryanair [2023] EWHC 2694 (Comm) at [74]:

> *"Where the Court does decide to 'grasp the nettle' and finally decide a point of law, then it must follow that the Court decides the issue on the balance of probabilities rather than simply on*

[2] *CNM Estates*, §49, §§69-77.
[3] *CNM Estates*, §74.
[4] Where the weight attached to the timing of an amendment will depend on "*the quality of the explanation for its timing*": Quah Su-Ling v. Goldman Sachs International [2015] EWHC 759 (Comm), §38(d).
[5] Approved by the Court of Appeal in AC Ward & Son v Catlin (Five) Ltd [2010] Lloyd's Rep IR 301 at [24].

> *the basis of whether the applicant has a real as opposed to a fanciful prospect of success."*[6]

20. The Claimant's skeleton argues (for the first time) that the Court should not resolve the discrete points of law on which this Application depends, and asserts that the issue of whether the LiveEngage platform is "goods" is *"not appropriate for resolution at this stage."* That is the wrong approach. The principal facts here, says the Defendant, are common ground, and the point of law can be stated very shortly: is the grant of a limited licence to use computer software hosted online a "sale of goods" within the meaning of the Regulations? The Defendant contends that the answer to that question is 'no' based on the authorities and that the Compensation Claim is therefore bad in law. In the words of Lewison J, the Court should *"grasp the nettle"* and decide this point of law on the Application.

21. Put another way, there is no reason to suppose that oral evidence is needed to determine whether the Regulations apply in this case. In Sagal v Atelier Bunz GmbH [2009] Bus LR 1527 (CA) at [16-17], Longmore LJ held that the application of the Regulations should be resolved by the terms of the contractual documents (even where *"counsel are able to argue that the effect of the documentation is (or may be) equivocal"*), and that the court should avoid hearing oral evidence on the issue: *"Permission to adduce further documents or oral evidence should only be granted where the judge is satisfied that the matter cannot be fairly decided on the basic documentation alone"* (at [16-17]). In the present case, the Court can, and should, determine whether the Regulations apply on the basic documentation (the MPA and the MSA) alone.

Discussion and conclusions.

22. For the most part, the parties are in agreement on the test for permission to amend. I am content to adopt the oft-cited observations of Lewison J (as he then was) in Easy Air, (approved by the Court of Appeal in Ward v Caitlin, as noted above) which were, for ease of reference (and in their entirety) as follows:

> *"The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91 ;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*

[6] Claimant's skeleton §23(a) and §35 suggest that if its legal arguments are *"more than merely arguable"* or have a *"real prospect"* then permission to amend should be given. That is the wrong test when the Court is deciding points of law.

*iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

*v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;*

*vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;*

*vii )On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 .”*

**The Compensation Claim.**

23. I turn to apply these principles, starting with the application to amend to add the claim for compensation under Regulation 17. In this regard, in my judgment, there are two issues which arise. The first is whether, on the basis of the material currently before me, the amendment stands any real prospect of success. The second is whether the material before me is sufficient to enable me to reach such a conclusion, or whether it is reasonably likely that further material will be available at trial which means that the trial judge will be better placed to determine this issue. This latter question reflects considerations (v) and (vi) in Lewison J's summary of the relevant principles. It is under this latter head that I will consider whether it is right to determine this point now, as opposed to allowing it to go to trial.

24. I start therefore with the Regulation 17 claim, or the Compensation Claim. In this section, I set out the parties' respective submissions, before turning to my conclusions on the point. Thereafter, I turn to the second of the two issues that I identified in the preceding paragraph.

*The Compensation Claim: The Defendant's primary position.*

<u>The Defendant's submissions.</u>

25. I start with the Defendant's primary position, which was that the amendment to introduce a Compensation Claim should be rejected in its entirety.

26. The Defendant's starting point was that the Regulations only apply to "commercial agents", as defined in Regulation 2(1), which states as follows:

> *"'commercial agent'" means a self-employed intermediary who has continuing authority to negotiate **the sale or purchase of goods** on behalf of another person (the 'principal'), or to negotiate and conclude **the sale or purchase of goods** on behalf of and in the name of that principal…" (emphasis added).*

27. Thus, the Regulations apply where an agent has the authority to negotiate the *"sale … of goods"* on behalf of a principal. The Defendant submitted that:

    (1) The Regulations do not apply to an agent engaged in the marketing or sale of services. In <u>Crane v Sky</u> [2007] 2 All ER (Comm) 599, an agency contract involved the agent selling Sky television subscriptions; Briggs J (as he then was) accepted at [11] that *"this did not qualify as a commercial agency within the Regulations because it was concerned with services rather than goods"*. In some other EU jurisdictions, the national legislation implementing the Directive applied to agents providing services. The UK Parliament expressly chose not to extend the Regulations in this way, and the Court must not usurp Parliament's role.

    (2) The Regulations also do not apply to distributor relationships, i.e. where a person resells goods in his own name. In <u>Sagal v Atelier</u>, Longmore LJ explained that the Regulations do not apply to *"agents who make contracts in their own name and on their own behalf"*; agents must contract *"in the name of the principal"* in order to be a commercial agent (at [12]).

28. The Defendant further submitted that where there is a written agreement between the parties, the determination of whether the Regulations apply is to be made solely by reference to those terms, as at the time they were made – and not by reference to the manner in which the agreement was performed: see Sagal v Atelier at [16-17]; Crane v Sky at [77]; and Smith v Reliance Water Controls [2004] ECC 38 at [22].[7]

29. Turning to what constituted goods, English case-law has consistently held that only tangible property can be *"goods"*, and that computer software therefore does not constitute *"goods"*: see e.g. St Albans DC v International Computers Ltd [1996] 4 All ER 481. However, this issue was recently considered in Computer Associates UK Ltd v The Software Incubator Ltd (Case C-410/19) [2021] Bus LR 1442, where the CJEU held, in summary:

(1) that both tangible and intangible goods can constitute *"goods"* for the purposes of the Directive, and that this can cover the supply of software by the grant of a perpetual licence; and

(2) in order to constitute a "sale" of goods, there must be a ***permanent transfer*** of the rights of ownership of a copy of the software, such as that effected by a perpetual licence to use software.

30. In summary, the facts of Software Incubator were as follows:

(1) The agent (Software Incubator) promoted a software package from the principal (Computer Associates) to the financial services industry. Customers purchased the software with a perpetual licence, and downloaded the software to their computers.

(2) At first-instance, HHJ Waksman QC (as he then was) held that electronically supplied software could amount to a *"sale of goods"* within the Regulations.

(3) Gloster LJ (with whom Irwin and Henderson LJJ agreed) allowed the appeal, and held that the supply of software did not amount to a *"sale of goods"* within the Regulations.

(4) Permission to appeal to the Supreme Court was granted. The Supreme Court stayed the appeal and on 28 May 2019 referred the following two questions to the CJEU:

[7] As to the approach to be adopted, the Defendant pointed out that Gloster LJ held in Computer Associates UK Ltd v The Software Incubator Ltd [2019] Bus LR 522 that the Directive and Regulations are aimed at commercial agents engaged in commercial transactions and so one should adopt a *"narrower interpretation of [the] language within a commercial context"*, i.e. how the words would be *"understood by the commercial parties at whom the Regulations and Directive are aimed"* (at [43]). By reference to the CJEU decision in Mavrona & Sia OE v Delta Etaireia Symmetochon, Case C-85/03 [2004] ECR I-1573, Gloster LJ held that "*in the absence of any indication in the Regulations that they apply to a particular contractual relationship, they will not apply. This justifies a stricter interpretation of the Regulations*" (at [44]). The Claimant submitted (as I indicate below) that this approach was not a justifiable one, in the context of a European directive.

> *"(1) Where a copy of computer software is supplied to a principal's customers electronically, and not on any tangible medium, does it constitute 'goods' within the meaning of that term as it appears in the definition of a commercial agent in article 1(2) of [the Directive]?*
>
> *"(2) Where computer software is supplied to a principal's customers by way of the grant to the customer of a* **perpetual** *licence to use a copy of the computer software, does that constitute a 'sale of goods' within the meaning of that term as it appears in the definition of commercial agent in article 1(2) of the Directive?" (emphasis added).*

31. The CJEU at [23] and [26] referred to the questions posed by the Supreme Court. The CJEU specifically identified that the software was supplied *"by a licence granted indefinitely"*, and that the issue was whether the concept of *"sale of goods"* in the Directive applied to computer software which was supplied by *"the grant of a perpetual licence"*.

32. At [30], the CJEU held that the concept of *"sale of goods"*:

> *"must be given an autonomous and uniform interpretation throughout the European Union, in the light of the need for the uniform application of EU law in conjunction with the principle of equality. That concept therefore constitutes an autonomous concept of EU law and its scope cannot be determined by reference either to concepts known to the laws of the member states or to classifications made at national level."*

33. In light of the above, the CJEU posed the key question at [32] as follows:

> *"… it must be determined whether the concept of* ***"sale of goods"*** *in article 1(2) of Directive 86/653 can cover the supply, in return for payment of a fee, of computer software to a customer by electronic means where that supply is accompanied by the grant of a* **perpetual licence to use that software***" (emphasis added).*

34. In other words, the CJEU judgment was specifically concerned with understanding the concept of *"sale of goods"* in the context of a customer paying a fee to download computer software and receive a perpetual licence to use that software.

35. In relation to *"goods"*, the CJEU held that they could be either tangible or intangible, and therefore software can in principle be classified as "goods", *"irrespective of whether it is supplied on a tangible medium or, as in the present case, by electronic download"* (at [36]). The CJEU held that there was a *"functional equivalen[ce]"* between the sale of a computer program on a CD-ROM and an online sale where it is downloaded from the internet (at [38]).

36. In relation to *"sale"*, the CJEU held at [40-43]:

> *"40. In the second place, according to a commonly accepted definition, a "sale" is an agreement by which* ***a person, in return***

> ***for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him*** *(Usedsoft GmbH v Oracle International Corpn, para 42).*
>
> *41. In the particular case of the sale of a copy of computer software, the court has held that the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of such a program is pointless if the copy cannot be used by its possessor. Those two operations must therefore be examined as a whole for the purposes of their legal classification (see, to that effect, Usedsoft GmbH v Oracle International Corpn, para 44).*
>
> *42. Accordingly, the court has taken the view that* ***the making available of a copy of computer software by means of a download and the conclusion of a user licence agreement for that copy, intended to make the copy usable by the customer, permanently, and in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor, involve the transfer of the right of ownership of that copy*** *(see, to that effect, Usedsoft GmbH v Oracle International Corpn, paras 45 and 46).*
>
> *43. Consequently, in the light of the wording of article 1(2) of Directive 86/653, it must be held that the supply, in return for payment of a fee, of computer software to a customer by electronic means where that supply is accompanied by* ***the grant of a perpetual licence*** *to use that software can be covered by the concept of "sale of goods" within the meaning of that provision" (emphasis added).*

37. The CJEU thus held that a sale of computer software takes place where a seller *"transfers to another person his rights of ownership"* so that the buyer has the right to use a copy of the software *"permanently"*. The *"grant of a perpetual licence"* is therefore a sale.

38. The CJEU concluded at [51]:

> *"It follows from all of the foregoing considerations that the answer to the questions referred is that the concept of "sale of goods" referred to in article 1(2) of Directive 86/653 must be interpreted as meaning that it can cover the supply, in return for payment of a fee, of computer software to a customer by*

> *electronic means where that supply is accompanied by* ***the grant of a perpetual licence*** *to use that software" (emphasis added).*[8]

39. The CJEU's analysis in Software Incubator, the Defendant argued, as to the "sale" of computer software was drawn directly from its earlier decision in Usedsoft GmbH v Oracle International Corpn (Case C-128/11) [2013] Bus LR 911. In Usedsoft v Oracle, the CJEU considered Article 4(2) of Directive 2009/24/EC (the "**Computer Software Directive**"), which provides that once there has been a *"sale"* of a copy of a computer program by the rights holder, their distribution rights in relation to that copy are exhausted within the EU. This is known as the doctrine of 'exhaustion'.

40. In Usedsoft v Oracle, the CJEU had to decide whether the provision by Oracle of a perpetual licence to use its computer software, in return for a fee, constituted a *"sale"* under Article 4(2) of the Computer Software Directive, and thus whether Oracle's distribution rights were exhausted. The CJEU held at [42-46]:

> *"42. According to a commonly accepted definition, a 'sale' is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him. It follows that the commercial transaction giving rise, in accordance with Article 4(2) of Directive 2009/24, to exhaustion of the right of distribution of a copy of a computer program* ***must involve a transfer of the right of ownership in that copy****.*
>
> *43. Oracle submits that it does not sell copies of its computer programs at issue in the main proceedings. It says that it makes available to its customers, free of charge, on its website a copy of the program concerned, and they can download that copy. The copy thus downloaded may not, however, be used by the customers unless they have concluded a user licence agreement with Oracle. Such a licence gives Oracle's customers a non-exclusive and non-transferable user right* ***for an unlimited period for that program****. Oracle submits that neither the making available of a copy free of charge nor the conclusion of the user licence agreement involves a transfer of the right of ownership of that copy.*
>
> *44. In this respect, it must be observed that the downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of a computer program is pointless if the copy cannot be used by its possessor. Those two operations must therefore be examined as a whole for the purposes of their legal classification (see, by analogy, Joined Cases C-145/08 and C-*

[8] Following the CJEU decision, the parties settled their dispute.

> *149/08 Club Hotel Loutraki and Others [2010] ECR I-4165, paragraphs 48 and 49 and the case-law cited).*
>
> *45. As regards the question whether, in a situation such as that at issue in the main proceedings, the commercial transactions concerned involve a transfer of the right of ownership of the copy of the computer program, it must be stated that, according to the order for reference, a customer of Oracle who downloads the copy of the program and concludes with that company a user licence agreement relating to that copy receives, in return for payment of a fee,* ***a right to use that copy for an unlimited period****. The making available by Oracle of a copy of its computer program and the conclusion of a user licence agreement for that copy are* ***thus intended to make the copy usable by the customer, permanently****, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor*
>
> *46. In those circumstances, the operations mentioned in paragraph 44 above, examined as a whole, involve the transfer of the right of ownership of the copy of the computer program in question" (emphasis added).*

41. In short, a 'sale' of computer software involves a *"transfer of the right of ownership"* in relation to a copy of that software, so that the buyer has the right to use it *"for an unlimited period"*, i.e. *"permanently."* This is the analysis that was adopted in Software Incubator.

42. It is clear from both Usedsoft and Software Incubator that a 'rental' of computer software, i.e. the right to use it for only a limited period, is not a "sale". The exhaustion doctrine in the Computer Software Directive does not apply to the mere rental of a computer program, as is made clear by the terms of Article 4(1)(c) of the Directive, which grant the copyright holder the exclusive right to *"any form of distribution to the public, including the rental, of the original computer program or of copies thereof"*, and Article 4(2) itself, which expressly excepts from the exhaustion doctrine the *"right to control further rental of the program or a copy thereof."* The term 'rental' is defined in Recital 12 as:

> *"the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof."*

43. In other words, EU law has drawn a sharp distinction between:

(1) The permanent transfer of the right to use a copy of the software, e.g. the grant of a perpetual licence. This constitutes a "sale" and will trigger the exhaustion doctrine in the Computer Software Directive.

(2) The right to use a copy of the software for a limited period of time, which is the "rental" of the software. The grant of such a licence does not transfer any

ownership rights, will not constitute a "sale", and will not trigger the exhaustion doctrine in the Computer Software Directive.

44. Copinger and Skone James on Copyright (18th ed, 2022) [26-389] puts the point shortly:

> *"...the right is exhausted only in respect of perpetual licences. Licences granted for a finite period of time do not fall within the court's definition of sale".*

45. In short, providing a limited licence to use software (e.g. by way of a subscription or a SaaS cloud-based model) is the rental of a computer program, and does not constitute a sale. Tritton on Intellectual Property in Europe (6th ed, 2022) summarises this point at [4-147]:

> *"[The decision in Usedsoft] has resulted in advice to legal advisors advising their clients to switch to subscription or cloud-based business models which avoid the transfer of ownership as a result of sale and are more akin to the rental of computer programs. The Computer Software Directive specifically excludes the application of the exhaustion right to the rental of computer programs."*

46. Tritton cites A. Nicholson, "Old Habits Die Hard: Usedsoft v Oracle" (2013) 10:3 SCRIPTed, which considers the Usedsoft decision and its ramifications. It concludes at §4.4:

> *"To appreciate fully the potential ramifications of UsedSoft it is therefore perhaps also highly beneficial to consider how players "on the ground" are currently reacting. This is arguably best done by examining reactions to the decision found in legal advice memos posted by commercial law firms and reports of the case in the commercial press.* ***The most common advice given to copyright proprietors by such services was to switch to subscription based or, ideally, cloud and Software as a Service ("SaaS") based business models****. Such sources were keenly aware of the Court's focus on exhaustion taking place where ownership is permanently transferred as the result of a sale. All sources explained that where media is provided over the cloud it is accessed purely over the internet: neither files nor ownership change hands, pulling the principle rug out from under the Court's feet.* ***That this approach is probably a legitimate exception to the UsedSoft ruling has been confirmed by articles in numerous academic journals*** *..." (emphasis added).*

47. The analysis from Usedsoft was adopted and applied in Software Incubator on the basis that there is an autonomous EU definition of "sale of goods".

48. Taking into account the above, the Defendant submitted that EU law on the sale of computer software (including in the context of the Directive) could be summarised as follows:

(1) Under EU law, a "sale" of software only takes place where there is a transfer of the right of ownership such that the buyer has the right to use a copy of the software for an unlimited period, i.e. permanently.

(2) By contrast, the grant of a licence for only a limited period is the rental of the software, and will not constitute a "sale".

49. Turning to the application of the law to the facts, in summary, the Defendant's primary submission was as follows:

(1) The terms of the MSA are set out above. Under the parties' arrangement, the Claimant could only market a *"limited, revocable"* licence to use the Defendant's cloud-based software (LiveEngage) under the terms of the MSA: see s.6.1 of the MSA.

(2) The key point is that the Claimant only had authority to market a *"limited, revocable"* licence to use the LiveEngage platform – typically for an initial 12 month period, which could be renewed annually.

(3) The MSA is clear that (a) there was no transfer of any ownership rights in the software, just a limited right to use that software during the tenancy of the MSA – see ss. 3 and 6.1; and (b) the customers who purchased the limited licence were only permitted to access particular services hosted by the Defendant, called the *"Hosted Services"*: see ss. 1 and 2 of the MSA.

(4) Consequently, the Claimant's activities fail to satisfy either part of the definition of *"sale of goods"*: the Claimant's activities did not relate to a *"sale"* and the product in question was not *"goods"* but a service.

50. Applying Software Incubator and Usedsoft (as summarised above), it is clear that a limited, revocable licence is not a *"sale"* for the purposes of EU law, including the Directive. It is the rental of the software for a limited period. The CJEU repeatedly stated that it was concerned with a perpetual licence: see [19], [24(2)], [26], [32], [43], [51] and the ruling in [52]. Further, this was a vital part of the CJEU's reasoning and its reliance on the Usedsoft decision and the Computer Software Directive, as explained above.

51. Once the CJEU decisions in Software Incubator and Usedsoft are properly understood, said the Defendant, it is clear that the Claimant's Application has no prospects as a matter of law as the grant of a limited, revocable licence to use computer software is not a *"sale"* under EU law.

52. Extending the concept of a *"sale"* of computer software to the grant of a limited, revocable licence would make no sense and would cause immediate and extensive problems in IP law vis-à-vis the doctrine of exhaustion: if a mere rental of computer software for a limited period constituted a sale then it would trigger the exhaustion doctrine, and thus prevent a rights-holder from making a further sale (or rental) of the software. The whole artifice of software subscription and SaaS models would be rendered impossible.

53. The Defendant then sought to deal with what it termed was the Claimant's other attempt to fit its Agency Claim within the Software Incubator analysis, which was to refer to the auto-renewal of the licences. Mr Feldmann states that:

> *"I re-iterate that licences auto-renewed unless terminated by either party. In practice, and prior to LivePerson terminating the MPA, the vast majority of customers allowed the licences to auto-renew, treating them as effectively unlimited."*

54. The short point, said the Defendant, is that auto-renewal is irrelevant:

    (1) The CJEU decisions are clear that a sale of computer software involves a transfer of the right of ownership in relation to a copy of that software, so that the buyer has the right to use it for an unlimited period, i.e. permanently.

    (2) A limited, revocable licence does not transfer any ownership right or grant the buyer the right to use the software permanently. The buyer only has the right to use the software for a limited period, in exchange for a fee. If the buyer wishes to continue using the software after that period, then he must pay a further fee.

    (3) The MSA itself makes it clear that no ownership rights whatsoever are transferred (let alone permanently): see s.6.1. The fact that the licences had to be renewed is itself clear evidence that they did not involve any permanent transfer of rights – the buyer's right to use the software is conditional on him renewing the licence and paying a further fee. The buyer does not have a perpetual right to use the software. Indeed, Mr Feldmann himself accepts that the licences did not always renew, as he only refers to the *"vast majority"* of customers renewing.

    (4) Mr Feldmann is therefore wrong to say that the licences were *"effectively unlimited"*. They could not be such, because there had to be a renewal of the licence, with a further fee being paid for the continued use of the software.

    (5) Further, the vast majority of software subscription and SaaS models allow for auto-renewal of the relevant licence (e.g. Netflix). That does not turn a limited licence into a perpetual one.

55. The second point that the Defendant made was that, even if the grant of a limited licence could be considered a *"sale"* under the Regulations (which it cannot), the LiveEngage product which the Claimant marketed was not *"goods"* under the Regulations – it was a service.

56. Under the terms of the MSA, customers were only permitted to access the *"Hosted Services"* (i.e. the LiveEngage platform) – a service hosted by the Defendant. The customer did not receive a copy of any software that it could use by itself. At all times, the LiveEngage platform was hosted on the Defendant's servers and the customers were merely granted access to those servers. That was a service provided by the Defendant.

57. An apt analogy would be a gym, where a customer purchases a membership pass that permits him or her to attend the gym and use its equipment. The gym is not selling any *"goods"* to the customer – it is selling a service, i.e. access to the gym's facilities.

58. The whole point of the SaaS model (software as a service) is that a customer is obtaining the right to use a particular computer program as a service, hence the name. The customer has access to the service provided by the SaaS provider, rather than its own copy of the software. This is a fundamentally different model to a traditional arrangement, where a customer would make a one-off purchase for a particular computer program, which it would then install on its own computer systems and use without any further involvement of the seller.

59. Turning to the gym analogy again:

(1) The gym provider must continuously provide its gym facilities at its own premises. If the gym shuts down then the customer can do nothing about it. The customer has not received any "goods" which she can keep and use by herself. The customer's only right was to access the service provided by the gym, which was dependent on the gym continuing to operate.

(2) In the SaaS model, the software provider must continuously host the software on its own servers. If those servers are shut down, then the customer can do nothing about it. The customer has not received any "goods" which it can keep and use by itself. The customer's only right was to access the service provided by the software provider, which was dependent on the servers continuing to operate.

60. As to the Claimant's arguments in this regard, the Defendant submitted as follows:

(1) **First**, Mr Feldmann claims that the Defendant was engaged in selling a *"product"* rather than a service. This is not a relevant distinction. Both a "good" and a "service" can be called a product. The question of whether a particular product falls into one category or another is a matter of substance that should be resolved by considering what was actually provided.

(2) **Second**, Mr Feldmann says that in order to use the LiveEngage platform, *"the customer was sent a bespoke computer code … that would have to be built into all of the customer's webpages in the target area"*, and that this code is *"the same as how you would traditionally have bought a physical CD or dongle (USB stick) from which to install software onto a computer"*. As to this:

(a) The Defendant agreed that the method by which a copy of the software is transferred to the customer is not a relevant consideration.

(b) However, the Defendant argued, the point is that the LiveEngage platform cannot be used simply by incorporating the code on a customer's website. The code merely allows the website to access the Defendant's servers and thus access the LiveEngage service. This code is not the software.

(c) To go back to the gym analogy again, the code is akin to a membership card or electronic fob which allows a customer to access the gym. The card or fob does nothing by itself – it is simply the means by which the service is accessed.

(3) **Third**, Mr Feldmann argues that he was engaged in a business to business ("**B2B**") model, rather than a business to consumer ("**B2C**") model, and that this is a relevant distinction from a SaaS provider such as Netflix. However, this is not a relevant distinction in categorising the LiveEngage platform as a good or a service. The businesses which obtained access to the LiveEngage platform received a <u>service</u> from the Defendant, for the reasons set out above. The fact that the Claimant was engaged in marketing to businesses, rather than directly to consumers, says nothing about whether a good or service was provided to those third parties through the agency of the Claimant.

(4) **Fourth**, Mr Feldmann claims that the *"LiveEngage platform is not a "portal" through which the customer can access services ... It is a sophisticated software tool that, once the code is installed, is highly customisable and controllable by the customer ... without any further involvement of LivePerson. ... Once LivePerson's customers installed LiveEngage, the customer could be completely autonomous and use LiveEngage without any support from LivePerson."* However, Mr Feldmann is wrong:

(a) The LiveEngage platform is essentially a "portal" through which customers access services. The software itself is hosted on the Defendant's servers, and the code installed on the customer's website simply allows the customer to access the LiveEngage platform.

(b) The fact that the customer can customise the use of LiveEngage on its website is irrelevant. The actual software is on the Defendant's servers. If the Defendant's servers go down, then the LivePerson platform will immediately stop working.

(c) It is wrong to say that the customer could ever be *"completely autonomous"*. They may not need any customer support from the Defendant, but the customer remains at all times completely dependent on the Defendant's servers for its continued access to the LiveEngage platform. Returning once again to the gym analogy, a user may not interact with any of the staff, but the gym still needs to continue to provide a premises and equipment in order for the user to have access to the gym services.

(5) **Fifth**, Mr Feldmann claims that the fact that the LiveEngage platform is hosted by the Defendant is irrelevant, and that the Defendant's approach *"is an outdated perspective that neglects to appreciate how software is regularly bought and sold in the modern world."* He claims that *"the product [being] hosted by the supplier and accessed by the customer via the internet … [is] the functional equivalent of providing a CD or downloading a product"*. As to this:

(a) As above, it is correct that the method of transfer is not a relevant consideration.

(b) The relevant distinction is between: (a) a customer who obtains a functional copy of the software, which it can install and use by itself with <u>no further service</u>; and (b) a customer who only receives access to software which is provided on a continuing basis by the seller, and thus requires a constant service to use the software.

(c) The former is the functional equivalent of a CD sold to a customer, and can constitute *"goods"* as it contains a fully functional copy of the software. The latter is fundamentally different and requires an ongoing "service" from the seller in order for the software to function; there is no equivalence to a CD, as the customer does not receive a functional product – only the means to access an online service. As such, the question of whether the software is "hosted" by the seller is a vital one.

The Claimant's submissions.

61. I turn to the Claimant's submissions.

62. The Claimant began by making reference to the purpose of the Regulations, which were enacted to protect agents by giving them a share of the goodwill which they have generated and from which the principal has benefitted after the agency agreement has been terminated: see Nagel v Pluczenik [2017] EWHC 1750 (Comm) at [42]. When construing a legislative instrument which is intended to give effect to a Directive, such as the Regulations, the Court should interpret it so as to accord with the purpose and intention of the Directive and its interpretation by the CJEU: see Tamarind International v Eastern Gas (Retail) Ltd Times 27 June 2000; [2000] Eur LR 708 at [21]; PJ Pipe and Valve Co Ltd v Audco India Ltd [2005] EWHC 1904 (QB) at [145].

63. It was in this regard that the Claimant took issue with what was said by Gloster LJ in the case Software Incubator case in the Court of Appeal. The Claimant argued that, far from giving a strict interpretation to the Directive, the Court should give a broad purposive construction. The Claimant also relied on the fact that, at paragraphs 43 and 44 of the judgment of Gloster LJ, she relied on the earlier decision of Popplewell J in Nagel v Pluczenik [2017] EWHC 1750 (Comm), a decision, which, the Claimant pointed out, was overturned by the Court of Appeal at [2018] EWCA Civ 2640. In the Court of Appeal, the Claimant pointed out, Leggatt LJ (as he then was) identified the need to give the Regulations a purposive construction, in order to give effect to the policy end sought to be achieved.

64. The Courts have held that "negotiate the sale" should be interpreted in the widest sense of dealing with and conducting or managing discussions between the principal and the purchaser: see PJ Pipe & Valve & Co Ltd. v. Audco India Ltd [2005] EWHC 1904 (QB) at paragraphs [154] – [155]. Hence, an agent does not have to do much beyond the introduction of a customer in order to be able to fall within the definition. On the evidential material before the Court, the Claimant's activities under the MPA clearly fall within the definition.

65. The Claimant therefore submitted that the principal issue between the parties was thus whether the products being sold were "goods" within the meaning of Regulation 2(1); and whether there had been a sale of such "goods". In summary, the Claimant submitted that the Compensation Claim met the relevant test.

66. In more detail, the Claimant submitted as follows:

(1) First, following the CJEU's judgment in *Software Incubator,* which is binding on UK courts,[9] computer software constitutes a "*good*": see paragraph [39] and the purchase of licences for computer software constitutes a "*sale of goods*" for the purposes of Regulation 2(1) of the Regulations: see paragraph 43. Leaving aside the question of whether *Software Incubator* required the relevant licences to be perpetual, the Defendant's LiveEngage platform is captured by *Software Incubator*. It is, at its core, a piece of computer software which allows businesses to communicate with consumers on their own websites, and it is purchased through a licencing agreement.

(2) Second, the Claimant argued that the Defendant's case contradicts *Software Incubator*. The Defendant argues that LiveEngage is not a "*good*" but instead a set of services; therefore, there is no "*sale of goods*", and the Claimant falls outside the purview of the Regulations. This argument depends upon an analytic approach at odds with the judgment in *Software Incubator*:

(a) Firstly, the CJEU treats the term "*sale of goods*" as a matter of substance and not form. The lack of practical difference in the supply of software through tangible or intangible media was integral to the CJEU's decision: see *Software Incubator*, §38. In contrast, the Defendant has sought to characterise LiveEngage as a set of services, at times simply because it was referred to as a service in contemporaneous documents. Even if this were sufficient to substantiate the Defendant's argument, it is not the full picture, as those documents actually refer to the sale of "*products*" or "*products or services*" in respect of LiveEngage.

(b) In any case, the Defendant's arguments on this point are superficial:

(i) In the first instance, the Defendant alleges that the provision of LiveEngage through an online platform makes it a "*hosting service*". Despite this, the Defendant has identified nothing of substance which turns on whether the Defendant delivers LiveEngage through a website or via download. The features of the "*hosting service*" which the Defendant identifies are just functionalities of the LiveEngage software. Just as there was no functional difference between computer software delivered via tangible or intangible means in *Software Incubator*, there is no functional difference between computer software delivered via website or download.

(ii) The Defendant has further attempted to support this argument by referring to two services that it provides customers: "*ancillary professional services*" and a "*turnkey service*" where the Defendant would operate LiveEngage on behalf of the customer.

[9] While *Software Incubator* was decided after the end of the transition period (31 December 2020), it was referred for a Preliminary Ruling by the UK Supreme Court prior to that date. As a result of Section 7A of the European Union (Withdrawal) Act 2018, it is binding on UK courts (Revenue And Customs v Perfect [2022] EWCA Civ 330, §21). Whilst the Retained EU Law (Revocation and Reform) Act 2023 makes it possible to depart from CJEU case-law, it does not change the fact that the starting point is that *Software Incubator* is binding. I understood this to be common ground between the parties.

However, these are optional services which customers can only use once they have purchased the underlying "*good*" which is the LiveEngage computer software.

(c) Secondly, the CJEU was clear that "*sale of goods*" is an autonomous concept of EU law, the meaning of which has a purposive dimension: see paragraphs 30-31. In particular, the CJEU noted that the effectiveness of the Directive would be undermined if the "*supply, in return for payment of a fee, of computer software by electronic means*" were excluded from its scope: see paragraphs 43, 49-50. Similarly, AG Tanchev, whose Opinion was followed by the CJEU, supported interpreting the phrase in a way that would minimise regulatory arbitrage. He noted, at paragraph 87 of his opinion, that if the grant of a licence in exchange for remuneration were not considered a 'sale' for the purposes of the Directive, then principals could avoid their obligations under the Directive by labelling any sale as the grant of a licence. In this regard, he said:

*"This interpretation is also consistent with the objectives of Directive 86/653. In particular, in light of the judgment in UsedSoft, it should be considered that a broad interpretation of 'sale' in Article 1(2) of Directive 86/653 is in line with the objective pursued by that directive to protect commercial agents in their relations with their principals (see point 43 of this Opinion). Any other solution would undermine that objective by allowing a principal to evade the mandatory provisions of Directive 86/653 simply by calling the agreement with his customer a 'licence' rather than a 'sale'. In addition, it would be likely to deprive a large number of commercial agents of the protection afforded by Directive 86/653, given that computer software is generally marketed through licences."*

(d) The same applies here: to find, as the Defendant contends, that LiveEngage is not a "*good*", would mean that principals could avoid their obligations under the Regulations simply by making software accessible via cloud computing rather than direct download.

(e) Thirdly, in *Software Incubator,* the relevant software was sold pursuant to licences which laid down a number of restrictions on a customer's ability to use the software, and which were not always perpetual. If a customer breached their obligations under the licence, the seller could force them to delete the software from their computer. Despite this, the CJEU found that the purchase of a conditional, revocable, licence was compatible with the concept of the "*sale of goods*". In contrast, the Defendant has sought to make a point of the fact that the licences for LiveEngage were automatically-renewing, 12-month licences, rather than one-time perpetual licences. This cuts against the grain of the CJEU's judgment, which focusses on the practical reality of the transaction, rather than technicalities. In the present context, businesses let the licences automatically renew, and treated them as "*effectively unlimited*". Thus, provided the customer pays the fee and complies with the terms of the licence, they have it for an unlimited period – a factual situation effectively equivalent to *Software Incubator* and one that the Defendant does not contest.

(3) Third, the factual basis for the Compensation Claim is sound. The factual basis on which the Compensation Claim rests is nowhere close to being "*inherently implausible, self-contradictory or not supported by the contemporaneous documents*", the test laid down in Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204, §42. The Compensation Claim is supported by the witness statements of Mr. Feldmann and Mr. Paciorek, as well as documentary evidence: for instance, the Defendant repeatedly refers to LiveEngage as a "*product*" (i.e. as distinct from services) in the Referral Agreement and the MPA.

Discussion and conclusions.

67. I start with a consideration of whether, on the basis of the materials before me, the Claimant's Compensation Claim has a real prospect of success.

68. I have concluded that, in this context, the Defendant's case is to be preferred. I reach this conclusion for the following reasons, which mirror to a large extent the submissions made by the Defendant. In essence, I have concluded that the contract in this case did not involve a sale of goods, because there was no permanent licence granted by LivePerson to the third party end user; and, secondly, I have concluded that the product which was marketed in this case was a service, not a good.

69. In more detail:

(1) First, although I accept the Claimant's submission that the Regulations must be construed purposively, in order to give effect to the policy intention behind them, and I also accept that that intention was to provide protection to commercial agents, on the basis that they were likely to be the commercially weaker party, I do not think that this assists me in answering the questions which arise in this case. Whilst it is clear that some commercial agents were to be entitled to the protection afforded by the Regulations, then the question in this case is whether the agency in the current instance falls within the categories of agent covered by the Regulations. If the agent is not of a type which falls within the Regulations, then it is not entitled to the protection given by the Regulations. In this case, the dispute between the parties is really as to whether the Claimant is an agent that is within the Regulation.

(2) Secondly, subject to the question of whether there may be further evidence which might be available at trial than I have in front of me (which I address in the next section of this judgment) I accept that insofar as this is a pure question of law, then if I grasp the nettle I should decide the point on the balance of probabilities (as would a judge at trial).

(3) Thirdly, it is common ground that, by reason of the definition of commercial agent in the Regulations, it is only agents who are involved in the ***sale of goods*** who are entitled to compensation for the termination of their agency. Thus, I accept the submission that if the product marketed by the agent is properly to be

described as a service, then the agency does not fall within the Regulation. I do not think that this was seriously in dispute. The dispute was as to the proper characterisation of the product in this case.

(4) Fourthly, in my view, the Defendant is correct in saying, first, that the Software Incubator decision does not assist the Claimant, as was, from time to time, asserted in the correspondence leading up to the hearing. It is clear, in my judgment, that that decision involved the grant of a permanent licence, and, for the reasons I come back to below, I do not think that the licence granted here was permanent.

(5) Fifthly, and related to this, I accept for my part that it was an essential part of the CJEU's reasoning in Software Incubator in relation to the issue of whether the transaction in that case involved a sale of goods that the licence granted in that case was a perpetual licence. Whilst I appreciate that the question which was posed to the CJEU in that case involved a perpetual licence, it seems to me that the passages quoted above from the judgment, and the reference back to the earlier decision in Usedsoft, emphasise the point that there must be a permanent divestment of the seller's interest in the product for there to be a sale.

(6) Sixthly, although I must accept on an application of the present type, that the 12 month licence was usually or indeed almost invariably renewed, I do not think that this matters. The fact of the matter is that the initial transaction *was* for a limited period, and that the renewal for each subsequent period entitled LivePerson to a further payment. In my judgment, this is akin to a rental and not a sale.

(7) Seventhly, although my conclusion that the arrangements in this case did not involve the sale of goods would be sufficient to determine this application, I also accept the submission that on the basis of the evidence before me, what LivePerson were engaged in was the provision of services rather than the sale of goods. What Mr Boyton's witness statement describes is a hosting service, in which the customer had access to a web platform, provided by LivePerson, on which the customers' clients were able to access the services run by the employees of LivePerson, who answered, on behalf of the customer, queries raised by the customers' clients. That arrangement, in my judgment, is one which involves the provision of services, and not goods. In my judgment, this conclusion is one which is linked to, but separate from, my conclusion in relation to the question of whether the arrangement involved a sale of goods. However, it goes to reinforce my conclusion in relation to the earlier question. The fact that, in certain instances, the customer's employees made use of the software to answer questions raised by its' customers, rather than relying on the Defendant's employees to do so, does mean that in such instances, the service provided by the Defendant was utilised to a lesser extent by the customer, does not in my judgment detract from the central fact that this was a hosting service, pursuant to which the customer was given access to a product which was held on the servers of the Defendant, with services being provided by the employees of the Defendant to a greater or lesser extent. The heart of the product was the service to which the customer subscribed.

70. For all of these reasons, I have concluded that the claim under Regulation 17 does not stand any real prospect of success on the basis of the evidence before me.

Can I reach a firm conclusion on the basis of the current evidence?

The parties's submissions.

71. The Claimant submitted that both expert and factual evidence was relevant and necessary in order for me to reach a final conclusion in relation to this proposed amendment. In this regard, the Claimant made the following points.

72. First, the Defendant's evidence came from its solicitor, Mr Boynton, a partner in Kirkland and Ellis. He had no first hand knowledge of the manner in which the Defendant's software functioned, being dependent on the information provided to him by his client's in house Counsel, Ms Greenberg and Ms Aach. This evidence was, said the Claimant, not a satisfactory basis for me to proceed on.

73. Secondly, the Compensation Claim is underlined by factual disputes which cannot be disposed of at this stage. The parties have witness statements which contradict the other on the following matters:

(1) The nature of SaaS. Mr Boynton portrays SaaS as a highly uniform business model which is dependent on "*renting*" rather than owning software. He does so explicitly to support the Defendant's case: "*As indicated by the name 'SaaS', what the Defendant sells is a service, akin to a Zoom or Netflix account*". On the other hand, Mr Feldmann states that SaaS is a flexible label which applies across a wide range of business models. In particular, Mr Feldmann suggests that the Defendant's perspective does not reflect how software is "*regularly bought and sold in the modern world*", and that the comparison of LiveEngage to other SaaS businesses (like Netflix) is factually inaccurate. It is to be noted that this is effectively an expert opinion, on which Mr Feldmann is better placed to give evidence than Mr Boynton. There is further no permission for expert evidence, although the Court might find expert evidence of utility.

(2) How businesses used LiveEngage. Mr Feldmann makes three points about the way that businesses use LiveEngage: (i) that the customer had to install the code on to their own website, having been sent it by email, or downloaded it via FTP or HTTP; (ii) that, given the complexity of using the LiveEngage software, businesses often deployed their *own* development teams to operate it; and (iii) that, in practice, most businesses treated the automatically renewing licences as "*effectively unlimited*". Mr Boynton does not explicitly reject these points, and the claim that LiveEngage is "*akin to a Zoom or Netflix account*" must be incorrect unless he in fact disputes them.

74. The Defendant, for its part, contended as follows.

75. First, the evidence of Mr Boynton was based on the evidence of those who did have first hand knowledge of the manner in which the system worked; and in any event, was background material, only.

76. Secondly, what was of real relevance was the terms of the contracts, which were clear and beyond argument.

77. Thirdly, the factual disputes referred to by the Claimant were peripheral, even to the extent that there was dispute. Even if the Claimant's accounts were correct, then this would not prevent me from determining this application fairly.

My conclusions.

78. I have concluded that in this case it is appropriate to determine the matter on a summary judgment application. I reach this conclusion for the following reasons.

(1) As to the author of the witness statement, whilst it may be that Mr Boynton does not have first hand knowledge of the workings of the platform, his account is based on the evidence of in-house legal counsel for the Defendant. In my judgment, those in-house counsel will have knowledge of the manner in which the platform operates.

(2) I accept the submission that the really important documents in this case are the contracts. There is no dispute as to the terms of those contracts.

(3) I do not think that general statements as to how SaaS is used in the business world are of assistance to me. The question must be as to how the Defendant's system operates.

(4) In this latter regard, then, taking the three points made by Mr Feldmann in turn:

(a) The fact that the customer had to install a code on its own website to make use of the platform is, in my view, of no real relevance to the two issues which this case raises, namely whether the platform constitutes goods or services, on the one hand, and whether there was a sale of those goods, on the other.

(b) It was accepted that, in at least some cases, customers utilised their own teams to operate the platform. In relation to such cases, then in my judgment, I have simply to decide this application on that basis. As indicated above, I have taken this into account in reaching my judgment.

(c) It was also accepted that in many, if not most cases, businesses did in fact renew their licence and did not terminate that licence as they were entitled to do. Again, I have therefore to determine this application on this basis.

79. I do not think that any of these considerations militate against the conclusions that I have reached. It is my view that here what was provided was services, not goods, and that those services were provided on a temporary basis only (being provided year on year), and not sold.

*The Defendant's "Alternative Position" on Agency*

80. As an alternative to its primary position, the Defendant adopts an alternative position, on the basis that a relationship of commercial agency existed, in which case it wishes to seek to exclude from the valuation of the agency so-called VBP contracts, associated professional services and Managed Success Fees. In view of my conclusion in relation to the Defendant's primary case, I do not need to express a view on these arguments.

**The Commission Claim**

The Defendant's submissions.

81. In its original claim for fees, the Claimant seeks certain allegedly outstanding fees. Paragraph 41 of the RAPOC seeks the same relief under Regulations 7 and 11, but without particulars.

82. Regulation 7, quoted above, provides that a commercial agent is *"entitled to commission on commercial transactions concluded during the period covered by the agency contract (a) where the transaction has been concluded as a result of his action; or (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind."* Regulation 11 (also quoted above) relates to the extinction of such a right.

83. The Defendant submitted that Regulations 7 and 11 do not apply in the present case. The Claimant's entitlement to fees is expressly set out in the MPA and its exhibits. The parties disagree on the facts as to whether the Claimant is entitled to particular fees, and the original claim for fees needs to go to trial to resolve that dispute. If the Court finds that the Claimant is not entitled under the MPA to certain fees, there is no basis for saying that the Claimant is nevertheless entitled to them under Regulation 7. The Claimant has not explained its position on this issue, beyond a bare assertion in the Claimant's skeleton that if commission is not due under the MPA, then *"it would be due under Regulation 7"*. That is not right, and no authority or analysis is provided in support.

84. The Claimant's skeleton also incorrectly asserts that Regulation 7 cannot be excluded by the parties' contract; it can: see Ingmar GB Ltd v Eaton Leonard Inc (formerly Eaton Leonard Technologies Inc) [2001] CLC 1825 at [30]. The right to commission cannot itself be excluded, but the parties can choose the mechanism for such commission in their contract.

The Claimant's submissions.

85. The Claimant submitted that this claim stands and falls with the issue of whether there is a Reg. 2(1) agency under the MPA. If, as the Defendant claims in its primary defence, the commission were not due under the extant breach of contract claim under the MPA then it would be due under Regulation 7. At the hearing, the Claimant submitted that this was an entitlement which cannot be ousted by contract, by virtue of Regulation 11(3), cited above. However, following the hearing, my attention was drawn to a decision of the CJEU after Brexit, in which the Court decided that this right under Article 7 could be ousted contractually Rigall v Bank Handlowy (Case C-64-21). Although I am not bound by that decision, I am entitled to take it into account.

Discussion and conclusions.

86. In my judgment, the Claimant is correct in saying that this issue stands or falls with the question of whether there is a Regulation 2(1) agency under the MPA. If, as I have held, the Claimant is not a commercial agent within the meaning of that phrase in the Regulations, then there cannot be a right to commission under that Regulation.

87. Accordingly, I hold that there is no tenable claim for commission under the Regulation. Any claim for commission must be based on the terms of the contract applicable to this case.

**The Resale Exhibit claim.**

<u>The Defendant's submissions.</u>

88. The Claimant was entitled to purchase and *"resell"* the Defendant's services under the Resale Exhibit – see paragraph 3(a) of the Preamble to the Resale Exhibit. The Claimant was entitled to purchase the Defendant's Services at a 30% discount. The Defendant would then *"invoice the [Claimant]"*, which would be *"solely responsible for payment of fees"* to the Defendant.

89. The Claimant was then entitled to *"sell the LivePerson Services"*. The Claimant was entitled to *"determine from time to time, in its sole discretion, the retail price that [the Claimant] shall charge to Customers for individual purchases of the LivePerson Services."*

90. Accordingly, the Claimant would enter into a contract directly with the customer, <u>in its own name</u>. The Claimant would be responsible for its own contractual relationship, including invoicing that customer for payment.

91. As already noted, the Regulations do not apply where a person resells goods in his own name, as the person is not acting *"on behalf of another"* under Regulation 2(1): see <u>Sagal v Atelier</u> at [12]. That is precisely what happens under the Resale Exhibit. It is only the Claimant's activities as a commercial agent which are part of the 'agency' under the Regulations and in respect of which a claim can be brought.

92. Whilst Mr Feldmann says that *"there was little difference between sales conducted under the Resale Exhibit and sales conducted under the Referral Exhibit*" the legal analysis of these two situations is quite different:

    (1) Where the Claimant marketed LiveEngage, and a contract was then concluded between the Defendant and the customer, the Claimant was acting *"on behalf of another person"* and so could fall within the definition of 'commercial agent'.

    (2) Where the Claimant entered directly into a contract with the customer, it was acting <u>in its own name</u> and thus not acting as a commercial agent.

93. Mr Feldmann also claims that, in practice, the Claimant did not set prices at its *"sole discretion"* and that the Defendant *"heavily dictated"* the terms of the Claimant's agreements with its customers. The Defendant does not accept this as a matter of fact, but ultimately it does not matter for two reasons:

(1) The Court should consider only the contractual position, rather than any (contested) evidence of what happened in practice.

(2) In any event, the Regulations do not apply if a person contracts in his own name, since he is not acting on behalf of another person. A distributor relationship is not a commercial agency relationship, *even if* the supplier exerts significant control in relation to the onward distribution of his goods.

94. The Claimant's skeleton at §34 relies on Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd [2002] CLC 913. That case is of no assistance to the Claimant:

(1) The contracts in that case were entered into between the principal and the purchaser, through the agency of the agent. The Court of Appeal held that the contractual documentation was not a sham, and it was not *"possible to ignore its effect"* (at [31]).

(2) The principal sought to argue that the way that relationship operated in practice provided strong indications that the relationship was not one of agency (at [33]). Rix LJ rejected that submission and focused on the contractual position, concluding at [33]:

> *"[The agent] was undoubtedly authorised to make such contracts, did make them, and made them expressly as agent for and on behalf of its principal."*

(3) In short, the agent did not enter into contracts in its own name – the contracts established that it was acting as an agent for the principal. In the present case, the reverse is true. Under the Resale Exhibit, the Claimant entered into contracts in its own name, and not as agent for the Defendant.

95. Accordingly, the Claimant's activities in relation to the Resale Exhibit did not come within the definition of 'commercial agent' and were not part of the *"business of the agency"*. The Claimant's Agency Claim in relation to such activities does not have any real prospect of success.

The Claimant's submissions.

96. The Claimant's evidence is that in practice the arrangements were highly regulated and akin to the practice under the Referral Agreement. Thus, everything was highly regulated by the Defendant.[10] The Defendant had the ability to refuse to approve a potential customer and thereby prevent a sale; the ability to require terms and conditions to be used as between the customer and the Claimant which were to the benefit of the Defendant and for which there was no need as regards the relationship between the Claimant and the customer; and very significantly a requirement that the Claimant give to the Defendant disclosure of all details of its arrangement with the customer, including as to pricing and payment terms. This was far from a "normal" reseller situation.

97. This was therefore in substance exactly the same process as occurred under the Referral Contract and in reality the Claimant was not free to sell on its own account, but rather

[10] *Cf* the facts of Sagal (t/a Bunz UK) v. Atelier Bunz GmbH [2009] 2CLC 1, where the opposite was the case.

the contracts were being placed with the Claimant as a matter of form, not substance. The position is therefore akin to the one in *Mercantile International* (op cit), where the Court of Appeal considered a situation where there was an agreement with clear wording describing the relationships between the parties, whereby direct contracts were brought into existence between the defendant principal and the purchasers through the agency of the claimant with the authority and knowledge of the defendant principal. The defendant principal sought to argue that notwithstanding this clear wording, because of the way the relationship worked in practice, and in particular that the claimant charged more to purchasers than the claimant had confirmed as the price to the defendant principal, the claimant keeping the difference for itself and obtaining no remuneration in the form of commission or otherwise from the defendant principal, this was not actually an agency relationship. The defendant principal argued that the claimant was operating as a distributor who undertook the obligations of a principal in a chain as buyers of goods from the defendant principal and as seller to the purchasers. The Court of Appeal rejected this argument, saying that the question of markup being applied was merely one factor which in other cases had assisted in a finding of fact that the basis on which the parties did business was that of sale and resale. By contrast to the other cases it considered, in the case before it the documents indicating there was an agency could not be regarded as a sham, but reflected the true relationship. It held that the effect of the parties' course of dealing was as if they had expressly agreed that the claimant could keep as its commission as an agent the mark-up which it was able to negotiate.

98. The Claimant contended that, at the very least, there is a real prospect that this point will succeed and that it requires a trial of the evidence, so that the amendment should be allowed.

<u>Discussion and conclusions.</u>

99. I have concluded that, once again, the Defendant's case on this aspect is to be preferred. I have reached this view for the following reasons.

100. First, as I understand it, the claim which the Claimant wishes to add under the Resale Agreement is premised on the hypothesis that its services pursuant to that Agreement entitle it to compensation under the Regulations. As such, it is relevant to the quantum of its Article 17 claim. As I have held that this claim does not have any real prospect of success, it follows that any claim under the Resale Agreement must also fail.

101. Secondly, as the Defendant pointed out and as I have noted above, the Resale Agreement involved the sale to Kompaktwerk and resale by Kompaktwerk of the product to a third party, in contrast to the referral agreement, which involved the bringing together of the Defendant and potential customers with a view to LivePerson selling the product to the third party. This latter was an agency relationship. On the face of it, the former was not.

102. The Claimant argues that despite this fact, various factual matters indicate that, despite the appearance of the contractual documentation, the resale agreement in fact worked in exactly the same way as the referral agreement, so that it should be treated as an agency arrangement. In this connection, reliance is placed on the Court of Appeal decision in <u>Mercantile International Group PLC v Chuan Soon Huat Industrial Group</u>

Limited [2002] EWCA Civ 288. However, that reliance is, in my view, misplaced. In that case, the contracts expressly stated that MIG were acting as agents. In the absence of an allegation that these contracts were a sham, the fact that the contract stated that MIG was an agent with authority to bind its principal was conclusive. Here, the position is the opposite. The Claimant argues that the fact that the resale contract does not state that it is an agent can be ignored, and instead, the court can look behind what are on the face of things the contractual arrangements and hold that what appears to be a purchase and resale transaction is in fact an agency arrangement. In my judgment, this is impermissible.

103. For both of these reasons, I hold that the application for permission to amend to introduce reference to the Resale Agreement should be dismissed.

104. I would be grateful if the parties could draw up an Order to give effect to this judgment. If any consequential matters cannot be agreed, I will deal with those at a further short hearing.