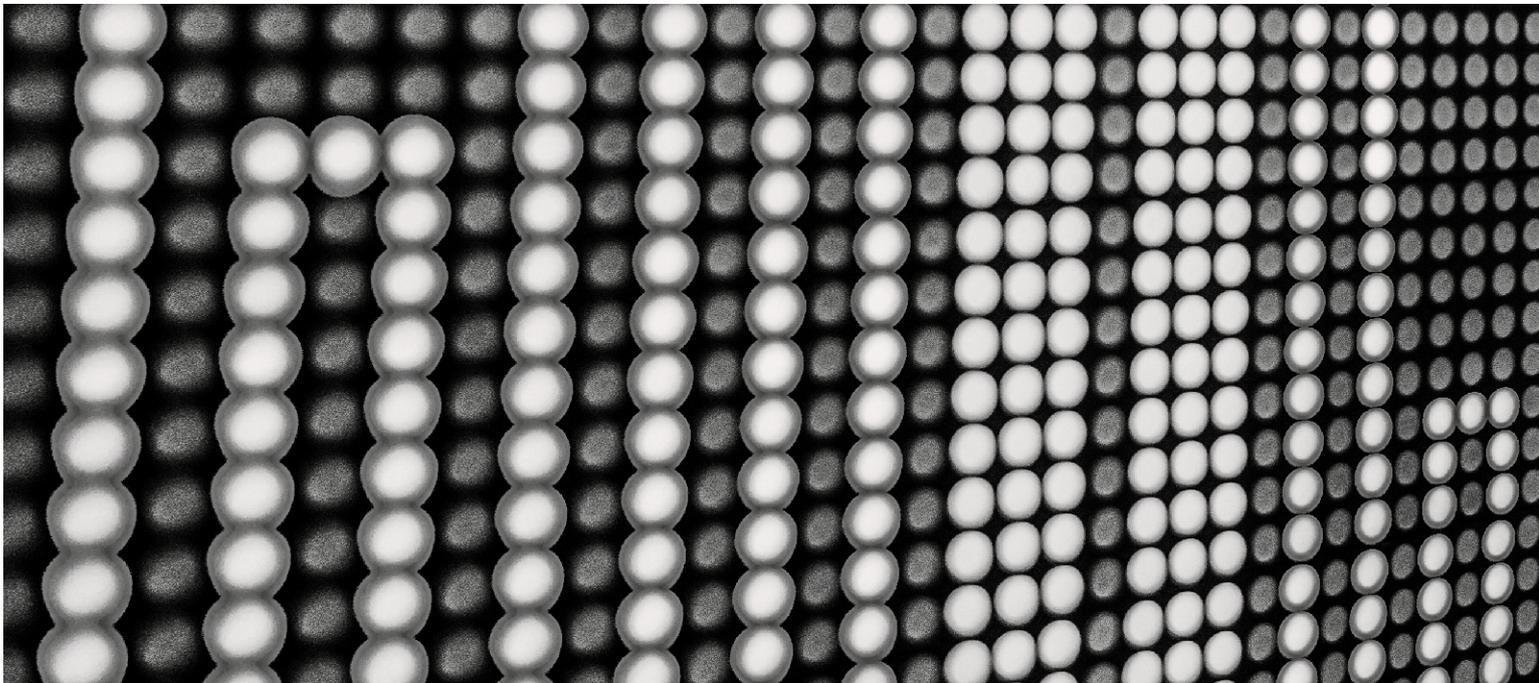




THE COMMERCIAL AGENTS (COUNCIL DIRECTIVE) REGULATIONS 1993: WHAT IS A "COMMODITY EXCHANGE" AND A "COMMODITY MARKET"?

***Pluczenik Diamond Company v W Nagel* [2018]
EWCA Civ 2640.**

The Commercial Agents (Council Directive) Regulations 1993 (the Regulations) enact into UK law an EU directive and offer some protection to self employed commercial agents in the form of an indemnity or compensation where an agency agreement is terminated but the principal enjoys a continuing benefit from the business built up by it. However, Regulation 2(2)(b) excludes "*commercial agents when they operate on commodity exchanges or in the commodity market*" from that protection.



The English Court of Appeal has now considered and ruled on the meanings of "commodity," "commodity exchanges" and "commodity market" for the purpose of the Regulations.

Facts

Mr Nagel acted as a broker in the negotiation and purchase of rough diamonds from De Beers. Nagel worked for wholesale diamond purchaser Pluczenik Diamond Company (Pluczenik) for a number of years before Pluczenik terminated the relationship. He claimed compensation under the Regulations and also under common law, for breach of contract.

A commercial agent is defined in Regulation 2(1) as: *"a self employed intermediary who has a continuing authority to negotiate the sale or purchase of goods on behalf of another person"*.

However, the Regulation 2(2)(b) excludes *"commercial agents when they operate on commodity exchanges or in the commodity market"* from this definition.

At first instance, the Court awarded Nagel damages for

breach of contract but held that his claim under the Regulations failed because it was caught by the exception in Regulation 2(2) (b). Pluczenik appealed. This summary will focus on Mr Nagel's cross-appeal, in which he argued that when De Beers sold boxes of rough diamonds to accredited purchasers at "sights" this was not a "commodity exchange" or a "commodity market".

Findings

Meaning of "commodity"

The trial judge had concluded that "commodity" was not the same as "any tangible goods". The Court of Appeal agreed and noted that this was reinforced by the fact that French and German directives use terms that directly translate as "raw materials" in place of "commodities".

Meaning of commodity exchange/ commodity market

The Court of Appeal held that an "exchange" is a place where trading takes place among members of the exchange and subject to its rules. *"An essential feature of a commodity exchange is that the commodities (or rights to buy*

and sell commodities) which are traded on the exchange can be freely bought and sold among the participants." An auction house, requiring bidders to satisfy specified criteria would not be regarded as an exchange in the commercial world.

The fact the Regulations use two different expressions indicates that "commodity market" and "commodity exchange" have different meanings. Commodity exchanges are typical of a commodity market but a commodity market must be wider than simply encompassing all exchanges. It encompasses any general trading in commodities that takes place in the open market.

De Beers held "sights" during which they sold rough diamonds to wholesalers. A party could not purchase diamonds from De Beers unless they were accredited as a "sightholder" and each sightholder was required to have an accredited broker. Therefore sights were a distribution outlet for a very particular producer of a very particular commodity, more typical of a wholesale shop than an exchange. The appeal judge held that commercial people would not



consider sights as a commodity exchange nor would the sales be understood as trading in the commodity market.

To adopt a wide interpretation of the meaning of commodity market to include De Beers' sights would frustrate the purpose of the Regulations as it would not protect commercial agents that have generated goodwill in the diamond trade.

The exception under Regulation 2(2)(b) did not apply here. The sale of boxes of unprocessed rough diamonds by De Beers at "sights" was not a commodity exchange or market because access to such market was not freely available. Nagel was therefore successful; as a commercial agent he was entitled to compensation under the Regulations.

HFW Comment

For commodities traders, this judgment offers a sensible and practical definition of the terms "commodity" and "commodity exchange" and "commodity market" which should make for more straightforward interpretation of

the exception under Regulation 2(2)(b). In reality, in most cases, the exception is likely to apply to commercial agents acting on behalf of a principal where commodities are traded.

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