

Gammasonics institute for medical research pty ltd

[Health & Medicine](#)



Gammasonic v Comrad[1] demonstrates the reluctance of the courts to interpret the Sale of Goods Act to include software downloads as a “good”, preferring to leave the matter up to statutory review. It primarily discusses whether a software package delivered by online download is effectively classed as “goods” for application of Sale of Goods Act[2] and outlines the progressive court decisions that have considered the question and have begun to recognize software attached to a medium, like a cd package as a “goods”.

It also briefly addresses the applicability of statutory warranties of fitness for purpose and merchantable quality and supports that fitness for purpose and merchantable quality are implied by common law giving reference the test for implication in fact outlined in BP Refinery (Westernport) v Shire of Hastings (1977)[3]

Background and overview

The disputing parties are Gammasonics, a provider of services to radiologists in NSW, and Comrad, a business that provide software and information management systems to radiologists in Australia and New Zealand. The dispute concerns a contract between the parties for the delivery and installation of a software package via remote internet download called “Comrad RIS”; which was to manage workflow, patient registration and appointments, online referrals and processing of Medicare claims for Gammasonics.

The software was downloaded onto Gammasonics' server and Gammasonic were purportedly responsible for hardware configuration and the network infrastructure specified to run the software.

Comrad delivered the software via internet download and certain areas of the software did not function as required. Gammasonics claimed to terminate the contract for breach of terms including “ failure to deliver a functioning software package, failure to provide goods of a merchantable quality and/or for the delivery of a software package which was not fit for its intended purpose.” [4] Comrad in turn sought an award for damages due to the repudiation of the contract by Gammasonic.

Trial Proceedings

This case is an appeal from Local Court against orders made by Magistrate Quinn in favour of Comrad for the amount of \$58, 011. 21. There Magistrate Quinn was not convinced the software supplied by Comrad was a “ good” as defined in s5 of the Sale of Goods Act 1923[5] and “ held the act did not apply”[6]. She also found Comrad failed in the delivery of certain components required for the software functioning; however it was stated that it was “ Gammasonics' own acts or omissions and not any conduct for which it had contractual responsibility that rendered the system unworkable, such that Gammasonics' purported termination was a repudiation of the contract thereby entitling Comrad to sue for damages.”[7]

Material Issues

The following are the key issues that arise from the judgement and contain the essential elements of the case which will be discussed in this case note.

1. Whether a software package delivered by online download is effectively classed as " goods" for application of Sale of Goods Act.[8]
2. Whether equivalent terms of fitness for purpose and merchantable quality are implied by common law.
3. Breach of essential terms

The matter of whether a breach of contract is a question of mixed fact and law is also addressed in this case but it will not be extensively discussed within this case note.

Whether a question of mixed fact and law arises was dealt with early in the case and Fullerton J was satisfied that the question of whether her Honour erred in holding that Comrad was not in breach of the contract, involved a question of mixed fact and law and as such leave to appeal ought be granted.

Comrad also filed a notice for contention on two points one concerning the implication of terms into the contract equivalent to the statutory warranties of merchantable quality and fitness for purpose, the other on the question of breach.

The Sale of Goods Act 1923

The definition of goods provided in the Sale of goods Act 1923 (NSW) s5(1) is

<https://assignbuster.com/gammasonics-institute-for-medical-research-pty-ltd/>

Goods include all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

It was submitted by Gammasonics that the software provided by Comrad was within the statutory definition of " goods" and they relied among other things on the implied condition as to quality or fitness in the act outlined in s19.[9]

On appeal a request was made to consider whether there was a “ Fresh Analysis of Authorities”[10] with a more modern approach to interpretation of the Act.

Whether a software package delivered by online download is effectively classed as " goods" for application of Sale of Goods Act.[11]

The case gives a thorough analysis and contains a comprehensive list of authorities that include case law and secondary sources which have reviewed this question. The key area of difference noted was that the software was delivered by download onto a server. This distinguished the case from that of others including Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd[12] where the software was held to be a ‘ good’ because it comprised both software and hardware.

Gammasonics relied on a passage from Advent Systems Ltd v Unisys Corp [13] as authority where an analogy was drawn to musical compositions and music on cds suggesting that once the software had been downloaded to

the server it became a tangible thing. However the common thread is that software provided on a disc falls within the statutory definition of a 'good' while remote download via a license it appears currently does not.

The case Fullerton J considered most analogous to the facts was St Albans City. [14] In this case the question of whether the transfer of the software, without the sale of the disk would give rise to a sale of "goods" under the Sale of Goods Act 1979 (UK) was considered by Sir Glidewell. There the disk was likened to an instruction manual however again the distinction is made between the delivery of the software via disk format and remote download a distinction that was also noted by Sir Glidewell.

An Australian case that revisited the question was Re Amlink Technologies Pty Ltd and Australian Trade Commission[15] this case did not follow the reasoning offered in St Albans City[16] by Sir Glidewell and considered the proposition taken to the extreme would see goods being defined in areas that were never meant to be covered by the act.

Secondary sources were further considered as Gammasonics highlighted what they supported to be a 'growing trend' in Australia to recognize software as a 'good'[17] The recent Trade Practices Law Journal article by Svantesson discussed the stages of development citing Toby Constructions[18] as the first step taken in recognition of software sold together with hardware as a good. The article also highlighted the decision in Amlink Technologies[19] to recognize software attached to some physical medium and suggested the next logical step for the courts was to further recognize software not attached to a physical medium.

A passage from a conference paper was also considered[20] where the distinction is made that where a customer purchases a digitized version of an encyclopedia it is a good however where it purchases access to the encyclopedia database it is a supply of a service. The facts of this case are most like that of the first scenario and the plaintiff submitted that the authorities support the conclusion that the software provided by Comrad is a 'good' under the act[21] It fell however to the principals of statutory interpretation in particular the everyday meaning of goods and possession.

Comrad submitted that the ordinary meaning and any interpretative words referred to things that are tangible; therefore, "because lines of computer code are intangible the position contended for by Gammasonics was inconsistent".[22]

Fullerton noted that it was preferable to give protection to consumers purchasing software by digital download and noted that research suggests that this is an increasing form of delivery means but stressed the need for legislative reform[23] in the area not judicial intervention and found that the Sale of Goods Act did not apply.

Whether equivalent terms of fitness for purpose and merchantable quality are implied by common law.

The case also outlines that common law terms as to fitness for purpose and merchantable quality can be implied. This is in accordance with test for implication in fact [24] from BP Refinery (Westernport) v Shire of Hastings which is:

1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that " it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

Although the test was ultimately not considered.

Breach of Essential Terms

With regard to the breach of essential terms two main areas were readdressed.

The interfacing with Medicare and network incompatibility. In both cases the documentary evidence was reviewed. While the plaintiff submitted that the findings of the Local Court were in error and that Comrad was responsible for both resolving the problems of interfacing with Medicare and for creating the interfacing problems. Comrad failed to provide sufficient evidence to support these claims and Fullerton J was not satisfied that Quinn J was in error therefore the appeal was dismissed.

Effect on Current Law

This case has been referred to in a recent journal article discussing when ' software is a good'.^[25] It has also been referenced in the recent edition of Australian Commercial Law^[26] as the authority for the principal that software delivered online does not constitute a good, within the meaning of the Sale of Goods Act^[27].

The case highlighted the need for legislative review in regard to the status of computer software and with the introduction of new legislation The Australian Consumer Law (ACL) it has finally been decided that for the purposes of the ACL software is now specifically included within the definition of goods [28] affording consumers protection under s54 Guarantee as to acceptable quality[29] and s55 Guarantee as to fitness for any disclosed purpose.[30]

It also shows the courts reluctance for judicial intervention on matters that may have wider applications in the interpretation of legislation and illustrates the progressive nature of the courts to effect change.