



JONES DAY
COMMENTARY

GB GAS HOLDINGS v ACCENTURE

The Commercial Court's most recent ruling in the ongoing litigation between Centrica and Accenture has attracted attention for its treatment of Centrica's claim that an aggregation of minor breaches of warranty could amount to a fundamental breach.

For providers of software systems and outsourcing services, of greater significance may be the Court's somewhat customer-friendly approach to identifying the factual matrix against which the contract ought to be construed, and the treatment of a common form of exclusion of consequential loss which the Court held did not prevent the recovery of *ex gratia* compensatory payments made by Centrica to customers.

BACKGROUND

Accenture was contracted to install and maintain new IT systems for Centrica (then British Gas) in five software releases. By the roll-out of the third release—an automated billing system based on prepackaged SAP software—substantial disputes had arisen over the performance of the first two deliverables. These disputes were settled in July 2004 on terms that Accenture would complete a pilot

release of the billing system, but that application migration and maintenance would then be taken over by Centrica's in-house team. The fourth and fifth releases were suspended.

Centrica subsequently asserted various breaches of warranties as to functionality and performance of the third release, allegedly causing Centrica losses approaching £200 million. Under the contract, it had additional rights if there was a "Fundamental Defect".

Mr Justice Field was asked to consider a number of preliminary issues including the following:

1. Could a series of minor breaches of warranty be aggregated to constitute a fundamental breach sufficient to be a Fundamental Defect, or was it necessary to establish one single breach which was on its own terms fundamental?
2. In giving notice of the breach alleged to be a Fundamental Defect, what degree of particularity was required?
3. Were any of Centrica's claimed losses excluded by the contractual exclusion of liability for consequential losses?

JUDGMENT

Field J accepted Centrica's arguments that a Fundamental Defect could be constituted by the aggregation of individual breaches of warranty. While this to a large extent turned on the specific wording used (and the use of the conjunctive "and/or" in the definition of "Fundamental Defect" in particular), significantly the judge appears to have attached considerable weight to complexity of the proposed system, noting specifically that it was inherent in the development of such a system that (i) it would involve interrelated processes, and that an error in one process could affect a related process; (ii) it was common to have defects in IT systems which in combination created an aggregated defect; (iii) what appeared at first to be trivial non-functions could turn out to be more important; and (iv) if something went wrong with the system it would be very difficult to find out why.

The judge readily accepted that a reasonable person having this background knowledge would have understood that a fundamental breach of warranty (and hence a Fundamental Defect) could be constituted by the aggregation of individual breaches.

As to notice, the judge rejected Accenture's case that Centrica was required to identify with any precision the warranty alleged to have been breached, the nature of the defect or the adverse effects allegedly caused. All that was required was such information and analysis as was then available to the customer.

This was despite the fact that the parties had reached a compromise in relation to the previous deliverables, and that Accenture was by that time to be off-site, with migration of customer accounts and the installation, implementation and maintenance of the system to be completed solely by Centrica.

As to Accenture's reliance on contractual exclusions, perhaps most notable was the judge's conclusions in relation to *ex gratia* payments totaling some £8 million that were made to customers as a result of reputational damage, to reflect "billing difficulties" and "poor customer

service". Mr Justice Field readily accepted that these losses were a direct result of the automation error and so were recoverable in principle by Centrica.

COMMENTARY

Suppliers should note the importance which the Judge seemingly ascribed to the underlying complexity of the proposed system. The factors that the judge described as being relevant to the factual matrix will apply to almost any complex system supply agreement or outsourcing. In view of the fact that Centrica had a significant, experienced and dedicated team of in-house engineers, the judge's approach seems somewhat customer-friendly.

Similarly, the Judge's approach to the characterisation of loss—and in particular his readiness to conclude that the *ex gratia* payment to customers constituted a recoverable, direct loss—may sound alarm bells for IT suppliers, and particularly those engaged in supporting processes which interface with end-users. The case provides a salient reminder of the Court's pragmatic approach to contractual exclusions of indirect or consequential loss.

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