

# An IT showdown – CIS General Insurance Ltd v IBM United Kingdom Ltd

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This article provides a brief overview of a number of interesting legal points which were decided in the claim.

## Facts

CIS contracted with IBM in June 2015 to implement a new managed IT system following the division of the Co-op's insurance arm from the rest of the Co-op group. The implementation of the new system did not go well. This dispute arose when IBM raised an invoice to CIS for just shy of £3 million which IBM said was in accordance with the agreed contractual payment milestones. CIS disputed that the invoice was payable and followed the contractual mechanism for disputing it.

Then in July 2017, IBM purported to terminate the contract as a result of CIS' non-payment of the c.£3 million invoice and in return, CIS argued that IBM was in repudiatory breach by purporting to terminate the contract without the right to do so. CIS also advanced claims that it would not have entered into the contract with IBM had it known that the IT system was not an 'off the shelf' product, that IBM had been the cause of a number of delays in the implementation of the system and that IBM had not met its reporting requirements. IBM said that CIS was the cause of any delays and that it had complied with its reporting requirements.

CIS brought a claim for around £128 million, being its total wasted costs of the failed project. In the alternative, CIS sought around £16 million, being its additional costs incurred as a result of the various issues with the system. IBM counterclaimed to recover its c.£3 million outstanding invoice which kickstarted the dispute.

## Decision

Following a lengthy trial (over 30 days of hearing) involving multiple factual and expert witnesses, the Judge found in favour of CIS on its lesser claim for around £16 million.

The Judge found that while IBM's c. £3 million invoice had become payable pursuant to the contractual milestone payments, IBM did not have the right to terminate the contract when it did because CIS followed the contractual mechanism to dispute the invoice. Therefore, while the invoice was payable but had not been paid, CIS' non-payment did not constitute a repudiatory breach entitling IBM to terminate.

In relation to CIS' claims concerning the suitability of the IT system, delays and reporting requirements, the Judge found that IBM was not in breach in relation to the suitability of the system but was responsible for the critical delays to the project and had not satisfied its contractual reporting requirements.

CIS' primary claim for its wasted costs of £128 million did not succeed because of an express limitation on liability in the contract preventing it from recovering 'loss of profit, revenue or savings'. The Judge considered that CIS' wasted costs fell into this category and

were therefore irrecoverable. The award of damages to CIS for its additional costs (the claim which did succeed) was also subject to the contractual cap on liability.

CIS tried to argue that IBM was in 'wilful default' by terminating the contract for commercial reasons ie to extricate itself from a non-profitable project, which would have permitted CIS to circumvent the agreed liability cap. However the Judge disagreed and found that while IBM had been wrong to purport to terminate the contract as it did, it had done so honestly such that the agreed liability cap remained effective.

The overall outcome was an award of damages of c.£16 million to CIS, reduced to around c.£13 million following the set-off of IBM's £3 million invoice, which was found to have become due and payable.

## Commentary

The case raises a number of interesting and important points:

1. CIS was found not to be in repudiatory breach of the contract because it had followed the contractual procedure to place the invoice 'in dispute'. Had CIS not followed the contractual procedure, it likely would have been in repudiatory breach, in which case the outcome of the claim might have been very different. This is an important reminder to contracting parties to ensure that you follow the terms of the contract, in particular in relation to non-payment of invoices and/or dispute scenarios. If you are in any doubt about what you should do, take advice.
2. The Judge found that CIS' wasted expenditure was the same in substance as 'loss of profit, revenue or savings' and CIS was therefore prevented from recovering these costs. This limitation on liability saved IBM up to £112 million. If you are embarking on a major IT project, take advice on any limitations on liability and make sure your contract works for the project at hand.
3. The set-off of IBM's c.£3 million invoice meant that CIS recovered around £13 million. Both parties will undoubtedly have incurred very significant legal costs in fighting this claim to trial, including a substantial amount in irrecoverable costs for CIS, further reducing its £13 million recovery. While CIS 'won' £13 million, IBM also 'won' on its counterclaim for c.£3 million. However both parties have had to deal with a failed project along with expensive and time-consuming litigation, which may yet be subject to appeal. So is it fair to say that either of the parties has truly 'won'?

If you require assistance in relation to a contract for an IT project or if you are concerned that your IT contract may be heading into dispute, do get in touch.

## Contact

Mark Hickson  
Head of Business Development

[onlineteaminbox@brownejacobson.com](mailto:onlineteaminbox@brownejacobson.com)

+44 (0)370 270 6000

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