

Tata Consultancy Services Limited v Disclosure and Barring Service: judgment in long-running IT dispute following 8-week trial

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The Technology and Construction Court handed down judgment today in a long running IT dispute which was one of the top 20 cases of 2023 according to The Lawyer. The dispute concerned a modernisation project to the IT and other systems used by the Disclosure and Barring Services ("**DBS**") between 2012 and 2020. The Claimant ("**TCS**") claimed more than £110m in delay damages, with DBS counterclaiming for delay and for the poor quality of the software delivered. Separately, both parties disputed the true construction of a volume-based regime for service charges.

In a wide-ranging judgment, Constable J rejected almost all of TCS's delay claims, save for a small period in respect of which he awarded £2.4m. DBS was awarded £4.6m in relation to delays for which TCS were responsible. Its other counterclaims were largely dismissed. In relation to the volume-based service charges dispute, the Judge preferred a mix of each parties' proposed constructions.

Although much of the Judgment is focused on issues which were specific to this dispute, the Judge's analysis of the obligations of an employer under the Contract [19]-[49] and of the detailed delay provisions within the contract [50]-[104] are likely to be of general importance.

Background

The claims related to the engagement of TCS by DBS in 2012 ("**the Agreement**") to take over its legacy Disclosure and Barring processes (known as R0), then build and implement new digital processes (known as R1). The Disclosure processes were later split into "Basics" and "Disclosure". Alongside TCS, DBS had contracted with Hewlett Packard Enterprises ("**HPE**") as an IT hosting and technical infrastructure provider.

After various delays, R1 Barring & Basics went live in September 2017. DBS contended that it suffered from serious defects which affected its take-up and the productivity of DBS staff using the system. In September 2018, DBS removed the remaining R1 Disclosure software from scope in partial termination of the Agreement.

TCS argued the delays were because of mismanagement of HPE or the conduct of HPE and it was not responsible. DBS argued the delays were due to TCS's delay in development and testing of the software and that it was not responsible for HPE in any event.

TCS's Delay Claims

In respect of TCS's delay claims, the Judge held that TCS had to show Delay caused by "Authority Cause", meaning a breach by DBS of an express or implied obligation. TCS's wider construction that anything for which DBS was 'responsible' could constitute "Authority Cause" was rejected.

With regard to R1 Barring & Basics delay, the Judge found that it was not possible to rely on TCS's IT expert in relation to the critical path and TCS had not proved when it would have achieved go-live absent the delay. In the circumstances, TCS's claims for Delay in relation to R1 Barring & Basics were entirely dismissed. In respect of R1 Disclosure, the Judge held TCS was not entitled to a claim for Delay whilst R1 Barring & Basics was in testing, nor

during a period in which the parties were forbearing such rights whilst engaging in commercial negotiations. However, during a subsequent short period of 3 months there was Delay caused by Authority Cause. The Judge also held that DBS had wrongly removed R1 Disclosure from scope and TCS was entitled to £2.4m for both of those issues.

In respect of DBS's delay claims, the Judge considered its claim for liquidated damages to be excluded by reason of its failure to comply with a condition precedent to serve a Non-Conformance Report. The Judge accepted that DBS could still advance an unliquidated claim for delay exceeding 6 months. However, the Judge did not consider causation had been established in respect of the unliquidated losses claimed. DBS was entitled to recover £4.6m in relation to an unpaid but agreed contract change notice.

Estoppel arguments arose in relation to several issues in the trial, one of the more interesting being in relation to a clause which required submission by TCS of a draft Exception Report as a condition precedent to delay. TCS accepted it had not complied, but argued there was a shared common assumption which crossed the line on which it relied to the effect that the requirement had fallen by the wayside. The Judge construed "crossing the line" generously, considering that all the conduct of the parties in the weeks and months could be taken together, notwithstanding the absence of a specific communication, or that a reasonable person in TCS's position would have expected to have been put on notice that the technical notice provision would be relied on.

The Agreement also excluded liability for loss of profit. As part of its claim, TCS sought to recover losses said to be anticipated costs savings. These losses arose because TCS expected that once R1 was launched, the per transaction cost to it would reduce substantially but that, because of the delays, that reduction had been delayed. The Judge considered that claim was in all but in name a claim for loss of profits and was excluded: it was the substance of the claim which was important.

Spiegelman Schedules

Finally, it is notable that the Judge required both parties to cooperate to produce a Spiegelman Schedule which identified which passages of the pleadings, witness statements, expert reports, and live evidence were relied upon in relation to each issue. Whilst commonly used in arbitrations, their use in the High Court has to date been limited. The Judge remarked that the Schedule was of great assistance and endorsed its broader application in complicated litigation. It may be that requests for such Schedules become a more frequent aspect of this type of dispute.

Simon Croall KC, Andrew Carruth, and William Mitchell acted for DBS, instructed by Bristows LLP.

Simon Croall KC

'It is lovely to involve him in a team because he relates immediately to everyone, is always across the details and is always energetic and engaged." (Chambers UK, 2023)

Simon Croall KC is an established commercial silk who has appeared in every court (including recent appearances in the Supreme Court). He is a sought after trial advocate as well as being respected in the appellate courts. In recent years much of his work has been in the context of International Arbitrations.

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Andrew Carruth

'Andrew provides very strong written advocacy and is able to get to the nub of issues." (Chambers UK, 2024)

Andrew undertakes a broad range of commercial work with an emphasis on shipping, offshore construction, international arbitration, energy and commodities. Andrew regularly appears in the High Court (primarily in the Commercial Court and the Admiralty Court) as well as in arbitrations. He has extensive experience of cross-examining both factual and expert witnesses. He has undertaken cases under all of the main arbitral rules (including LCIA, ICC, LMAA, UNCITRAL, SIAC, HKIAC and GAFTA). Andrew was appointed a Recorder in May 2023.

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William Mitchell

'William has a fantastic way of grasping the key issues and finding novel arguments to run in a complex area of law." (Chambers UK, 2024)

Will has a broad and busy commercial practice encompassing all areas of Chambers' work, including contractual disputes, shipping, insurance, banking and finance, international arbitration, information technology, aviation, jurisdictional disputes, and insolvency. Additionally, he is also regularly instructed on gambling disputes, and appears as sole counsel for the Claimant against TSE Malta LP (t/a Betfair) (LM-2021-000010) in a 12-day hearing due to come before the London Circuit Commercial Court in July 2024.

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