

Anatomy of a troubled digital twin project (Topalsson v RPMC)

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TMT analysis: This judgment is useful reading for IT lawyers involved in negotiating contracts for the procurement of digital twin systems. The lessons of the case also apply to IT and software procurement more generally—when buying a bespoke software system, what can the customer put in the contract to ensure critical deliverables are delivered on time and to standard? When there are lots of quasi-contractual documents (implementation plans, timelines, etc), how best to ensure their contents are binding? How to handle uncertainties as to scope and timing, particularly if changes and delays occur? The judgment helpfully illustrates how these issues can go wrong and contains some important lessons for drafting IT contracts. Written by Chris Kemp, partner at Kemp IT Law LLP.

Topalsson GmbH v Rolls-Royce Motor Cars Ltd [\[2023\] EWHC 1765 \(TCC\)](#)

What are the practical implications of this case?

The practical implications of this case are fairly obvious. However, the judgment is helpful in the way it narrates how common scenarios and negotiating points encountered at the start of a software development project can become substantive issues of disagreement later on.

The first point concerning whether the project timeline was binding illustrates the importance of consistency in drafting, both in the contract itself but also in the quasi-contractual documents (timelines, statements of work, technical specifications, etc) whose drafting may often be assigned to non-legal members of a project team.

The second point concerning whether Topalsson had delivered on time goes to the importance of accuracy of defined terms and, in particular, defined terms associated with acceptance testing in a software development or implementation project. Definitions in this context can often be missing (as in this case), self-referential or otherwise unclear and this can lead to uncertainty about whether or not a supplier has met their obligations.

The third point concerning whether RPMC had impeded Topalsson from performing is a cautionary tale about accepting terms which a party believes might be suboptimal in the interests of getting a deal over the line. Here the contract essentially provided for the project to proceed using a waterfall methodology although the supplier considered (and regularly aired the view) that an agile methodology would have been faster—and would, Topalsson argued, have enabled it to meet the deadlines.

What was the background?

In 2019, Rolls-Royce Motor Cars Ltd (RPMC), the luxury carmaker, contracted with Topalsson GmbH (Topalsson), a supplier of digital twin engine software.

Topalsson's software allows prospective car buyers to configure and see photorealistic renderings of the cars they are considering buying. In particular, the software lets the buyer see what customisation and upgrade options would actually look like.

RRMC's contract with Topalsson covered the design, licensing and implementation of a digital twin solution for use in connection with the launch of a new Rolls-Royce model in early 2020. The total value of the contract appears to have been c.€9m (as per para 338 of the judgment).

The project encountered delays and delivery deadlines were postponed on several occasions. The appropriate project delivery method (agile or waterfall) was a running issue. RRMC sought to terminate the contract in April 2020. Topalsson issued proceedings in September 2020.

Overall, the court addressed a number of issues:

- was the project timeline binding?
- did Topalsson deliver on time?
- did RRMC impede or prevent Topalsson from performing the contract?
- was RRMC entitled to terminate?
- had there been a misrepresentation?
- what was the quantum?
- was either party was entitled to an order for delivery up or destruction of software (para 137 of the judgment)

This case analysis focuses on the top three issues, which give rise to a number of practical tips and pointers for drafting IT contracts.

What did the court decide?

Was the project timeline binding?

Prompt implementation of the software system was important, because it coincided with the launch of a new Rolls-Royce model.

The contract contained a time of the essence provision, but delivery deadlines were spread across a number of documents: in particular, an 'Implementation Plan' and a project plan agreed in December 2019 (the December Plan). The Implementation Plan was found not to contain binding deadlines, as it was too vague—it was described as a 'high level', 'anticipated timeline' and contained a series of activity bars which 'although indicative' did not identify specific dates 'with any degree of certainty'.

However, the December Plan set out the deadlines 'in sequence' and 'with clear milestones'. It was prepared by Topalsson, approved by the RRMC steering committee, and used by both parties as the basis for discussions about subsequent delays. The court was comfortable that it imposed binding deadlines.

Did Topalsson deliver on time?

The contract required 'Technical Go Live' to happen by a certain date. But that term was not defined and the parties disputed its meaning—did it require testing to have been completed? Did all defects need to have been fixed? Without an express definition, expert evidence was required.

The court ultimately identified the meaning of the term, but the obvious point this flags up is the importance of ensuring the acceptance testing definitions are all present and correct in the contract.

Did RRMC impede Topalsson from performing?

The judgment recounts ongoing friction between the parties on whether an agile or waterfall methodology was preferable. Topalsson argued RRMC's required waterfall structure caused project delay. However, the court found that the contract expressly required the project to proceed in this way and that Topalsson's argument amounted to 'no more than an assertion that an alternative approach would have been better'.

Case details

- Court: King's Bench Division (Technology and Construction Court)
- Judges: Mrs Justice O'Farrell DBE
- Date of judgment: 12 July 2023

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