



## BACKGROUND

The recent case of *Topalsson v Rolls-Royce* [2023] EWHC 1765 (TCC) (“Topalsson”) raises important issues that are likely to be of interest to everyone involved in managing ICT contracts, as well as those responsible for advising and drafting termination notices. The case is a reminder of the need to take care, plan and seek specialist legal support before serving termination notices. Hasty action and serving defective termination notices could return to bite you and leave your organisation exposed to the risk of repudiating the contract.

### What happened?

In October of 2019 Topalsson - a German software services company - specialising in digital data visualisation - entered into an agreement with Rolls Royce Motor Cars (“Rolls-Royce”) to develop and supply a new car configurator landscape for the new line of luxury Ghost model, which was scheduled for launch from spring 2020. The objective was to enhance the commissioning experience for affluent individuals interested in buying the supercar, by allowing them to see what it would look like on a screen prior to actual delivery.

Typical of software development projects, there were project delays which both parties blamed each other for. Topalsson claimed that Rolls-Royce had imposed an unsuitable implementation plan due to the tight timescales, widened the scope and imposed funding pressures. Conversely, Rolls-Royce alleged Topalsson of misrepresenting its experience and expertise in securing the tender, as well as inadequately resourcing the project, which resulted in delays to the agreed ‘Technical-Go-Live’ date.

The software agreement included a “High Level Project Roadmap” which included that Topalsson would achieve key milestones by certain quarters (for example the “web configurator” by Q2 in 2020). In December 2019 (shortly after the software agreement was signed), the parties agreed an “Implementation Plan” which set out the dates by which Topalsson would achieve certain milestones (the first of those being in March and subsequently early April 2020). However, critically in March 2020, the parties agreed revised dates including new dates for certain “Technical-Go-Live” milestones.

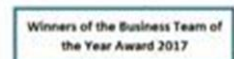


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## FIRST AND SECOND ATTEMPT AT TERMINATION

Rolls-Royce first attempted to end the software agreement by issuing a termination notice on 16 April 2020, on the grounds that Topalsson had failed to meet agreed milestone dates set out in the December 2019 implementation plan. The break notice was rejected by Topalsson on the grounds that the milestones had never been agreed. However, in doing so, they affirmed the software agreement, by denying that the December Plan dates were contractually binding

This did not stop Rolls-Royce, who tried once more on 22 April 2020 as they served the second termination notice for the failure to achieve the target dates set out in the implementation plan agreed in March 2020. They relied on common law grounds and, in the alternative, on Clause 13.11.3 of the software agreement.

By an email sent on 1 May 2020, Topalsson disputed that Rolls-Royce was entitled to terminate the software agreement and treated the second termination notice as repudiation.. On this occasion, they also stopped further work on the project and claimed damages for unlawful termination and loss of profits in the sum of €6,420,793. Rolls Royce counterclaimed damages of €20 million flowing from Topalsson's repudiatory breach and misrepresentation.

## THE KEY ISSUES AND DECISION OF THE COURT

These can be summarised as follows:

***Was Topalsson obliged to deliver and install the software in accordance with an agreed programme or within a reasonable time?***

The Court found that the anticipated timeline in the "High-Level Project Roadmap", which was included in the Invitation to Tender ("ITT"), failed to specify sufficiently defined contractual deadlines. For instance, the activity bars on the Gantt chart did not specify a particular date on which delivery was expected (it merely indicated estimated dates which were going to be fully confirmed later) and as such could not be taken to set "contractual milestones or delivery dates". Therefore, Rolls-Royce's first notice was found to be erroneous and invalid.

However, it became apparent from the expert witness testimony, that Topalsson had itself proposed, fully understood commercial sensitivities that the software had to be ready in time for the big launch date and was aware of the contractually binding obligations to comply with the December Plan and the subsequent March Plan. The software agreement was also clear that "time was of the essence" regarding Topalsson's obligations to deliver the service by the milestone dates.

***Did Topalsson achieve any of the milestone dates or carry out its obligations within a reasonable time?***

The Court heard that, while "Technical-Go-Live" was not fully defined in the software agreement, parts of the agreement were still clear and the meaning of Technical-Go-Live could be safely deduced i.e. the solution was delivered, installed and passed systems integration and user acceptance.

By the time Rolls-Royce had sent its Second Termination Notice, the Technical-Go-Live milestone dates for two key deliverables had passed and it was accepted that the third milestone date was also unlikely to be achieved. The Court, therefore, did not accept Topalsson's claim that it was on track to achieve Technical-Go-Live despite Rolls-Royce's termination. It also rejected Topalsson's claim there was no requirement for all testing to have been completed and the existence of open defects did not prevent Technical-Go-Live being achieved. The Court found that Topalsson had failed to achieve Technical-Go-Live under the March Plan which had further been acknowledged within the four walls of Topalsson's offices.

***Was Topalsson impeded in performing its obligations by Rolls-Royce?***

While there was evidence of some initial delay, as the project had commenced much later than originally anticipated, there was no finding that Rolls-Royce was responsible in any way which could exonerate Topalsson for the failure to meet the agreed delivery milestones in the March Plan. The Judge was of the view that the most likely reason for the delay was the lack of appropriately

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skilled resources, either because Topalsson took on more than what they were capable of delivering or because it struggled to recruit and retain necessary manpower.

***Was Rolls-Royce entitled to terminate under clause 13.11.3 of Section 7 of the Agreement or at common law?***

The First Termination Notice sent on 17 April 2020 was erroneous, because Rolls-Royce had agreed to revise dates in the March Plan and, as a result, were not entitled to rely on breaches of the December Plan as repudiation by Topalsson. However, the second Termination Notice referred to the March Plan and entitled Rolls-Royce to terminate the software agreement as it related to a material breach going to the root of the contract.

The wording of Clause 13.11 did not permit Rolls-Royce to terminate for trivial or inconsequential breaches. For example, if the milestones had been missed by only a few hours. However, Topalsson's failure "could not be described as a near miss" as one of the key milestones was achieved 11 days late and others were not achieved at all.

Topalsson's failure to meet the agreed milestones, therefore, amounted to a breach of condition which entitled Rolls-Royce to terminate under the relevant clause of the software agreement or at common law for repudiatory breach.

***Did Topalsson induce Rolls-Royce to enter into the agreement?***

The Court found no evidence of misrepresentation by Topalsson at the tender pitch relating to the claim made by Rolls-Royce, that it had supported a worldwide roll-out of a configurator for a rival car manufacturer.

***Award of Damages***

Taking into account Clause 20 of Section 7 of the Agreement, which capped both parties' contractual claims, the Court awarded Rolls-Royce damages of €5m plus interest for the loss caused by Topalsson's repudiatory breach of contract.

## **KEY TAKEAWAYS**

- Take care when issuing/ receiving termination notices and seek legal advice immediately.
- Ensure valid legal and factual bases are relied upon when exercising rights to terminate contracts, otherwise it could expose your organisation to a repudiation of contract claim.
- If you require a supplier to achieve milestones on time or there is a need for a project to be delivered by a specific "Technical-Go-Live" date, ensure there are express clauses relating to parties' obligations and set dates to avoid disputes arising later. Consider making time of the essence for achievement of critical project stages.
- If the contract includes a process for agreeing a detailed implementation or project plan, ensure that this is agreed early as part of contract mobilisation, otherwise there is a risk that a high level or outline plan (if included in the contract) may not have any contractual force.
- Keep the delivery plan under constant review and, if necessary, agree and document any changes via the contractual variation or change control mechanism.
- If the prime contractor is using sub-contractors, ensure that it remains fully responsible for the contract performance.

## **CONCLUSION**

The court sided with Rolls-Royce, ruling that the termination was valid and awarded damages in their favour. Topalsson's claim that the software agreement had been unlawfully terminated was dismissed. This case highlights the importance of clearly defining and agreeing upon milestone dates in a contract. It also underscores the need for careful planning and seeking legal advice before serving termination notices. A hasty action could lead to serving defective termination notices, potentially exposing

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your organisation to the risk of repudiating the contract. So, plan carefully, seek legal advice and remember – the devil is in the detail!

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