"Poetic licence and get the buggers out": Feral ICT contract outcomes are avoidable

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Speed Read

A recent court decision illustrates what we have seen time and again among the numerous ICT disputes on which we have advised. Parties to ICT contracts end up with unnecessarily poor outcomes. We use the decision to provide a check list for those facing ICT disputes so they can reduce losses.

In Summary:

Checklist

- Paper trail, paper trail, paper trail
- Watch out for smoking gun documents
- Document agreement changes even if just by email
- Bring experienced lawyers in early

When someone on the supplier side sent an email to a colleague saying as to its customer to use "poetic licence and get the buggers out", we doubt he expected the customer or the judge to see such a smoking gun. But it did, as that is what happens in disputes.

The focus of the case is on the supplier's problems, but the issues apply as much to customers as well. This article first appeared in CIO.

The Detail

A recent court decision illustrates what we have seen time and again among the numerous ICT disputes on which we have advised. We use the decision to provide a check list for those facing ICT disputes so they can reduce losses. The focus of the case is on the supplier's problems, but the issues apply as much to customers as well.

The judgment even has the perfect gotcha "Poetic licence and get the buggers out" smoking gun email to watch out for, a nightmare email the supplier would never have thought would have been seen by the customer and the court.

The thing that we often see is that, when an ICT contract turns feral, the parties end up, understandably, fighting bushfires, without making sure they take optimal steps to protect and document carefully their positions, in parallel.

For example, the parties, their project managers and other professional staff, will typically be flat out trying to sort out the problems. Time and again, and typically without giving it much thought, they'll leave the documentation and other key steps to be sorted later. They'll often even explain this as their rationale for shelving that detail. Usually, by then, it is too late, and often things will have been written that make it worse.

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Too hard to capture then all the necessary information in what are nearly always complex situations. And too late to fix unhelpful or non-existent paper trails.

It's hard to get the balance right, because the primary focus is, usually correctly, on trying to sort out the problems in the first place, leaving little time for shoring up the legal position. But this really is a time to try and find resource and focus to optimally deal with the latter given usually the sums involved are considerable (expense, damages claims, lost revenues, and so on). In this case, failure to do that proved to be very costly for the supplier.

What happened in the case?

This played out like so many other problematic contracts we've seen over the years, so much so we could insert other names and details in the same story for disputes we've seen.

Large incumbent UK telco, BT, has a substantial outsourcing business. In 2013, it took on a £160M 10-year outsourcing contract for Cornwall Council and related parties, to provide ICT and other services. As is usual, the contract had KPIs and SLAs, with a service credit regime where KPIs were not met. But, particularly where there were repeated breaches of KPIs, the customer could also give notice terminating the agreement, in some instances without having to give BT the opportunity to remedy the breaches.

Soon after the contract started, breaches of SLAs and KPIs started to mount. Focus by both BT and the customers escalated over time, including discussions around re-baselining the agreement, such as agreeing revised KPIs. BT spent a great deal of time and money in trying to sort out the problems. Project teams for both BT and the customers, and the equivalent of a steering committee, were engaged. For the customers, they also had a great deal at stake both in terms of money and in terms of deliverables to their ratepayers. This wasn't just a problem for BT.

BT pulled the stops out, as, again, we've seen often with suppliers engaged in problematic contracts (where, as here, there is almost always fault on both sides). The customer even acknowledged that "BT could hardly have done anything more" in making considerable efforts to rectify things.

Internal reviews set out the options: try and remediate the problems or terminate. While trying to fix things and re-negotiate, in June 2015, the customers advised BT that they were looking to terminate the agreement instead, due to the multiple breaches of the SLAs and KPIs. That's always a big call to make, legally, and practically.

BT argued that the customers couldn't terminate as the agreement didn't allow termination, and that in any event the circumstances were such that the customers had waived their rights to terminate, given the discussions around revised KPIs, etc, and what was said in those discussions. BT said the right to terminate was taken away via an oral agreement (or that there was a legally enforceable waiver of rights, under the legal principles of waiver and estoppel).

What the court had to decide

Could the customers terminate, or was BT right? That was the issue addressed by the court in BT Cornwall v Cornwall Council. The answer from the court was: yes, the customers could terminate. The outsourcing agreement allowed it, and there was no legally enforceable arrangement overriding the agreement, nor had the customers waived their rights. BT hadn't done enough to make sure that, as part of the remedial steps it was taking, arrangements had been made to remove the termination option.

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Where BT fell down

Essentially, BT didn't create a paper trail to achieve this, and it seems to have assumed that the customers had waived their rights to terminate. Additionally, the judge didn't accept evidence from BT people thatrights to terminate had been waived in discussions. Therefore, the original terms of the agreement applied and they, in addition to service credits for breach, also allowed termination for the same breaches.

Although not fully clear from the judgment, it looks like BT were doing all they could to sort out the problems. What they didn't do, as we've seen so often, is to make sure the legals were covered off, and they therefore ended up in the pickle of spending much time and money to sort the problems, only to face the great cost of termination (entailing having to pay damages and so on, on top of lost revenue, damage to reputation, etc).

Checklist

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First the contract was lousy.

What does the case tell us? Before turning to the focus of this article, we note that the actual agreement was lousy and there was much both parties could have done to improve it. BT got into trouble initially due to terms that ran against it. Said the judge:

> *"The Agreement is, as a document, very hard to work with, including by reason of its impractical length, and the imprecision in some of its drafting. It runs to several lever arch files without that length providing clarity in return. Its oversight and governance arrangements proved inadequate for all parties when things started to go wrong."*

Our experience is that not enough time is spent on getting the contract right in the first place, as we've outlined in our article, "So what! The contract just goes in the bottom drawer."

Paper trail, paper trail and paper trail

As everyone chases their tails, process and strategy go out the window. Our experience, numerous times, is that people feel they are too busy dealing with core problems and they adopt the approach that they'll leave such detail until later. For example, change control processes are ignored (when often they will produce optimal results for one or other of the parties).

The party that keeps the best paper trail, and plays the processes optimally, can be winner for that reason alone. Cynical, yes, but that is often the reality.

Here, BT regretted that they hadn't fixed some errors, as they saw it, in contemporaneous documents. But the court wouldn't have a bar of it and stuck with what the original documents said, reflecting how critically important the contemporaneous documents are in any dispute context whether in court or otherwise. Dispute lawyers are well aware of this. Contemporaneous documents trump oral evidence most of the time. Trying to patch them up later usually won't work.

This is the sort of lack of attention to detail that ended up costing BT millions. It is the sort of situation we have seen many times and indicates that it is worth organisations resourcing adequately when things hit the fan, despite the time and money challenges. BT's managers weren't believed by the judge, and there was no paper trail backing up their oral evidence.

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We dispute lawyers have a saying that emails and letters are sometimes written not for the named recipient to read but for the judge to read (but it's not just judges: it's other managers, the other parties, and so on). That's the so called "letter to the judge".

Paper trail, paper trail, paper trail.

Bring experienced lawyers in early

There's legal detail, for the reasons above, plus there's key strategy and tactics that can save considerable sums (and time). It's challenging as a dispute lawyer to be brought in late, and it's false economy.

Lawyers also provide a conduit for frank exchanges on steps to take, that won't be seen by the other side: which segueys into the next point, around the value of privileged communications, and the value of legal advice as to what to say and not to say.

The BT case has the perfect "gotcha" illustration of this.

In litigation and arbitration, the other side gets to see internal memos, emails, etc by the discovery process, warts and all (a key exception being much of the correspondence and documents involving lawyers as that is privileged). Most disputes don't go to defended hearing, but the access to such documents still is a major dynamic when considering tactics and strategy around any dispute, even if proceedings haven't been issued. Therefore, this should always be seen as an issue. After all, any party with bad news documents under the hood will generally settle to avoid opening the kimono.

Watch out for smoking gun documents: the 'poetic licence and get the buggers out' email

To the BT case, an internal email within BT said:

> *"We are in grave danger of breach on ticket performance. … Ian & Mark will be working with Stuart & Nicola to make sure that we keep as many tickets out of the system as we can. Tickets that do enter the system will be simply & quickly classified (get people off phones & fixing). For those that are in the system we need to re-categorise wherever possible; to get them out of SLA breach."*

Then a little time later, another internal email within BT, which is the horror story (key bit highlighted):

> *"Where did the new [tickets] come from since Thursday? Need to use poetic license & [g]et the buggers out".*

The judge said this indicated that BT was inappropriately avoiding its responsibilities as to handling of tickets, which impacted compliance with the SLAs. The writer of the email tried to explain it away as a late night joke but the judge didn't accept that.

Basically, not only was the paper trail in favour of BT non-existent, but what was there was decidedly harmful.

It will be important in the real world for people trying to sort out the core problems not to be too bogged down by overly minding legal p's and q's. Some pragmatism and risk is necessary. But, at least some high level guidance for most of the team is needed (much more care is needed by more senior people though).

Document agreement changes even if just by email.

BT reckoned they had an oral agreement or arrangement by which the customers would not terminate as the parties tried to sort out the issues and re-negotiate. The judge didn't accept that – reading the judgment, you get the impression that he thought the BT people were gilding the lily - but the position is likely to be different if it was written up by, say, exchanges of emails.

Paper trail, paper trail, paper trail.

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