

## Can a perpetual licence come to an end?

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**When it comes to mission critical software, business continuity is top of mind. Many customers can't afford for use of their software to come to a grinding halt, even if a party decides to terminate the agreement. It's in these types of situations that customers take some comfort that they have a perpetual licence and will at least be able to continue using the software while they find a replacement. But what if that perpetual licence could in fact be terminated?**

### The never ending licence

You'd be forgiven for thinking a licence that is stated as being "perpetual" grants rights that are never-ending and survive termination of the licence agreement. However, on the basis of a recent UK High Court ruling,<sup>1</sup> a "perpetual" licence may merely mean the rights exist for an indefinite amount of time, and can come to an end.

In the case, the supplier had entered into a licence agreement and a support agreement with its customer. The customer eventually decided to develop software to replace the supplier's software. So, the customer terminated the support agreement but claimed that its licence to use the software would continue in effect on account of the "perpetual licence".

### So what does 'perpetual' really mean?

The UK High Court judge considered that the word "perpetual" can carry different shades of meaning. He cited two examples: "never ending"; and "operating without limit of time" (ie, indefinitely, but subject to termination provisions). Which shade of meaning prevails is determined by the context of the agreement and the intentions of the parties.

In this case, the judge concluded that the licence was only indefinite (and could be terminated). His reasons included that the parties had not intended the licence to the software to continue if the support agreement

was terminated, as evidenced by the existence of a clause in the licence agreement stating that "[i]n the event that the [support agreement] is terminated for any reason whatsoever [the licence agreement] shall terminate forthwith", and another clause requiring all copies of the licensed software to be returned within seven days of termination. These provisions were not excluded by the fact that the licence was stated as being a "UK-wide perpetual licence".

### What this case means for licensees

This case highlights two key issues for customers that are seeking a "never ending" licence, or at least some added certainty around the length of their software licence.

Firstly, the importance of understanding the wider contractual framework when seeking perpetual licence rights (eg, the parties rights to termination, and the effect of termination). Some licences alert the customer to this issue with the inclusion of words such as "subject to the terms and conditions of this Agreement" preceding the licence grant. This is a red flag for licensees.

Secondly, the importance of clear and unambiguous drafting. Simply using the term "perpetual" will not be enough. The standard approach is to provide that the license is both perpetual and "irrevocable". However, if the first issue above is not adequately dealt with then this type of amendment may not necessarily work.

### What if the supplier insists on the right to terminate the licence?

Most suppliers will insist on the ability to terminate a customer's licence. But at what

<sup>1</sup> *BMS Computer Solutions Ltd v AB Agri Ltd* [2010] EWHC 464 (Ch).

point should they be able to do this? If a customer is blatantly ripping off the supplier's IP then you can understand why a supplier may push for the right to "turn off the tap" on the licence. However, most suppliers starting position is that they should be able to terminate the agreement for any breach whatsoever, regardless of whether or not it was material and without any opportunity to remedy the breach. This is generally unsatisfactory, particularly for more critical software applications (for example, ERP systems).

There are a number of solutions (some creative) customers could propose to a savvy supplier who demands that a licence be subject to termination. These solutions often

revolve around what really matters to the supplier and what would actually happen in practice.

Options such as restricting the circumstances in which the supplier can terminate (but still allowing them alternate rights to seek compensation), and ensuring there is a reasonable opportunity to remedy or compensate a supplier for a breach, can help reduce the risk of a licence to crucial software coming to an abrupt end. For critical software, a more elaborate disengagement regime can also assist.

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*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

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