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## **Capturing the IT customer's requirements: a shared responsibility**

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### **Abstract**

The development, delivery and installation of a computer system specifically created to meet the customer's requirements, can be a complex task to achieve. An element of this complexity arises by virtue of the fact that it may be difficult to establish precisely what the customer's requirements are. Indeed, the failure to have accurately 'captured' the customer's requirements is a common cause for computer disputes.[1] This paper presents the view that responsibility for capturing the customer's information technology requirements is a responsibility which should be shared between the customer and the supplier. With this in mind, established legal principles relating to pre-contractual information are re-examined through an IT perspective and the treatment by the courts of such information in this context is analysed. By exploring the potential impact of the law on pre-contractual information, the role of the lawyer in drawing these matters to the attention of the contracting parties is underlined. It is emphasised that the process of capturing the customer's requirements is one which can benefit considerably from legal assistance and it is noted that the lawyer is well placed to actively encourage the parties to communicate their requirements fully and accurately. In undertaking this role, the lawyer may in turn facilitate a greater likelihood of the parties securing a match between their respective expectations of the system being supplied.

### **Background**

IT disputes frequently arise as a result of the non-existence of a specification of work or as a result of the documentation being too vague or imprecise.[2] If the requirements of the customer are not fully and accurately identified it will prove difficult to achieve a match between the expectations of the customer and those of the supplier in respect of the system being provided. The process of capturing the customer's requirements and therefore bridging any existing or potential gap between the expectations of the contracting parties is substantially reliant upon an effective exchange of information. This is illustrated by the fact that the customer has knowledge of its own business and its requirements while the supplier has knowledge of its product's capabilities. Only by sharing such information can the resultant system adequately reflect both what the customer wished to obtain and what the supplier intended to supply.

The lawyer has an important role to play in facilitating an effective capture of the customer's requirements. Indeed, it is feasible that the lawyer or law firm may themselves be the customer acquiring the computer system – a possibility which will be observed further on. More commonly however, the lawyer is likely to assume the role of legal adviser. He or she may contribute significantly to the requirements capture process by encouraging openness and certainty between the parties throughout the acquisition proceedings.[3] Capturing the customer's requirements and

identifying the corresponding capabilities of the system being supplied may be a lengthy process during which extensive discussions between the parties may take place. It is important for the parties to be made aware that this process may be further complicated by the fact that pre-contractual statements may become terms of the contract.

## The effect of pre-contractual statements

The lawyer is in a good position to draw to the attention of the contracting parties issues relating to pre-contractual information. Any statement made during contract negotiations will be classified by the courts as either a representation or a term; a significance of classification being the consequences on breach. A term is a promise or undertaking which forms part of the contract, whereas a representation is a statement which induces one party to make the contract but does not become part of the contract itself. If a pre-contractual statement is found to be a term of the contract, which is subsequently proved to be untrue, this will give rise to an action for breach of contract. If however, the statement is classified as a representation and that representation proves false, the remedy will lie in an action for misrepresentation.[4]

Whether a pre-contractual statement is a term relies primarily on whether there is an intention on behalf of the parties for it to be considered as such, and the test to determine contractual intention is an objective one.[5] The approach adopted through the common law reveals that the judiciary have acknowledged several factors as being relevant aids to determining the application of the intention test. These include: the importance of the statement[6]; reliance of the other party on that statement [7]; and the relative knowledge and expertise of the parties[8].

These factors have been considered and applied by the courts in a wide spectrum of situations arising in a pre-contractual context, although an IT specific example may be drawn upon to further exemplify the point being made. The case of *MacKenzie Patten & Co. v. British Olivetti Ltd*,[9] concerned a small practice of solicitors which had agreed to lease a system from British Olivetti for accountancy and time recording purposes. The law firm, as the customer, understood that the system would be capable of keeping appointments, of providing a record of time spent, and would have the facility to record current and past cases and to diarise future ones. It was submitted by the plaintiffs that the supplier had claimed that a machine could be provided which would “precisely meet their requirements”. [10] However, the court found that the system supplied was not suitable for the customer’s needs; it did not perform all the functions promised; moreover, the customer’s needs could have been better and more efficiently served in other ways. The judge concluded on his findings of fact that the statements of the defendant as to the system’s suitability and performance capabilities had been made with the intention of inducing the plaintiffs into an agreement. In reaching this conclusion, the judge highlighted the plaintiffs’ lack of knowledge of computer systems and their corresponding reliance on the expertise of the defendant stating: “[The] defendants had special knowledge in this field. Mr. Mackenzie and Mr. Patten were entirely ignorant in it.” [11] As the plaintiffs had relied upon the defendant’s statements, the court held the statements had become terms of the contract and the law firm successfully sued for damages.

Decisions such as the one reached in *MacKenzie Patten* illustrate how pre-contractual statements may become terms of the contract. The customer had relied upon the seller’s knowledge and expertise and the court held that to be a determining factor in applying the test of intention. This case may operate as a cautionary tale to suppliers and particularly to sales staff who may have a tendency to ‘oversell’ their system in order to secure a deal. Suppliers need to be aware of the possibility of their pre-contractual statements becoming terms of the contract. The lawyer is in a suitable position to inform the supplier of the potential legal consequences which may arise from their pre-sales discussions with customers. In particular, the lawyer can stress the importance of an accurate identification and communication of the actual capabilities of the system being presented. On a practical level the lawyer may assist this process of requirements capture by encouraging the use of clear and comprehensive documentation in which technical issues are addressed and from which

descriptions regarding the system's capabilities are taken. Such information may be produced in the form of a functional specification which may at a later stage be incorporated into the contract as a schedule.

In the same way that the lawyer has an important role in advising the parties of the possibility of pre-contractual statements becoming terms of the contract, it is equally important that he or she highlights to the contracting parties the potential consequences of the failure to communicate a particular requirement of the system being procured. The customer should be made aware that if it requires a particular feature or facility to be provided by the system this requirement must be fully and accurately communicated to the supplier. The case of *Micron Computers v. Wang (UK) Ltd*<sup>[12]</sup> illustrates this point. The plaintiffs complained that the system they acquired never worked satisfactorily and in particular that it was incapable of performing a function, known as 'transaction logging'. The plaintiffs claimed that they had specifically requested for this function to be included. In response to Micron's complaint, Steyn J found that the absence of the transaction logging facility was not in reality a fault in the system. The court held that Micron would only be able to complain about the absence of this facility if it could establish that it had made this requirement known to Wang, such that it had become a contractual term or an actionable representation. The court found that this could not be established by Micron and therefore its claim in this respect failed.

### **Shared responsibility for 'requirements capture'**

It can be seen that failure to communicate a particular requirement of the system being procured may result in that requirement not being included in the supplied system and moreover that responsibility for this failure may not lie with the supplier. The case of *Micron* demonstrates how responsibility for ensuring the customer's requirements are satisfied is a responsibility to be shared between the customer and the supplier. The customer has a responsibility to ensure their requirements are fully and accurately communicated to the supplier in order to enable those requirements to be met by the supplier. Failure to do so will result in the development of a system which does not do what was hoped for and for which the customer may not be able to secure a remedy.

Further support for the notion of responsibility for 'requirements capture' being shared between the parties may be found in the ruling of *Anglo Group plc v. Winther Browne & Co.*<sup>[13]</sup> In this dispute, arising from the supply of a standard computer system, the court held that it "is well understood that the design and installation of a computer system requires the active co-operation of both parties."<sup>[14]</sup> The court found that the extent of this cooperation should be such that the following terms, *inter alia*, could be implied into the contract: first, that the purchaser communicates clearly any special needs to the supplier; second, that the purchaser takes reasonable steps to ensure that the supplier understands those needs; and third, that the supplier communicates to the purchaser whether or not those precise needs can be met - if so how they can be met and if not, what appropriate options are available.<sup>[15]</sup>

The finding that it should be an implied term that the purchaser communicates clearly any special needs to the supplier with a corresponding requirement for the supplier to communicate whether or not those precise needs can be met, operates as a clear acknowledgement that responsibility for identifying an IT customer's requirements is a responsibility to be shared between the parties. However, as has already been seen in the case of *Micron*, if on an assessment of the objective intention of the parties it is found that the customer has not effectively communicated a particular requirement, the supplier will not be found to have expressed agreement to that requirement and therefore will not be under an obligation to satisfy it. For this reason, it could be suggested that it may not have been necessary for the court in *Anglo Group* to have classified the responsibilities as implied terms. A similar approach to the one adopted in *Micron* could have been taken, notably that an unexpressed requirement will quite simply, not become part of the contract. If there is an unexpressed requirement it will not fall within the scope of the supplier's obligations and therefore will not have to be explained by reference to an implied obligation on the customer to state that

requirement clearly.[16]

## Conclusion

Whether it is the law relating to contractual interpretation or the law relating to implied obligations which is chosen as the preferred legal framework for determining the parties' responsibilities, the conclusion may nevertheless be drawn that the capturing of an IT customer's requirements is a process which relies upon the input and cooperation of both the customer and the supplier. Moreover, the lawyer may make an invaluable contribution to the success of the requirements capture process. At the pre-contractual stage the lawyer's contribution may take the form of technical advice, notably advising the parties of the legal implications of their pre-contractual statements, alerting the parties to the potential risks in the project and encouraging a fair apportionment of those risks. On a practical level, the lawyer may operate as a facilitator to the parties. In this capacity he or she may actively encourage the parties to express with accuracy and clarity their respective expectations of the system and in so doing may promote the greater likelihood of a system being supplied which satisfies all interested parties.

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[1] The term 'capture' has been specifically chosen to emphasise the difficulties which may be encountered when defining the customer's requirements. For example, the customer themselves may be uncertain as to what functions they require an IT system to perform or, it may not be technically possible to supply a system to solve the perceived IT problems. For these reasons and many others, the IT customer's requirements may be rather elusive and therefore in need of 'capturing'.

[2] Mathiason Turner, Consultants 'The UK Computer Disputes Survey', 1991, cited in Stephens, R (1992) *Computer Disputes: Lessons and Pitfalls*, I.C.C.L.R. 1992, 3(6), 210 – 213. Also, see Mulley, R (2001) *Projects contracts survey*, Corp. Brief. 2001, 15(3), 2-6 which details the findings of a survey conducted in 2000 by Nabarro Nathanson in association the Computing Services and Software Association.

[3] Davies, C (2003) *The Lawyer's Role in the Procurement of IT Systems and Services*, Comps. & Law 2003, 13(6), 26-30 at 27.

[4] It is possible for a statement to be both a term and a representation in which case the claimant will have a choice between their means of achieving a remedy. However, as Halson, R (2001) *Contract Law* (1st ed.) Pearson Education Limited, notes at p. 47: "... there exists a hierarchy of remedies in which the remedies available for breach of contract occupy a superior position to those available in respect of misrepresentation. This in turn reflects the view that breach of contract is more serious than misrepresentation". Furthermore, as Denning L.J. stated in *Leaf v International Galleries*: "An innocent misrepresentation is much less potent than a breach of condition." [1950] 2 K.B. 86 at 90.

[5] *Heilbut, Symons & Co v. Buckleton* [1913] A.C. 30; *Thake v. Maurice* [1986] Q.B. 644; *Ignazio Messina & Co v. Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566 at 579. *Heilbut, Symons & Co v. Buckleton* was followed in the computer software case of *Jonathan Wren & Co Ltd v. Microdec Plc* 65 Con. L.R. 157 in which it was held that there was no collateral warranty because there was a "complete lack of intention".

[6] *Bannerman v. White* (1861) 10 C.B. 844.

[7] *Schawel v. Reade* [1913] 2 I.R. 64, HL, statement found to be a term, which may be contrasted with *Ecay v. Godfrey* (1947) 80 L1.L.R. 286, where the statement was found not to be a term as the buyer was asked to verify the seller's statement.

[8] *Oscar Chess v. Williams* [1957] 1 W.L.R. 370, where a private car seller incorrectly stated the age of a car to a car dealer and the statement was held not to be a term; which can be contrasted with *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623, where a car dealer's statement as to mileage was considered to be a warranty.

[9] (1984) unreported, 11 January.

[10] *Ibid.*

[11] *Ibid.*

[12] (1990) unreported, 9 May.

[13] [2000] I.T.C.L.R. 559 (QBD (T&CC)).

[14] *Ibid* at para 125.

[15] *Ibid* at para 128.

[16] See further, Douglas, M & Pilling, B, *Implied terms in computer contracts*, *Comps. & Law* 2001, 12(3), 28-32 at 31.