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BSKYB V HP ENTERPRISE

By Jim Oulton and Dan Futter

In 2000, BSKyB decided to procure a new customer relationship management system. EDS were selected to design, build, implement and integrate the system. However, this did not proceed as anticipated and in 2002, BSKyB removed EDS from the project and subsequently brought proceedings.

In these proceedings, BSKyB alleged that EDS personnel had made false representations as to EDS's ability to design and build the system in the timescales specified. The Court found EDS personnel had misrepresented that EDS had analysed the time and work needed to complete the initial delivery. The Court found that such representations were made fraudulently, as no proper analysis had ever been carried out and EDS had no basis for honestly believing in their truth.

BSkyB sought damages of hundreds of millions of pounds, despite the contract providing that there was a liability cap of £30m. The Court found in favour of BSKyB, holding that, EDS were liable for the making of fraudulent misrepresentations, and that the liability cap did not apply to losses caused by fraud.

The case highlights several issues of note to insurers. First, the damages that can arise from an IT procurement dispute can vastly exceed the value of the contract in question.

Second, it demonstrates that no matter what limit of liability a contract provides for, an Insured's potential exposure can be greater. If fraud is proved, liability caps will not apply to losses caused by fraud and a Defendant will usually be liable for all losses arising (not just those foreseeable when the contract is entered).

Finally, insurers will want to consider coverage issues when the Insured has been found liable for fraud or a claim has been caused by fraud. Insuring clauses will need to be evaluated to see if they offer full civil liability cover. The exclusion clauses will also need to be scrutinised, to determine if they are triggered. It is common that policies will exclude indemnity for the consequences of fraudulent conduct of employees from the point in time at which the Insured had grounds for suspecting an employee had acted fraudulently. Insurers will want to carry out a careful evaluation of just what the Insured knew in such circumstances to determine if any exclusions apply. They will also want to bear in mind that the Court will be concerned with the substance of what happened rather than the form of any claim.



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