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REACH FOR THE SKY

By Matthew Lawson and Piers Elliott

At first blush, the long awaited judgment of *BSkyB Ltd and Another v HP Enterprise Services UK Ltd and Another* presents a veritable smorgasbord of contractual failure to hungry IT lawyers and commercial litigators alike. On closer analysis, however, it is important and interesting not because it creates any new law (it doesn't) but because it is one of the first major IT disputes to proceed to trial and judgment, it encapsulates many of the features and problems typical of this kind of project and, by the application of established legal principles, serves as an object lesson in how a £48m IT project with risk ostensibly capped at £30m can mushroom into a several hundred million pound disaster.

The result is based very much on the facts (including the dishonesty of a key EDS employee) but serves as a useful reminder in particular of the requirements and difficulty of proving fraud, as well as the law relating to misrepresentation and entire agreement clauses.

The facts

In 2000, BSkyB selected EDS following a tendering process to design and implement a new customer relationship management (CRM) system. Matters did not proceed well and in 2002, BSkyB removed EDS from the project. BSkyB brought proceedings alleging that EDS personnel used fraudulent

misrepresentations as to the time, cost, resource, technology and methodology of implementing the system in order to land the £48m contract ahead of other bidders. BSkyB also brought claims for breach of the Prime Contract and negligent misrepresentations made by EDS prior to a Letter of Agreement which had varied the terms of the Prime Contract once problems with the implementation became apparent.

Proving claims of fraudulent misrepresentation is difficult

Damages for breach of contract and negligent misrepresentation were capped at £30m in the Prime Contract. The key to unlocking BSkyB's £710m claim therefore depended upon it being able to establish fraudulent misrepresentation which fell outside the ambit of the cap.

Despite comprehensively demolishing the credibility of one of EDS's key witnesses (Joe Galloway, head of EDS's CRM practice and the lead salesman during the tender process), BSkyB only managed to succeed on one of its five fraudulent misrepresentation claims – as to the time it would take EDS to deliver the CRM system. The judge found that:

- EDS had no basis for an honest belief in the truth of its time estimates – in part because it was unable to evidence that any proper analysis of them had been carried out before or after the tender process.



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- The representation as to time was therefore made dishonestly by Mr Galloway who knew it to be false.
- EDS intended BSKyB to rely on it to select them for the project and to enter into the Prime Contract which BSKyB did, to its detriment.
- rejected an argument by EDS that an express statement at the end of the clause, to the effect that it did not exclude fraudulent misrepresentation, by implication covered non-fraudulent misrepresentation.

The constituent elements of a fraudulent misrepresentation claim were therefore made out, with the consequence that damages were not limited by the cap or the usual rules on foreseeability of loss.

The fact that BSKyB only succeeded with one of their five claims nevertheless highlights the difficulty in proving claims of fraudulent misrepresentation even in situations where the general credibility of a key witness is shattered. As Ramsey J summarised in his judgment, the court has to determine who made each representation; whether that person was authorised to speak on behalf of the corporation; and whether that person or some other person who directed the representation to be made had a dishonest state of mind, failing which the claim for deceit fails.

Entire agreement clauses

BSkyB also managed successfully to avoid the entire agreement clause in the Prime Contract which EDS had argued defeated the claims for negligent misrepresentation. Although the clause as drafted was held to be effective to stop prior representations from giving rise to contractual liability, that did not of itself exclude liability in misrepresentation for such representations. To achieve that, clear words are required. Ramsey J:

- noted the need for the “contractual renunciation of the need to rely” (*Man Nutzfahrzeuge v Freightliner*); and

This should act as a prompt to check the wording of entire agreement clauses in standard terms. They will not exclude liability in misrepresentation for non-fraudulent pre-contractual representations without express wording to that effect.

It is also a useful reminder that not all pre-contractual statements of intent will amount to representations having contractual effect. Clients wishing to rely on them as such will need to ensure they or their lawyers capture and expressly incorporate such statements into the contract.

What price fraud?

Although the total amount of damages due to BSKyB has yet to be decided, it is understood that the parties have now agreed to an interim payment of damages of £200m by EDS, a remarkable figure given the initial value of the project and a contractual liability cap of £30m.