

# The sky's the limit

When sales patter becomes fraud—damages go sky high, say **Matthew Lawson & Piers Elliott**



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## IN BRIEF

- (*BSkyB Ltd and Another v HP Enterprise Services UK Ltd and Another*): a stark illustration of the dangers of exaggerated sales pitches as well as a valuable reminder of the law relating to misrepresentation, entire agreement clauses, repudiatory breach of contract and mitigation of loss.

The judgment in BSKyB's £710m claim against EDS (*BSkyB Ltd and Another v HP Enterprise Services UK Ltd and Another*) has been eagerly anticipated by lawyers and the IT industry since the trial commenced on 15 October 2007. The hearing lasted almost a whole court year and the court bundle comprised some 400 files. Even once the trial concluded on 30 July 2008 there was a further 18-month wait for the judgment which runs to an epic 468 pages.

So, has it been worth the wait? In one sense, no: the judgment does not create any new law. On the other hand, 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 judgment is interesting and important. Few information technology industry cases ever make it to trial, most being dealt with privately by arbitration or settled confidentially. This one charts a full range of legal and practical features and problems typical of this kind of project and subjects each to judicial scrutiny by the application of established legal principles.

It is also a highly interesting and, in places, entertaining judgment due to the events that took place during the trial which highlighted the dishonesty of a key EDS employee in a manner which would not have been out of place in a Hollywood courtroom drama. It serves as a stark illustration of the dangers of exaggerated sales pitches as well as a valuable reminder of the law relating to misrepresentation, entire agreement clauses, repudiatory breach of contract and mitigation of loss.

## Background

In 2000, BSKyB decided to procure a new customer relationship management system and, following a tendering process, EDS were selected to design, build, implement and integrate the system. Matters did not proceed as anticipated and in 2002, BSKyB removed EDS from the project and subsequently brought proceedings. These alleged that EDS personnel had made fraudulent misrepresentations as to the time, cost, resource, technology and methodology of implementing the system and that these misrepresentations had led to EDS being awarded the £48m contract ahead of other competing bidders. BSKyB also brought further claims for breach of the Prime Contract and negligent misrepresentations made by EDS both prior to the Prime Contract and a Letter of Agreement which had varied the terms of the Prime Contract once problems with the implementation became apparent.

## Fraudulent misrepresentation

Damages for breach of contract and negligent misrepresentation appeared to be capped at the £30m provided for 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.

The evidence of one of EDS's key witnesses proved pivotal. Joe Galloway was head of EDS's customer relationship management (CRM) practice and the lead salesman during the tender process. The credibility of Mr Galloway was destroyed upon cross examination as he perjured

himself with regard to an MBA he claimed to have received from the Concordia College and University on St John in the US Virgin Islands. Mr Galloway claimed that he had been working on St John on a project for Coca-Cola at the time of gaining the qualification and that "there was a small commuter flight that went back and forth to St John". However, witness evidence produced by BSKyB proved that there was not, nor had there ever been a Concordia College and University, a Coca-Cola office or facility or even an airport on St John. The nail in the coffin for Mr Galloway was when BSKyB's leading counsel, Mark Howard QC, revealed that he had purchased an MBA online from Concordia College and University for his miniature Schnauzer Lulu, who, the Court learnt, managed to achieve higher marks than Mr Galloway.

Despite comprehensively demolishing the credibility of Mr Galloway who Ramsey J remarked to have "demonstrated an astounding ability to be dishonest", 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 relied in part on a lack of documentation by EDS to evidence its analysis of its time estimates in finding that no proper analysis had been carried out and that EDS had no basis for an honest belief in the truth of them. The representation as to time was made dishonestly by Mr Galloway who knew it to be false. In making the false misrepresentation, EDS intended BSKyB to rely on it and to select them for the project, and to enter into the Prime Contract which BSKyB did, to its detriment. 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 claims nevertheless highlights the difficulty in proving claims of fraudulent misrepresentation even in situations where

the dishonesty of a witness can be proved. Ramsey J noted that, in accordance with the decision in *Armstrong v Strain*, the court has to determine who made each representation; whether that person was authorised to speak on behalf of the corporation; whether that person had the required state of mind and, if not, whether some other person who directed the representation to be made had the required state of mind. If the person who made the statement or directed it to be made did not have a dishonest state of mind, then the claim for deceit fails. This illustrates the exceptionally high standards of proof required to succeed with claims of deceit.

### Negligent misrepresentation

EDS claimed that an entire agreement clause in the Prime Contract had the effect of excluding any claims for non-fraudulent misrepresentation in respect of pre-Prime Contract representations. BSKyB managed successfully to avoid the entire agreement clause as Ramsey J held that although the entire agreement clause as drafted was effective to stop prior representations from giving rise to contractual liability, that did not of itself and without more exclude liability in misrepresentation for such representations. To achieve that, clear words are required. Pointing to the decision in *Man Nutzfahrzeuge v Freightliner*, Ramsey J noted the requirement for the “contractual renunciation of the need to rely” to form part of the wording of the clause. He also 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. Express wording is required.

Further negligent misrepresentations were alleged to have been made by EDS before the Letter of Agreement, to induce BSKyB to continue with the project once problems had surfaced under the Prime Contract. Only one of these was found to have been made, a negligent misrepresentation as to steps taken to develop an achievable plan for the project. Damages for this negligent misrepresentation are, however, subject to the £30m liability cap stated in the Prime Contract which Ramsey J found to be effective.

### Alleged settlement

The Letter of Agreement which varied the Prime Contract was expressed to be in full and final settlement of all known and unknown claims between the parties. EDS argued that this defeated BSKyB’s claims.

## Lessons from BSKyB Ltd

### Practical tips for IT service providers

- *Be wary of “sales patter” from employees*—while based on its own facts, the decision should cause IT service providers to review internal procedures and training to ensure employees involved in sales pitches do not get carried away or pressured into making promises of performance or implementation which cannot be delivered.
- *Examine the entire agreement clause*—service providers should check the wording of their standard entire agreement clauses as they will not exclude liability in misrepresentation for non-fraudulent pre-contractual representations without express wording to that effect.
- *Be aware of the risk of allegations of dishonesty*—it is not expected that this judgment will open the floodgates to successful claims of fraudulent misrepresentation. Such claims remain very difficult to bring and prove.

### Practical tips for customers

- *Not all pre-contractual statements of intent will amount to representations having contractual effect*—if a customer wants to rely on pre-contractual statements made by competing suppliers they will need expressly to incorporate such statements into the contract.
- *Do not think that it will be easy to successfully bring claims in deceit*—customers need to think very carefully about bringing claims of fraudulent misrepresentation ensuring that they are absolutely certain that they can prove this which, as illustrated by this judgment, can be very difficult.
- *Ensure you are happy with the scope of any liability cap*—it is not possible to exclude or limit liability for fraud. However, customers should ensure that they are aware of the type of claims that will be covered by any liability cap or exclusion clause and that they are happy with these, as depending on the wording, claims such as gross negligence may be successfully limited or excluded.
- *Ensure that all aspects of the contract accurately reflect the deal*—the contract should contain a detailed project specification and adequate provisions dealing with timetables, change control mechanisms, and payment triggers and liabilities.

In examining the effectiveness of and scope of this release, Ramsey J found that the parties were only seeking to compromise claims for breach of the Prime Contract and that the words used would not cover a claim for either deceit or misrepresentation which had induced BSKyB to enter into the Prime Contract or the Letter of Agreement.

The release in the Letter of Agreement was nevertheless held to be effective to settle all claims for breach of the Prime Contract due to EDS’s failure properly to resource the project and its serious delay in carrying out the work. BSKyB were unsuccessful in its argument that these breaches, either individually or in combination, amounted to a repudiatory breach. EDS was able to produce evidence of contemporaneous internal communications between senior officers of BSKyB which showed that BSKyB had no real concern about these breaches. Ramsey J therefore held that these breaches were not sufficiently serious as to amount to a repudiatory breach by EDS which BSKyB had accepted.

### Mitigation

One further interesting aspect of the judgment was the extent to which BSKyB were required to take steps to mitigate their loss. EDS argued that as BSKyB finished the project themselves, they had incurred greater cost than if they had used an expert outside contractor. However, on the facts Ramsey J held that this was not an unreasonable failure to mitigate.

### Damages

It is understood that the parties have now agreed to an interim payment of damages of £200m by EDS despite EDS signalling their intention to appeal. This payment suggests that £200m will be the minimum amount BSKyB receive, a remarkable figure given the initial value of the project and a contractual liability cap of £30m. NLU

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