

## **BSkyB v EDS judgment at long last – a dodgy degree, a dog called Lulu and some lessons for both customers and suppliers**

This is a briefing on the long-awaited judgment in BSkyB's claim against what was Electronic Data Systems Ltd (EDS) (now part of Hewlett Packard). Although the case concerned an IT deal, the judgment is of general interest to customers and suppliers alike. We therefore hope that you will find this briefing useful – please contact us if you would like to discuss any point in more detail.

The court took 18 months to hand the 500-page judgment down and it has been eagerly awaited by suppliers fearing the worst. Now the judgment is with us, and the verdict is mixed news for *all* suppliers, not merely those in the technology sector. On the one hand the judgment does turn on its own facts to some extent, due to the fraudulent conduct of EDS's employee. On the other hand, in the light of the case, suppliers will want to consider how they can better train their sales teams and monitor/control their conduct in negotiations.

### **The Contract**

The contract was for EDS to build a customer relationship management system for BSkyB. It contained the following clauses on which the case eventually turned:

- a limitation of liability clause which capped EDS' liability at £30 million, except in the event of fraud; and
- an "entire agreement" clause in which both parties acknowledged that no statements made in negotiations prior to signing the contract were to form part of the contract and that statements and representations would be "merged" into the contract. It also acknowledged, as has become common,

that the clause did not exclude liability for fraudulent misrepresentation.

### **It all goes wrong ...**

After a bid by EDS and several rounds of pre-contractual negotiations, the contract was entered into in 2000. Things quickly went downhill. There was a renegotiation in 2001; even so, by 2002, BSkyB decided to take back part of the work itself. The project was only completed in March 2006, and at a cost of around £256 million. At that point, BSkyB sued EDS.

### **BSkyB's claims**

BSkyB claimed damages of around £700 million and has just been granted an interim award of £200 million, which suggests that the final figure will be at least equal to that amount. BSkyB's claim was in two parts. First, it alleged that EDS had breached the *contract* in three ways:

- failing to provide appropriately skilled and qualified personnel to carry out the project;
- failing to deliver according with the specification in the contract; and
- failing to use reasonable skill and care in performing the contract.

Secondly and in parallel, BSkyB also claimed that EDS made statements that were not true during the negotiations leading up to the contract – so-called "misrepresentations". It claimed for both "fraudulent" and "negligent" misrepresentation.

## What is fraudulent and negligent misrepresentation?

A fraudulent misrepresentation in pre-contract negotiations is made where one party makes a representation knowing that it is not true or reckless as to whether it is true or not, and another party relies on it in deciding to enter into the contract. The law generally says that you may not exclude liability for fraudulent misrepresentation – therefore the liability cap/entire agreement clauses in a contract provide no comfort for the supplier in the event of fraudulent misrepresentation by its team.

The bar is set lower in negligent misrepresentation. This is where a statement is made in pre-contract negotiations where the party making it believes it is true, but it is negligent in holding that belief (i.e. it ought to have realized that the statement was false). The claimant needs to be able to show that it relied on the negligent misstatement in entering into the contract and also that there was a particular relationship between the parties which gave rise to the defendant having a “duty of care” to the claimant. When looking at whether there is a “duty of care” the court looks at all the circumstances, including the terms of the contract that the parties entered into. If the contract contains any clauses that are inconsistent with there being a “duty of care” relationship between the parties, this is likely to provide a defence for the supplier against a claim for negligent misrepresentation. If such a claim succeeds, it will still be subject to any liability cap (unlike a claim for fraudulent misrepresentation).

## *The alleged misrepresentations*

Before looking at the alleged negligent misrepresentations, the judge considered whether there was anything in the contract which was inconsistent with the necessary “duty of care” relationship arising. Amongst others, EDS argued that the “entire agreement” clause, which excluded liability for all pre-contractual statements save fraudulent ones, was inconsistent with there being a “duty of care” relationship prior to the signing of the contract. The judge disagreed and held that there was nothing in the entire agreement clause per se which would prevent BSKyB bringing a claim for both negligent and fraudulent misstatement.

BSkyB alleged that during the bid phase EDS had represented that personnel with the necessary skill and expertise had been reserved for the project in order to meet the specification and timetable. In particular, Joe Galloway for EDS emailed BSKyB, stating that that EDS was “*ready to start this project as of Monday 17 July*” and that EDS had “*resources reserved for this project; in fact we have picked up some additional high level resources that you have worked with previously. These folks come with great experience of these types and size of project*”. BSKyB alleged that it entered into the contract in reliance on those statements and was ready to start work with available resources as soon as BSKyB gave the green light. EDS argued that it had simply meant that the resources were potentially available should the project go ahead.

The good news for suppliers is that the judge favoured EDS's argument. He understood Joe Galloway's email as simply referring to resources being reserved to *start* the project in July. In a similar vein, BSKyB made similar allegations of misrepresentation by EDS of "readiness to start" and in relation to the cost of the project. For various reasons the judge found in EDS's favour that there had been no such misrepresentations. This shows that in many cases it may well be difficult to establish a meaningful misrepresentation.

#### *Fraudulent misrepresentation*

However the more serious issue turned out to be that EDS also stated that it had scoped the work fully and had confirmed that the timescales were realistic. However, in fact it had not done any supporting analysis. On the evidence, the judge found that this was actually a fraudulent misrepresentation by Joe Galloway, who when he made the statement knew what he was saying was false or at the very least was reckless as to whether it was true or not, having undertaken no analysis.

No doubt the judge was influenced by Joe Galloway's lack of credibility as a witness – he was found to have lied about his qualifications, having "bought" an MBA from an "online" university (the prosecutors illustrated to the court how this was done by obtaining the same qualification for the QC's dog, Lulu; doubtless the court enjoyed a little light relief when it transpired that Lulu had obtained better grades in her MBA than Joe Galloway himself!). Given that fraudulent misrepresentation took place, the £30 million liability cap was of no assistance

to EDS, since it is not possible to exclude liability for fraudulent misrepresentation which the other party has relied upon.

#### **Comment**

We have been waiting for this judgment for 18 months. The case does turn on what must be an unusual set of circumstances – fraudulent conduct by an employee who was willing to commit perjury in the witness box, although it sails close to the "puffs" that salesmen are often tempted to make. It is also true that EDS have already indicated an intention to appeal – and therefore the last word has not yet been had in this case. It is quite possible that the Court of Appeal could overturn this decision.

That said, the judgment as it stands at the moment does still contain some important points for suppliers and customers to note.

**Entire agreement clauses** - the judgment shows that a bland conventional entire agreement clause can not always be relied on to exclude all pre-contractual representations. Even if it is set out in black in white in the entire agreement clause that pre-contractual statements are excluded, a court may decide that the necessary "duty of care" relationship still arises to form a basis for a claim for negligent misrepresentation. In this case, EDS thought it had neutralized any negligent misstatements by using the entire agreement clause, only to have the judge decide that in principle there was nothing to prevent BSKyB bringing a claim for negligent misstatement. However, such claims will be subject to the overall liability cap; suppliers should keep this

in mind when negotiating liability caps. It is possible that more explicit drafting could affect this position, and it would certainly be wise to review drafting of entire contract provisions. One course is to make very explicit that there is no reliance on pre-contractual representations. Had the parties done so in this case, it is possible the judge might have been more willing to find that having this sort of clause in the contract was inconsistent with the existence of the "duty of care" relationship necessary to successfully claim for negligent misstatements. It seems unlikely that this would successfully avoid liability for telling lies, but it is still possible that, if a party makes a sufficiently clear and bold statement in the contract that it is not relying on pre-contractual statements, a court would be willing to find that there was in fact no reliance and therefore no liability, even for a knowingly inaccurate statement.

**Running pitches and conducting pre-contractual negotiations** – supplier sales staff should be trained and supervised in such a way that the risk of their making deceitful and/or negligent misstatements is minimized. Unfortunately for suppliers it is not possible to guarantee that their organization does not contain a "bad apple" who is prepared to tell lies, but hopefully such individuals are few and far between – although again it is worth stressing that the line between a rosy description and a untrue exaggeration is not always all that great. Training will be a key issue here. Of more concern is the risk that sales staff make negligent misrepresentations; as discussed above, sales staff should not assume that an entire agreement clause will give them a free hand in pre-contractual

negotiations. The misstatements made here were as to the time required for the project without proper analysis behind it. It would be easy for any sales team in any sector to do likewise. Sales teams and negotiators must be careful not to make statements of this sort without having done the necessary analysis to support them (which will defeat any later claim that they were made negligently). There is *some* good news for suppliers in this judgment in that the judge was cautious about finding there had been negligent misrepresentation on the majority of counts alleged by BSKyB.

**Use the contract for key elements of the deal!** In this case, the contract did not document the detail of the design and the development of EDS' work for BSKyB. If it had done so, this case would have been a much more straightforward breach of contract claim and BSKyB would not have had to construct a complex case of negligent misstatement. The key lesson for customers is to ensure that the contract contains in writing and in adequate detail those parts of the deal which are absolutely key (such as commitments on timetable).

**Length and cost of litigation.** The trial took 109 days over 10 months, involving thousands of documents. It took the court 18 months to prepare the 500 page judgment. And it's not over yet; EDS are now planning to appeal. Although no final order as to legal costs has yet been made, it goes without saying that this must be one of the most expensive pieces of litigation ever conducted. It may well be that, although the case appears to open up the

possibility of actions by customers for negligent misstatements in pre-contractual statements, many customers nonetheless will be put off by the costs involved.

If you would like to discuss any aspect of this client briefing please contact [Greg Gibson](#) (01603 693375) or [Jenny Beresford-Jones](#) (01223 222518).