

BSkyB v EDS

How to avoid a liability cap

The epic court battle between BSkyB and EDS, a technology supplier, has exposed the risk of making overly optimistic statements in order to secure a contract. *Philip Clifford and Alex Hamilton of Latham & Watkins* examine when pre-contractual puffery goes too far.

BSkyB, the UK satellite TV company, has succeeded in the English High Court in claiming that it should recover losses far in excess of the £30 million cap on liability under its contract with EDS (the information technology supplier since acquired by HP). The amount of damages to be awarded will be considered in February, but it is widely expected to be at least £200 million.

BSkyB's claim arose out of a £46 million project for EDS to provide a new customer relationship management (CRM) system for BSkyB's call centres. The project overran massively and BSkyB sued EDS, claiming over £700 million in damages. The judge held that EDS was liable for fraudulent misrepresentations and that these claims were not subject to the contractual caps on liability.

Not your usual case

The case has been closely watched, if nothing else for its sheer size. It lasted over six years, with 109 days in court. The much anticipated judgment took 15 months to be delivered and came in at more than 460 pages. With few informa-

tion technology industry cases actually going to trial, the case has inevitably been described by commentators as a milestone judgement.

The case is, however, unlikely to be repeated soon as so much depended on the behaviour of one of the main witnesses for EDS who was found by the judge to have "demonstrated an astounding ability to be dishonest". The witness, Joe Galloway, who had been the head of EDS's regional CRM group at the time of the bid, was challenged on his claim that he had an MBA qualification from a college in the US Virgin Islands. Despite the witness describing in detail the college and how he had attended it, BSkyB showed that the college sold degrees through its website, as memorably illustrated by a BSkyB lawyer's dog being granted one!

The judge said that "[h]aving observed him over the period he gave his evidence and heard his answers to questions put in cross-examination and by me, which have been shown to be dishonest, I also consider that this reflects upon his propensity to be dishonest whenever he sees it in his interest, in his

business dealings. Whilst, of course, this does not prove that Joe Galloway made dishonest representations, it is a significant factor which I have to take into account in assessing whether he was dishonest in his dealings with Sky."

The judgment

In his judgment of 26 January 2010, Justice Ramsey found that:

- EDS breached the main contract with BSkyB.
- During the competitive bid and prior to BSkyB and EDS entering into a letter of intent and then the main contract, EDS fraudulently misrepresented that it had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go-live of the customer contact centre and that they held the opinion that, and had reasonable grounds for holding the opinion that, they could and would deliver the project within this timescale.
- Prior to an amendment to the contract

being agreed by the parties, EDS made a negligent misrepresentation that it had developed an achievable plan to get the project back on track, which had been the product of proper analysis and re-planning.

Justice Ramsey held that EDS intended BSKyB to rely on the representations, which BSKyB did, to select EDS for the CRM project instead of PricewaterhouseCoopers, to enter into the letter of intent and the main contract and to continue with EDS rather than select an alternative systems integrator following difficulties with implementation of the project. To reach this conclusion, he considered many of the documents and meetings that typically arise during the competitive process, including:

- EDS's Response to Sky's invitation to tender (ITT) - the judge said that the use of phrases such as "on time" and "within the required timescales" could be taken as confirmation of the timescales being represented. The judge also referenced diagrams within this Response in support of his findings.
- Planning documentation - the judge commented that there was "surprisingly little documentation relating to the process by which EDS prepared its Response". He considered the two project plans setting out sequence and time for the deal, the work that had gone into the production of the plans, variations between the two plans, variations between the plans and other evidence, and the level and nature of the consideration of the plans.
- Witness evidence - key participants in

the projects, on both sides, were subject to detailed cross-examination.

- EDS internal report - the judge considered and quoted a report which was the result of a review to monitor the development of the project (prior even to the main contract being signed).
- Internal EDS e-mails.
- Planning meetings and oral statements made in those meetings.

Significantly, the evidence highlights that potential liabilities arose early on in the project; the judge went as far as to rely on EDS's response to the ITT, possibly one of the earliest documents between the parties, when deciding if misrepresentations had been made.

Finally, the judge was able to find that the misrepresentations were made fraudulently based on the evidence of just one of EDS's witnesses.


The consequences

However unusual this case may have been with the drama surrounding EDS's witness and the judge's reliance on this to find fraudulent misrepresentation, we do expect this case to lead to significant changes to pre-contract discussions in the information technology industry.

Suppliers are going need to review how their sales teams operate and think again whether hyperbole that may have been considered to date as mere "puffery" can any longer be safely included in bids. The teams will need guidance on not only what can be said, but also how key assertions should be backed up with internal documentation. We are not convinced that this ruling will reduce suppliers' appetites for taking on riskier projects, but we do believe that suppliers will be more cautious in

how they describe their capabilities and the timelines they can meet.

Customers on the other hand, will want to ensure that they have documented the key representations made by the supplier that they are relying on and preferably include these in the contract.

Hopefully, greater effort being put into clarifying what can be achieved will lead to more projects being delivered on time and on budget, or at least more realistic timelines and budgets being agreed at the beginning. 

The authors would like to express their thanks to the co-authors of this article, Brian Meenagh and Jane Rahman.

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