



## NEWS

### "I'll hold you to that" – the dangers of pre-contractual sales promises

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**In this article, [Michael Axe](#) looks at a recent High Court decision in which an IT supplier was held responsible for the fraudulent misrepresentations made by its sales team while bidding for a high value contract.**

The case of *BSkyB Limited v Electronic Data Systems Limited* has been one of the largest commercial disputes of the last decade, but the issues it raised are ones likely to affect businesses of all shapes and sizes. Whilst the sums involved in this case are impressive, the background to the dispute is a situation which will be familiar to many.

#### **The £48m project**

In 2000, BSkyB invited IT-supplier Electronic Data Systems (now a part of Hewlett-Packard) to pitch for a £48m contract to design, build and implement a new Customer Relationship Management (CRM) system for BSkyB. EDS was ultimately successful in winning the contract, but soon after the work began the project started to run into difficulties. In 2002 BSkyB took over responsibility for the CRM project, and eventually in 2006 a new CRM system was finally implemented at a total cost of approximately £265m.

#### **The £700m claim**

In 2007 BSkyB issued Court proceedings against EDS, claiming more than £700m in damages. BSkyB's principal allegation was that EDS had made fraudulent and/or negligent misrepresentations to BSkyB in relation to EDS' ability to deliver the project within the required timescale. Although the contract between BSkyB and EDS had capped EDS' liability at £30m, it is an established legal principle that a contractual cap cannot be used to limit liability for fraudulent misrepresentation.

EDS denied the allegations, saying that the delays and problems with the project had been caused by BSkyB altering its instructions and requirements throughout the project.

#### **The High Court decision**

After a trial that lasted over 100 days, the High Court delivered its 333-page judgment earlier this year in favour of BSkyB. The High Court ruled that:

- BSkyB had been induced into awarding the contract to EDS by EDS' fraudulent misrepresentations that it would be able to deliver the project within the timeframe stipulated in the tender documents, in

circumstances where it had no reason to believe that this would actually be possible as it had carried out no proper analysis of the time involved. As such, EDS could not rely on the contractual £30m cap on liability in relation to the fraudulent misrepresentations;

- EDS could not use the “entire agreement clause” in its contract with BSKyB to avoid liability for negligent misrepresentations made in relation to planning that had been carried out, as the clause did not expressly withdraw or override any pre-contractual statements/representations;
- EDS had been in breach of contract by failing to exercise reasonable skill and care and failing to comply with good industry practice.

What is also of particular interest is that the High Court clearly singled out one EDS employee in particular, the Bid Team Leader, as having been responsible for the dishonest representations made on behalf of EDS.

The Bid Team leader was found to have been dishonest in putting forward the timescale which he believed BSKyB wanted to hear, despite the fact that he knew there was no proper basis for the timescale and no reason to believe that it could be met. A number of his colleagues had also objected, saying that the timeframe was unachievable. The High Court ruled that the Bid Team Leader had dishonestly represented to BSKyB that a “proper analysis” of the time needed for the project had been carried out, and that EDS had “reasonable grounds” for believing that the stipulated timescale could and would be met.

Not only was the Bid Team Leader responsible for the original fraudulent misrepresentations in the first place, but he was also later discredited as a witness when he was shown to have perjured himself during the trial.

### **The £318m settlement**

Due to the complexity of the issues involved, the High Court’s initial decision related solely to the question of liability, with the quantum of BSKyB’s claim for damages, costs and interest still to be determined at a later stage.

However, it has been reported in the press that BSKyB and Hewlett-Packard have now reached an out-of-court settlement whereby Hewlett-Packard will pay BSKyB £318m in final settlement of its claim. Whilst this is less than the total value of BSKyB’s claim for £709m, it is significantly more than EDS ever hoped to earn from the £48m contract.

So whilst the misrepresentations may have won EDS the contract in the first place, the whole affair will have cost it hundreds of thousands of pounds, especially once its own legal costs and losses are taken into account.

### **Lessons to be learnt**

This case has brought into sharp focus how easily a company can be held responsible for the ill-conceived decisions of one “bad apple”. In this case, it was apparent that the Bid Team Leader had been primarily responsible for the fraudulent misrepresentations made, and yet his poor judgment has now cost EDS in excess of £300m.

As a result, many suppliers involved in submitting tenders for work will want to review their internal safeguards and procedures to ensure that none of their own sales staff become overzealous in making sales promises which cannot be backed up or met.

Given the size of the reported settlement (£318m) in comparison to the value of the contract (£48m), many suppliers will also want to review their insurance policies to ensure that they will have adequate cover in place, at least in relation to negligent misrepresentations.

Purchasers, suppliers and their advisors will also want to pay close attention when negotiating contracts to ensure that the scope of any contractual caps on liability and the effect of any “entire agreement clauses” are as intended.

For further information on this or any other contractual issues, please contact [Michael Axe](#) by emailing [Michael](#) or by calling him on 08450 990045, or speak to your usual contact in the [Commercial Disputes Team](#).

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