

BSkyB v EDS: a dog's dinner of liability issues in a contract to supply a computer system



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The case of *BSkyB v Electronic Data Systems* (EDS is now part of Hewlett Packard) is one of the largest computer contract disputes to reach the English High Court in recent years. The decision of the High Court (Ramsay J) [2010] EWHC 86 (TCC) was published on 28 January 2010.

BSkyB commissioned EDS to develop and supply a new computer system, including software and hardware (known as a “customer relationship management system”). BSkyB would use the system at its call centres, to improve the service given by call centre staff to BSkyB customers. Unfortunately the development did not run to plan and eventually BSkyB sacked EDS as system integrator and took the project in-house. They incurred considerable additional costs and losses. BSkyB sued EDS to recover these costs and losses.

As is discussed below, a significant part of the case was concerned with whether the exclusion clauses and entire agreement clauses in the main contract between the parties were effective to limit or exclude EDS's liability to BSkyB.

The case involved 109 hearing days and thousands of documents. Mr Justice Ramsay's decision runs to a massive 468 pages. It has been claimed that the dispute cost £40 million in legal fees for each side and that EDS may have to pay £200 million or more in damages.

The case hit the headlines because of the judge's conclusion that one of EDS's lead witnesses, Joe Galloway, had been “palpably dishonest” in the witness box in relation to his description of how he obtained an MBA from Concordia College. Concordia College is a website that provides on-line degrees to anyone who pays the required fee. But Mr Galloway claimed, in response to counsel's questioning, that he attended MBA courses at their (non-existent) facilities in the US Virgin Islands. Lead counsel for the claimant demonstrated the falsity of this claim, partly by obtaining an MBA from Concordia College for his dog, Lulu. Lulu obtained higher marks in her MBA than did Mr Galloway. In the judge's view, “Joe Galloway's credibility was completely destroyed by his perjured evidence over a prolonged period.” He was dismissed by EDS the day after his evidence had been shown to have been false.

The judge held that certain statements made by Mr Galloway in the course of negotiating the computer system contract with BSkyB were false, particularly in relation to the anticipated timescales for completion of the project, and that this amounted to fraudulent misrepresentation on the part of EDS. These statements induced BSkyB to enter into the contract with EDS, and as a result EDS suffered certain losses for which EDS was liable to BSkyB.

Many findings of fact and law were made in the course of lengthy judgment. Given the sums of money at stake (potentially hundreds of millions of pounds), it seems likely that an appeal will be made against the judge's decision; if this happens, it will be more productive to look in detail at the Court of Appeal's legal analysis and judgment rather than the High Court's. At this stage, it is useful

to look very briefly at some of the main findings of law that are relevant to how contracts should be drafted generally. These points can be summarised as follows:

1. The legal effect of an entire agreement clause, in relation to prior representations

1.1 The contract included an entire agreement as follows:

*“Subject to Clause 1.3.2, this Agreement and the Schedules shall together represent the entire understanding and constitute the whole agreement between the parties in relation to its subject matter and supersede any previous discussions, correspondence, representations or agreement between the parties with respect thereto notwithstanding the existence of any provision of any such prior agreement that any rights or provisions of such prior agreement shall survive its termination. The term **“this Agreement”** shall be construed accordingly. This clause does not exclude liability of either party for fraudulent mis-representation.”*

1.2 The judge held that this wording was not effective to exclude liability for misrepresentation. He contrasted the above wording with the wording of an entire agreement clause in the case of *Man Nutzfahrzeuge AG & Ors v Freightliner Ltd & Ors* [2005] EWHC 2347. In that case, the Court of Appeal held that the clause was effective to exclude misrepresentations. However the difference in that case, according to Ramsay J, was that the clause included the words *“none of the Parties has relied or is relying on any other information, discussion or understanding in entering into and completing the transactions contemplated in this Agreement...”*. It seems that if the clause in the BSKyB contract had included words similar to the words quoted in the previous sentence, the entire agreement clause would have excluded liability for misrepresentation (other than fraudulent misrepresentation).

2. The legal effect of a settlement agreement in relation to non-contractual claims

2.1 The main contract between the parties was signed in November 2000. In 2001, the parties signed a Letter of Agreement that varied the terms of the main agreement and provided for a settlement of existing contractual liabilities. Paragraph 17 of this letter provided that the terms of the letter were *“in full and final settlement of: (a) all known claims which SSSL may have against EDS or which EDS may have against SSSL and/or British Sky Broadcasting Group Plc for any breach of the Prime Contract as of the date of both parties signing this letter; and (b) all unknown claims which SSSL may have against EDS or which EDS may have against SSSL and/or British Sky Broadcasting Group Plc for any breach of the Prime Contract during the period up to and including 17 June 2001”*.

2.2 EDS argued that the above wording was a full and final settlement of all claims between the parties during the relevant period, including claims for misrepresentation. Ramsay J disagreed. He referred to a case cited by BSKyB, *BCCI v Ali* [2001] 2 WLR 735, in which the wording in issue was: *“in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist”*. In that case the House of Lords had decided that this wording covered damages for claims for misrepresentation. Ramsay J considered that the much narrower wording of paragraph 17 of the Letter of Agreement covered only claims for breach of contract and not for misrepresentation.

3. The legal effect of a Memorandum of Understanding that was labelled “Subject to Contract”

- 3.1 The discussions between the parties over whether EDS could perform the contract went on for some time. Eventually, BSkyB decided to take over the role of systems integrator and, in effect, sack EDS from this role. The commercial discussions between the parties at this time and the “way forward” were summarised in a Memorandum of Understanding (MOU). The MOU was headed “Subject to Contract”. The parties intended to enter into a more detailed agreement after signing the MOU, but this never happened.
- 3.2 EDS argued that the MOU was, in effect, an amendment to the main contract between the parties, despite the “Subject to Contract” heading. They argued this on two alternative grounds: (1) later wording in the MOU suggested it was an agreement between the parties, and (2) even if the MOU wasn’t initially a binding agreement, the parties by their conduct adopted its terms as a variation to the contract.
- 3.3 Ramsay J concluded that the MOU was not binding on the parties, in view of the “Subject to Contract” wording, and that if they were acting in accordance with its terms they were doing so “at risk” (ie without the protection of new contract terms) until a new agreement was signed. This conclusion provides some reassurance to the drafter of a contract who may be worried that a court will ignore “subject to contract” wording in an MOU or term sheet, where parties fail to enter into a subsequent agreement.

4. Whether a (non-contractual) duty of care is owed by the original tenderer to the issuer of the invitation to tender, where the eventual contract is between two different parties

- 4.1 In the present case, the original invitation to tender had been issued by either BSkyB Limited (BSkyB) or its affiliate Sky Subscribers Services Limited (SSSL). Either Electronic Data Systems Limited (EDSL) or Electronic Data Systems Corporation (EDSC) submitted the tender. The identities of the exact parties on either side to these preliminary documents were not entirely clear. In due course, the main contract was signed by SSSL and EDSL, with EDSC giving a parent company guarantee.
- 4.2 One of the questions before the court was whether, as non-contracting parties, EDSC owed any duty of care to SSSL or BSkyB, or EDSL owed any duty of care to BSkyB. These questions were relevant to the issue of whether any actionable misrepresentations had been made, and whether the entire agreement and exclusion clauses in the main contract had any relevance to parties other than the contracting parties.
- 4.3 The judge relied on case authority (eg *Pacific Associates v Baxter* [1990] 1 QB 993 and *JP Morgan Chase Bank and others v Springwell Navigation Corp* [2008] EWHC 1186 (Comm)) in concluding that: “a duty of care should not be imposed upon EDSC in favour of BSkyB or SSSL or upon EDSL in favour of BSkyB which would circumvent or escape the contractual exclusion or limitation of liability which the parties put in place. That contractual structure, in my judgment, negatives any possibility that such a duty of care should arise in these circumstances.”

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15 February 2010
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