

Getting the Best from Procurement: BSkyB v EDS and the curious incident of the dog with the degree



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Outline

- Background
- Contract construction issues – prime contract, settlement letter, MoU
- Misrepresentation claims – Sky’s case and court decision
- Practical implications

Background: the stats

- UK's most expensive IT legal dispute
- £700m claim (TCV of £54m)
- 109 court days
- 6 years for case to be concluded
- 468 page judgment
- Still elements of judgment outstanding
- Interim damages award of £200m
- HP announced they plan to appeal - but not yet filed

Background & facts

- EDS (bought by HP in 2008) contract with BSkyB
- Customer relationship management (CRM) project
- Baseline contracted budget of £47.6m to go live by 31 July 2001 and be completed by 1 March 2002
- Actually only completed in part in March 2006 at a cost of £265m
- Sky claimed for breach of contract and misrepresentation (including fraud)
 - focussing today on misrepresentation claims

Background: parties

- **“BSkyB” means British Sky Broadcasting Ltd**
 - Operating company running pay-per-view SKY TV in the UK/I
 - Wholly owned subsidiary of British Sky Broadcast Group PLC - listed on the LSE
 - **“SSSL” means Sky Subscribers Services Ltd**
 - Until 2005 was a wholly owned subsidiary of BSkyB
 - Provides ancillary services and other functions supporting the satellite TV operation.
 - **“EDSL” means Electronic Data Systems Ltd**
 - Now called HP Enterprise Services UK Limited
 - Carry out design, development, integration and implementation of IT solutions
 - **“EDSC” means Electronic Data Systems Corp**
 - Now called Electronic Data Systems LLC
 - US corporation
 - Ultimate parent company of EDSL
-
- SKY
- EDS
- | | |
|--------|-----|
| KEMP | LLP |
| LITTLE | |

Special Guest Stars

■ Joe Galloway

- EDS
- In late 1999 set up CRM practice within e.solutions line of business for EMEA
- Became MD of the e.solutions line of business
- Left EDS in December 2000 to form CRM consultancy ITIVITI
- Became a consultant to EDS

■ Lulu

- Mark Howard QC's dog
- Obtained degree – can still buy the MBA for \$549
- Obtained better marks than Joe Galloway

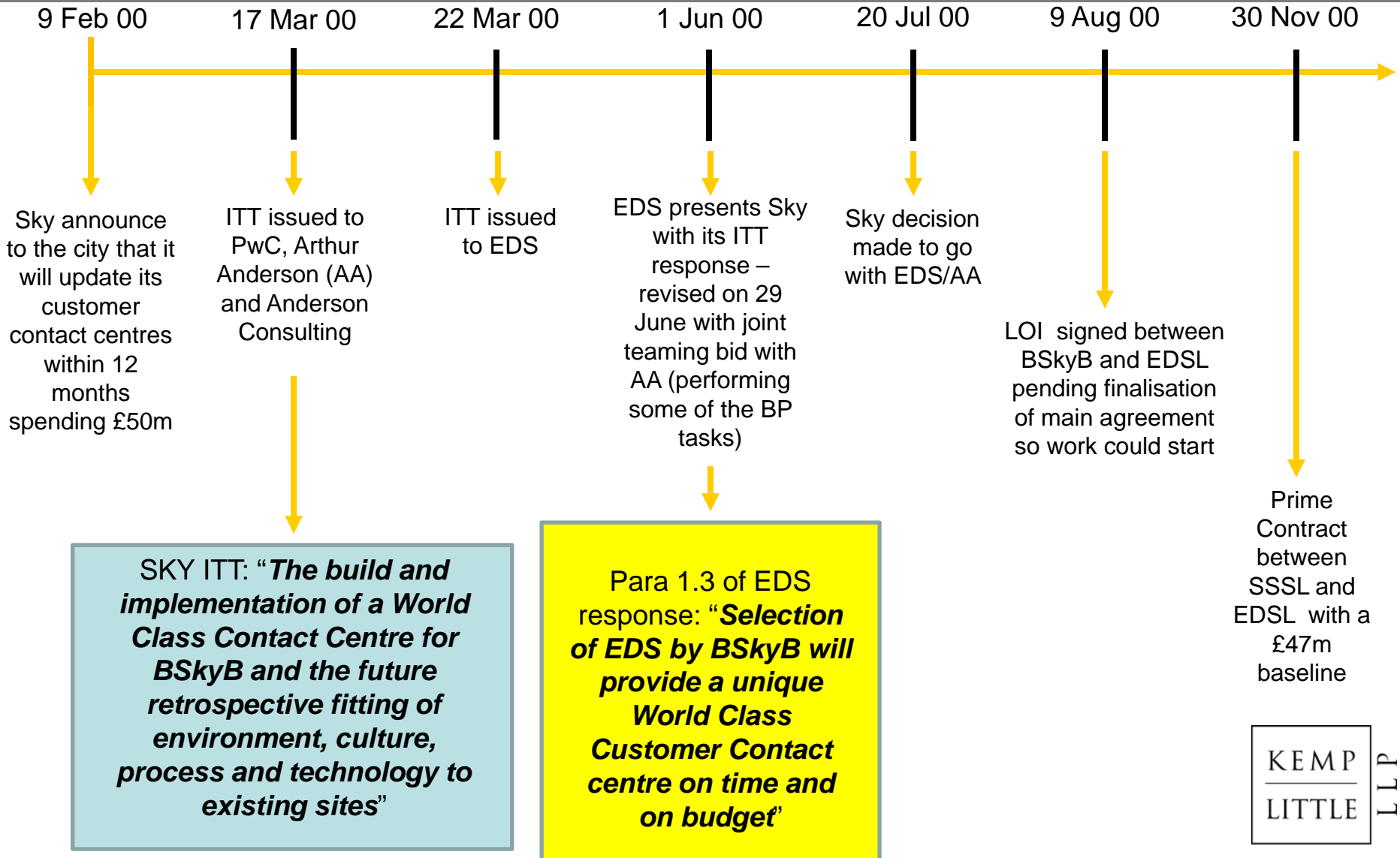


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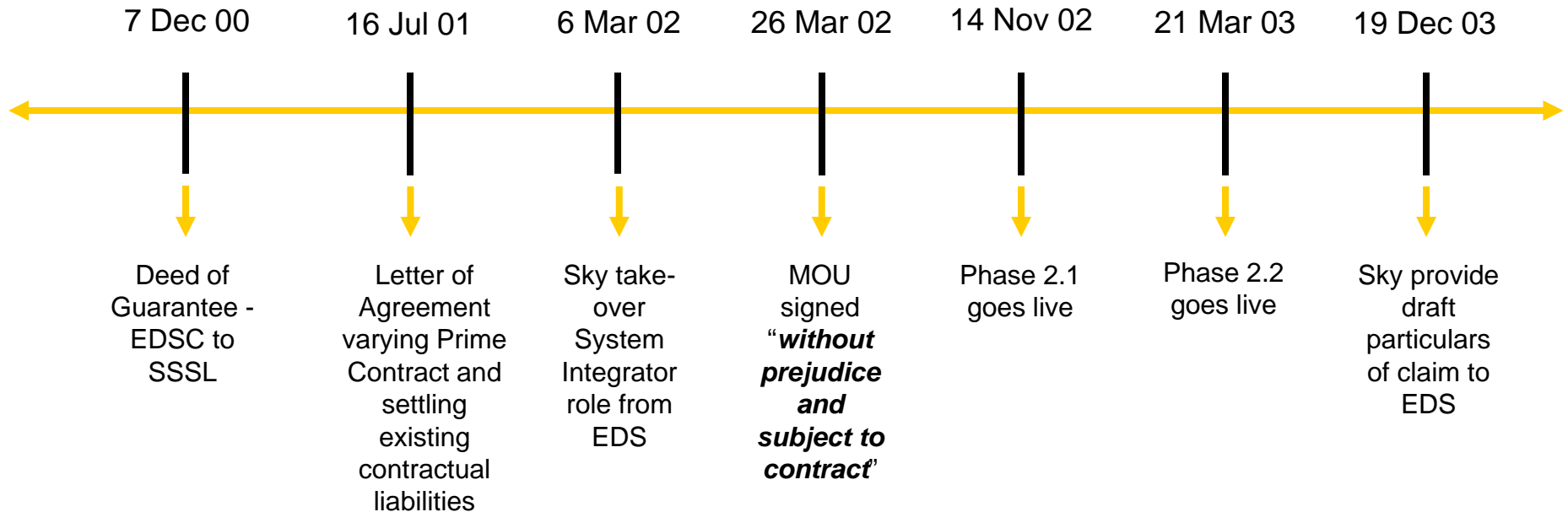
ELENA FUELLER, Concordia Alumna, 2002

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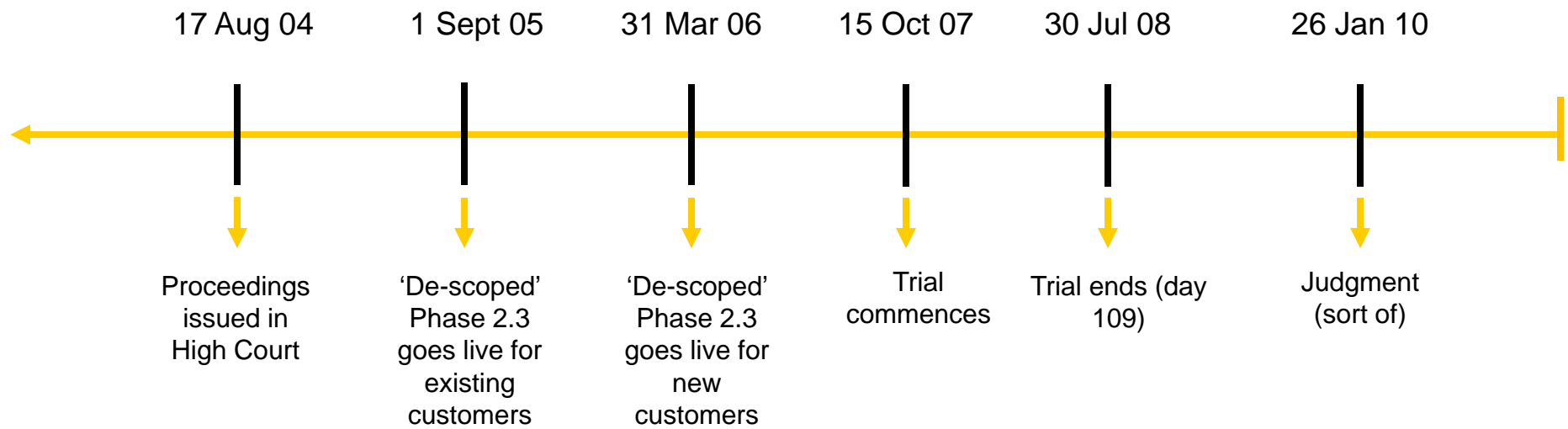
Timeline (1)



Timeline (2)



Timeline (3)



Misrepresentation: background law

- Claims for misrepresentation can be brought:
 - under Misrepresentation Act 1967 and
 - if representation becomes term of contract – for contract breach
- **Three types of misrepresentation:**
 - innocent, negligent, fraudulent
- **Negligent and innocent misrepresentation**
 - requires law to imply a duty of care and must be ‘fair, just and reasonable’ to do so (*Caparo Industries v Dickman [1990]*)
 - relevant to whether representations had been made by or to non-contracting parties
 - liability can be limited (subject to UCTA reasonableness etc)
- **Fraudulent misrepresentation**
 - false statement made either (i) knowingly or (ii) recklessly (i.e. careless as to whether it is true)
 - liability cannot be limited

Misrepresentation claims: overview

- Five allegations of misrepresentation
 - availability of resources
 - costs estimate
 - ability to meet timescales
 - use of proven technology
 - methodologies to be used
- Based on ITT Response, bid presentations, subsequent correspondence and Prime Contract
 - **“ability to leverage global resources”** (ITT Response)
 - ***“We have the resources and ability to deliver the systems and services you require and to meet the financial and budgetary targets you have set”*** (letter from Joe Galloway dated 05.07.00)
 - ***“We’re ready to start this project as of [17.07.00]. We have the resources reserved for the project; in fact we have picked up some high level resources that you have worked with previously ...”*** (e-mail from Joe Galloway dated 11.07.00)

Misrepresentation claims: overview

Sky's case

- Misrepresentations made by and to non-contracting group entities
 - EDSC and BSkyB involvement in bid process
 - not parties to contract so liability caps and exclusions did not apply
- Entire agreement clause did not exclude liability for misrepresentation claims
 - even if misreps not fraudulent
- But in any event, misreps were made fraudulently
 - contract caps and exclusions did not apply
- *cf* previous UK IT cases
 - liability caps and exclusions challenged on grounds of enforceability (Unfair Contract Terms Act 1977) or interpretation/scope (*'contra proferentum'*)

EDS' case

- No duty of care owed (i) by EDSC or (ii) to BSkyB
- Denied that most of the representations had been made
- Admitted a limited number, but denied fraud
- Any that were made were excluded by entire agreement clause
- And settlement letter had settled all existing claims (contractual and non-contractual) including misrep claims

Issues for determination by the court

- **What was the effect of the contract documentation on any pre-contract representations?**
 - issues of construction
 - claims by and against non-contracting entities
- **Had any pre-contract misrepresentations been made?**
- **If so, were they innocent, negligent or fraudulent?**

Issues arising from construction of documents

▪ **Prime Contract (Nov 2000)**

- entire agreement clause – EDS claimed liability for pre-contract misrepresentations was excluded
- liability clause – EDS claimed it excluded liability for loss of anticipated savings

▪ **Settlement letter (July 2001)**

- EDS – wiped slate clean: covered all claims, contractual and non-contractual

▪ **Memorandum of Understanding (Nov 2002)**

- EDS – elements were binding notwithstanding ‘subject to contract’ banner

Issues arising from construction of documents: entire agreement clause

- Entire agreement clause:

“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 misrepresentation.”

- Sky’s case:

- clause meant that pre-contract representations did not form part of contract

- it did not exclude liability for misrepresentation

- in any event did not cover negligent misrepresentations

- *Canada Steamship Lines v R [1952]* - exemption clause will not relieve a party from liability for negligence unless it does so “expressly or by necessary implication”

Issues arising from construction of documents: Entire agreement clause

- Ramsey J:
 - Entire agreement clause did not exclude liability for misrepresentation
 - *“[T]he statement that the Agreement superseded any previous discussions, correspondence, representations or agreement between the parties with respect to the subject matter of the agreement prevented other terms...from having contractual effect. It did not supersede those matters so far as there might be any liability for misrepresentation based on them”*
 - Compared to Man Nutzfahrzeuge AG v Freightliner Ltd [2005]
 - entire agreement clause: *“none of the Parties has relied or is relying on any other information, discussion or understanding in entering into...this Agreement”*
 - “contractual renunciation of right to rely”
 - In any event, would not have excluded liability for negligent misrepresentations
 - *“if a clause is to have the effect of excluding or reducing remedies for damaging untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting liability for falsehoods he may have told”*
(Thomas Witter v TBP Industries [1994])

Issues arising from construction of documents: Settlement letter

- Parties agreed to settle claims (known or unknown) for breach of contract
 - *“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.”*
- EDS claimed intent was to “wipe the slate clean”
- BCCI SA v Ali [2001]
 - words used there were *“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 BCCI court looked at intention
 - found not to be to “release rights and surrender claims which they never had a contemplation of”
 - *“If the parties had sought to achieve so extravagant a result they should in my opinion have used language which left no room for doubt and which might at least have alerted [the Applicant] to the true effect of what (on that hypothesis) he was agreeing.”* - Lord Bingham
- Ramsey J
 - “words on their ordinary meaning...would not cover claims for misrepresentation”
 - exclusion of claims in negligence requires clear words (*Canada Steamships v R [1952]*)

Issues arising from construction of documents: Liability clauses

■ Clause 20.2 of Prime Contract

“...neither party shall have any liability to the other party in respect of (i) any consequential or indirect loss or (ii) loss of profits, revenue, business, goodwill and/or anticipated savings”

■ EDS claimed excluded Sky claims for losses for:

- development costs implementing the CRM
- operating costs and loss of profits
- other business benefits

■ Sky claimed “Call Rate Reduction”

- losses based on the premise that the CRM system would reduce inbound subscriber calls to the call centres, reducing the number of resources needed to answer calls and manage and support call answering staff.

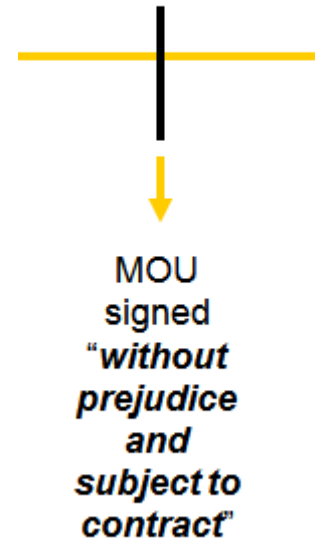
■ Ramsey J agreed that 20.2 excluded liability for:

- indirect and consequential losses
- anticipated savings (including call rate reduction benefits) on a direct or indirect basis

Issues arising from construction of documents: Memorandum of Understanding

- MOU signed on 26 March 2002
 - Headed “without prejudice and subject to contract”
 - Sky claim intention of MOU to capture intention that need to re-neg the Prime Contract
 - EDS claim MOU in 3 parts:
 - 1. agreement that need to re-draft the Prime Contract
 - 2. an agreed way forward for services to be provided
 - 3. the principles for further arrangements
 - EDS claim that intention was that 2nd part was binding
- Judgment:
 - the blanket “subject to contract” at the head of the memo is the clue – it is all STC
 - all of it was not intended to be legally binding

26 Mar 02



Could claims be brought by or against non-contracting entities?

■ Sky:

- EDSC and BSkyB involved in tender process
- EDS policy to market itself as single global organisation
- EDSL employees authorised to act on EDSC's behalf
- ITT Response referred to EDS (not EDSL)

■ EDS:

- parties had agreed contracting entities (EDSL and SSSL)
- imposition of duty of care would circumvent contractual structure agreed between the parties

Could claims be brought by or against non-contracting entities?

- **Were any representations made by EDSC?**
- Ramsey J:
 - EDSC had not made any representations
 - common for multinationals to use single brand/logo
 - use of EDS brand by a EDSL employee did not imply authority to act for EDSC (or other parts of group)
 - parties had agreed EDSL would be contracting entity
 - absence of references to EDSC's role in tender process in recitals to Prime Contract/Deed of Guarantee

Could claims be brought by or against non-contracting entities?

- **Were any representations made by EDSL to BSKyB?**
- Ramsey J:
 - ITT & Response referred to “BSkyB” requirements (no definition of which entity this was)
 - BSKyB and SSSL employees involved in ITT, Response, and Lol
 - Lol entered into by BSKyB
- But *“No duty of care should be imposed upon...EDSL in favour of BSKyB which circumvents or escapes the contractual exclusion or limitation of liability which the parties put in place between EDSL and SSSL. That contractual structure negates such duties of care and no such duties arise in this case...”*
- EDSL not liable to BSKyB for innocent/negligent misrepresentation

Misrepresentation claims: overview

- Centred on representations as to costs, timescales and resources made prior to contract signature
- Sky's position – in order to respond properly and honestly to an ITT, necessary to:
 - ascertain what work is required to arrive at the client's intended destination;
 - prepare a plan so as to be able to assess whether it is feasible to perform that amount of work in the timescales desired by the client;
 - prepare a resource plan identifying what resources will be required (both in terms of numbers and skill sets) and when, in order to achieve that amount of work in the desired timescale;
 - assess extent to which one possesses such resources, and whether suitable resources will be available when required in order to complete the planned work in the planned timescale; and
 - to the extent that one does not possess the requisite resources, secure commitments from third parties to provide resources, by informing them of your requirement for resources in what type (in terms of skill sets, experience and so on) and when
- And that EDS had failed to do so

Misrepresentation claims: resources (1)

- Sky – EDS represented that it had resources available and reserved to deliver project (**‘greater resources’** representation)
 - **“ability to leverage global resources”** (ITT Response)
 - ***“we have the resources and ability to deliver the systems and services you require and to meet the financial and budgetary targets you have set”*** (letter 05.07.00)
 - ***“we’re ready to start this project as of [17.07.00]. We have the resources reserved for the project”*** (e-mail 11.07.00)
- EDS - denied **‘greater resources’** representation but accepted:
 - **‘lesser resources’** representation: EDS personnel could be made available as and when required (letter 05.07.00)
 - **‘ready to start’** representation: resources reserved for initial phase only (e-mail 11.07.00)
 - reasonable grounds for making these representations

Misrepresentation claims: resources (2)

- **Ramsey J:**

- **Greater resources representation**

- scope of project uncertain and requirements not fully defined
 - unreasonable to expect EDS to work out resources and skill-sets required
 - acknowledged existence of 'cone of uncertainty' in IT projects
 - no ability to have resources available and reserved for whole of project at tender stage (for large/complex IT projects)

- **Lesser resources and ready to start representations**

- EDS had reasonable grounds for making representation (due to EDS's size)
 - despite no formal resources plan & internal acknowledgements of likely shortages if EDS won project

- Rejected bid preparation planning process relied on by Sky

Misrepresentation claims: costs

- Sky - EDS represented it had (i) carried out proper analysis of cost to complete project and (ii) reasonable grounds to believe it could deliver the project to budget
 - EDS will deliver *“on time and on budget”* (ITT Response)
 - EDS’s cost estimates in ITT Response
 - EDS has resources and ability to deliver systems and services required *“to meet financial and budgetary targets”* (letter 05.07.00)
 - no reasonable grounds for making statements
- EDS – accepted cost representation in ITT Response – but proper estimate based on knowledge at the time
- Ramsey J – accepted that representations had been made
 - ITT was clear that responses would be evaluated based on cost
 - representations implicit in EDS’s cost estimates
- But reasonable grounds for making representation
 - top-down and bottom-up estimate
 - business analysis and development effort - level of customisation needed

Misrepresentation claims: timescales

- Sky - EDS represented it had (i) carried out proper analysis of time to complete project and (ii) reasonable grounds to believe it could deliver the project on time
 - EDS will deliver “*on time and on budget*” and “*within required timescales*” (ITT Response)
 - EDS’s time estimates in ITT Response
 - EDS has resources and ability to deliver systems and services required “*to meet financial and budgetary targets*” (letter 05.07.00)
- EDS – denied representations
 - caveats in ITT Response
 - subsequent change in project scope
 - commitments to timescales were not representations, but merely an assumption of risk by EDS
- Ramsey J – accepted Sky’s claims
 - ITT was clear on timescale requirements
 - representations implicit in EDS’s time estimates
 - representations were false:
 - *no exercise was undertaken to establish what work was required to be done in order to achieve go-live*
 - *no attempt was made to do any credible planning to establish that go-live could be achieved in nine months*
 - *no effort was made to establish what number of resources would be required for that purpose*

Was time misrepresentation fraudulent?

Internal risk List and 'red team' review

▪ Internal risk list

- dated Aug 2000, but contained conclusions reached “well before contract signature”
- highlighted number of concerns on timing - *“unrealistic expectations being set with client”* and *“proposed timescales not achievable”*
- recommended revised set of milestones
- brought to attention of Joe Galloway

▪ Red team review (Aug 2000)

- identified ‘control of scope’ and availability of staff (quantity and skillsets) as key risks
“The project is required to deliver to pre-determined and business critical time scales. However, the scope, both in business and content terms is not yet well defined. The consequence of this is that it is not yet possible to determine whether the project is deliverable in the required timescale. What is clear is that none of the team interviewed believe that a solution can be delivered in Manchester by 1 April 2001 that is likely to meet the totality of the anticipated client requirement.” (emphasis added)

▪ Subsequent internal correspondence (to Joe Galloway among others)

- *“Your team has stated programme timescales are unachievable”*
- *“Joe – at the red team review your team admitted that the April delivery date could not be met”*

Was timescale representation fraudulent: Judgment

- Joe Galloway's approach to timing was 'cavalier'
 - aware no attempt had been made to assess whether timescales could be met
 - offered timescales Sky had requested, knowing no basis for doing so
- *"In my judgment his conduct went beyond carelessness or gross carelessness and was dishonest. I consider that he acted deliberately in putting forward the timescales knowing that he had no proper basis for those timescales. At the very least he was reckless, not caring whether what he said was right or wrong."*
- Sky had relied on representation and EDS were liable in damages for fraud
- NB: only JG found to have acted fraudulently – other EDS personnel did not act fraudulently or negligently

Lessons learned

- Not all bad news for suppliers?
 - EDS' (basic) processes for ITT Response were sufficient in all but one of the claims
 - fraudulent misrepresentation decision – fact-specific
- Carrying out 'due diligence' on key terms of bid (before making bid) is critical
 - must have reasonable grounds for believing accuracy of statements (on costs, resources, timescales etc)
 - and keep the supporting documentation
- Beware statements made in pre-contract correspondence – they can amount to representations
- Having a validation/QA process step in bid process is important – goes a long way to defending claims of negligence and fraud
- Having the process is half the battle, following it and documenting it is the other half
- Watch drafting of entire agreement clauses – if want to exclude negligence, don't be 'mealy-mouthed' about it
- Be careful where referring to parent or other entities in Recitals etc
- Beware dangers of supplier oversell – English courts will strive to find way to negate any contract limitations and exclusions
- You can get an MBA for \$549...for your dog

Questions?

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