



## LEGAL BRIEFING

### *BskyB Ltd & Another v HP Enterprise Services UK Ltd & Others (No.2)*

[2010] EWHC 862 (TCC), Mr Justice Ramsey

#### *Facts*

BskyB wanted to procure a new state of the art customer relationship management system (CRM system). They invited tenders and selected Electronic Data Systems Limited ("EDS") on the basis of a formal response. A letter of intent was signed. The target date for the CRM systems launch was April 2001. In September and October 2000, BskyB was concerned about the timetable. The launch was delayed to July/August 2001 and a full contract between the parties was signed on 30 November 2000. EDS was to be paid £48 million for developing the system.

The system was delayed and finally went live in March 2006 at a cost of approximately £265 million.

BskyB issued proceedings against EDS claiming £700 million in damages. BskyB claimed that EDS had made fraudulent and negligent misrepresentations in order to secure the CRM system project. These related to the resources that EDS had available, its technological capabilities and the time required and cost to complete the project. EDS argued that an entire agreement clause excluded any liability.

#### *Issues*

There were three main issues:

- (i) Were BskyB entitled to damages for fraudulent misrepresentation?
- (ii) Were they entitled to damages for negligent misrepresentation?
- (iii) Did the entire agreement clause exclude liability?

#### *Decision*

Mr Justice Ramsey held that BskyB was entitled to damages for fraudulent misrepresentation. EDS had represented that they had carried out a proper analysis of the time required in order for the system to be launched and those representations were false and had been made dishonestly. In addition, and before the letter of agreement had been signed, EDS also represented that it had developed an achievable plan for the project. These representations were made falsely and negligently. EDS was therefore also liable for negligent misrepresentation.

The entire agreement clause did not exclude liability for negligent misrepresentation. Very clear words were required in order to exclude liability for negligent misrepresentation. The entire agreement clause excluded "representations" but those did not include ones that had been made negligently or fraudulently. In other words, it did not include misrepresentations.

#### *Comment*

This case reminds those submitting tenders that they must be very sure that the written (and oral) representations that are made are honestly believed and can be objectively shown to

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be correct. A court will award all of the damages that flow from a misrepresentation, and those can be substantial.

In addition, very clear words are needed to exclude liability, and the usual wording of an exclusion clause or entire agreement clause will only exclude liability for representations properly made, not misrepresentations. Parties often think that these exclusion clauses will protect them from erroneously made representations, but this case shows that that is just not correct.

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