A tender too far

The facts and findings of a case with lessons for all, analysed by Ian Pease

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Rarely can the consequences of a man's ambition have cost a company so much, but *BSkyB Ltd v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd)* [2010] is a lesson for us all in what not to do when tendering a project. Ramsey J's judgment, 18 months in the writing, has been much anticipated, given the general applicability of its subject matter.

Facts of the case

These are quite straightforward: Sky required a new customer database and in March 2000 sent out invitations to tender to 'design, build, manage, implement and integrate' the system. Following meetings, workshops and presentations with the tenderers, Electronic Data Systems (EDS) was chosen in July 2000. The nub of the case is what was said in the meetings that induced Sky to enter into a contract with EDS. Sky alleged that EDS's personnel involved with the tender (particularly the managing director of the relevant division) made fraudulent misrepresentations in relation to resources, cost, time, technology and methodology, which led to EDS being selected and awarded the contract in November 2000, after a letter of intent phase that started in August 2000.

Of course performance of the contract did not go as the parties had anticipated. There was poor performance by EDS, and in July 2001 Sky and EDS signed a further agreement which amended the terms of the original contract. More alleged negligent misrepresentations were made at this stage by EDS. There were further technical problems and delays, and eventually, in March 2002, Sky decided to take over from EDS, completing the project (to a 'de-scoped' extent) in about March 2006. Well before then, in August 2004, Sky issued proceedings against EDS in the Commercial Court, claiming over £700m in damages.

A key matter of construction between the parties was the legal effect of an entire agreement clause in the contract, which stated:

> 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 misrepresentation.

Arguments raised

EDS claimed that this clause effectively negated any duty of care owed to Sky in respect of representations. Further, EDS argued that no claim for non-fraudulent misrepresentation could be advanced. In other words, the clause was purporting to cover liability in tort, as well as contract.

Sky saw the clause differently, saying that it simply provided that pre-contractual representations were not to form part of the contract. The clause operated merely to defeat any suggestion of a collateral warranty or other side agreement, but did not exclude liability for misrepresentation (be it fraudulent, negligent or innocent). Lastly, Sky contended that to the extent that there was any ambiguity in an exemption clause it had to be resolved *contra proferentem*.

Court's view

The court was unconvinced by EDS's reasoning. The judge held that the

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provision was aimed at defining the extent of the contractual terms. Any representations were to be superseded and would not become contract provisions (unless, of course, they were included in the written agreement). The clause was simply not wide enough to cover EDS's construction of it, and the judge cited *Man Nutzfahrzeuge v Freightliner Ltd* [2005], where the clause went wider:

> There are no representations, warranties, covenants, conditions or other agreements, express or implied, collateral, statutory or otherwise, between the Parties in connection with the subject matter of this Agreement except as specifically set forth herein and 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 and the Ancillary Agreements.

And what of the reference to fraudulent misrepresentation implying that other types were being covered by the clause? The court concluded that while there was reference to representations, there was nothing in the clause indicating that it was intended to take away a right to rely on misrepresentations. Clear words are needed to exclude a liability for negligent misrepresentation, and this clause did not include such wording.

However, for a duty of care to arise, and for the statements to be classified as more than 'mere puff' or 'honest opinion', it has to be shown that there was reliance on them (see *Comyn Ching v Radius Plc* [1997], also a case involving a computer contract). In this regard, another significant clause of assistance to Sky was 7.2:

> The Contractor warrants to SSSL that it has the knowledge, ability and expertise to carry out and perform all obligations, duties and responsibilities of the Contractor set out in this Agreement and acknowledges that SSSL relies on the Contractor's knowledge, ability and expertise in the performance of its obligations under this Agreement.

Cap on damages

Of greater difficulty to Sky was clause 20, which sought to cap damages:

> … 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.

And:

> … the total aggregate liability of each party… arising out of any act, omission, event or circumstances relating to this Agreement or with respect to the matters contemplated herein shall in no circumstances exceed… £30 million.

For a duty of care to arise, and for statements to be classified as more than 'mere puff', it has to be shown that there was reliance on them.

Given its substantially greater losses this was a problem for Sky, unless it could show that the liability exclusions and cap in the clause were not effective in the circumstances. The parties both accepted that the cap applied to a breach of contract or negligent misrepresentation, but it was also common ground that the cap did not apply to any claim for fraudulent misrepresentation pre-contract. A lot therefore rode on the proof of fraudulent misrepresentation, which is a difficult cause of action to make out. As Lord Herschell said in *Derry v Peek* [1889]:

> … fraud is proved when it is shewn that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must… always be an honest belief in its truth… If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

The perjurer

Hence fraud always imports dishonesty even if the motive is not personal gain. We are not dealing here with statements made merely carelessly or even negligently: rather they have to be made knowingly or at any rate recklessly as to the truth.

Joe Galloway was the managing director of EDS and the mastermind behind EDS's response to the invitation to tender. He was the driving force behind their bid at all stages of the contractual negotiations up to leaving EDS in July 2002. It would be an understatement to say that the court was not impressed with his honesty. In his judgment Judge Ramsey reports:

> 174. In his first witness statement at paragraph 8, Joe Galloway stated that 'I hold an MBA from Concordia College, St Johns (1995 to 1996)'. Whilst it is, superficially, correct that Concordia College had granted him an MBA, as set out below it was not a genuine degree and was not obtained by study in 1995 to 1996. However, on being asked questions about that degree Joe Galloway gave evidence to the court over a prolonged period which EDS fully accept, as they have to, was completely false. This led to the termination of his employment by EDSC and to EDS having to accept that their main witness had lied in giving his evidence. He was also the person who, as Managing Director of the relevant part of EDS, directed and was fully involved in EDS' Response to the [invitation to tender] and in the various matters which are alleged by Sky to give rise to the misrepresentations in this case.
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> […]
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> 194. … He then gave perjured evidence about the MBA, including repeatedly giving dishonest answers about the circumstances in which he gained his MBA and worked in St John on a project for Coca Cola. In doing so, he gave his evidence with the same confident manner which he adopted in relation to his other evidence about his involvement in the Sky CRM Project. He therefore demonstrated an astounding ability to be dishonest, making up a whole story about being in St John, working there and studying at Concordia College. EDS properly distance themselves from his evidence and realistically accept that his evidence should be treated with caution.

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195. In my judgment, Joe Galloway's credibility was completely destroyed by his perjured evidence over a prolonged period. It is simply not possible to distinguish between evidence which he gave on this aspect and on other aspects of the case. My general approach to his evidence has therefore to be that I cannot rely on the truth of his evidence unless it is supported by other evidence or there is some other reason to accept it, such as it being inherently liable to be true.

196. Having 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.

After that it was but a short step to the conclusion that Mr Galloway's dealings with Sky in that pre-contract period showed the same lack of respect for the truth and so qualified as fraudulent misrepresentations:

838. Joe Galloway, with the title of managing director of the relevant part of EDS was evidently the main person at EDS who was involved in the estimating process to provide that information to go into the EDS Response. He compiled the Costing Spreadsheets which contained the detail of the effort, the overall resources and then the cost of the project. It is clear that he took responsibility for the overall contents of the EDS Response.

[...]

840. I consider that Joe Galloway approached the whole question of the time to achieve go-live in a cavalier fashion. As the person with the title of managing director, he was the main person involved in the estimating process... He knew that no proper analysis of time had been carried out and he knew that he had no basis for saying that go-live could be achieved in nine months and complete delivery in 18 months. Indeed, he said that he did not consider the timescales to be sufficient... 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.

[...]

948. Those representations were made by EDS based on deceit by Joe Galloway who dishonestly made those misrepresentations knowing them not to be true. The representations were made both before the selection of EDS and the Letter of Intent and also in October 2000 prior to the signing of the Prime Contract. They were intended to be relied on by Sky to induce them to select EDS and enter into the Letter of Intent and then subsequently to induce Sky to enter into the Prime Contract. Sky did rely on those misrepresentations and was induced to select EDS, enter into the Letter of Intent and the Prime Contract. EDS is accordingly liable to Sky in deceit for fraudulent misrepresentation.

And so to the dog

It is obvious from the above that the bogus MBA from Concordia College was the beginning of the end of Mr Galloway's credibility as a witness, and with that EDS's case. Counsel for Sky needed to show what a bogus institution Concordia College really was, and he did this in the following fashion:

In fact, Concordia College is a website which provides on-line degrees for anyone who makes an application and pays the required fee. This was effectively and amusingly demonstrated by an application which was made on the website for an MBA degree for a dog 'Lulu' belonging to Mark Howard QC. Without any difficulty the dog was able to obtain a degree certificate and transcripts which were in identical form to those later produced by Joe Galloway but with marks which, in fact, were better than those given to him.

So what points can we all learn from this dispute? Some might think that it is an unusual case, but we all know the commercial stresses involved in winning business and the personality types that are attracted to senior management:

Joe Galloway was quite clearly anxious to further his career. He was ambitious and to achieve a successful bid with Sky for the CRM Project would provide him with an opportunity to demonstrate his abilities to those in EDS.

BSkyB highlights the importance of considering the detailed ambit of boilerplate clauses which are sometimes drafted into contracts unchanged.

From a legal standpoint, the case highlights the importance of considering the detailed ambit of boilerplate clauses, such as entire agreement clauses, which are sometimes drafted into contracts unchanged. The question to be asked is whether the intention is to determine the contractual provisions or to exclude claims for misrepresentations.

Sky's solicitors, Herbert Smith, have said (at *www.legalease.co.uk/sky*) that:

The case should give the supplier community a firm push in the direction of best practice in bid preparation and submission, involving careful analysis of customer requirements and the resources necessary to meet them.

However, this was a case of a domineering MD being willing to ignore members of his team who disagreed with his views. As such, more importantly, it highlights the need for overall checks and balances in a company. Indeed, it shows the need for risk managers with real power of veto over senior management. Without that the situation may well recur. ■

BSkyB Ltd v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd)
[2010] EWHC 86 (TCC)
Comyn Ching v Radius Plc
(1997) CILL 1243
Derry v Peek
[1889] UKHL 1
Man Nutzfahrzeuge v Freightliner Ltd
[2005] EWHC 2347 (Comm)

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