

Fraudulent misrepresentation claim upheld

BSkyB v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited)

[2010] EWHC 86 (TCC)

Summary

This case sounds a strong note of caution for sales and tendering teams who are tasked with the difficult job of pitching for new work in a tough economic climate.

IT supplier, Electronic Data Systems ("EDS") (now part of Hewlett-Packard), has been left with a bill stretching to potentially hundreds of millions of pounds after Ramsay J found that the company had fraudulently misrepresented its ability to deliver a project on time and within budget when pitching for work from BSKyB.

Facts

Following a competitive tender process, EDS was chosen to set up and operate a new customer relationship management system for BSKyB.

A contract was subsequently signed by the parties in November 2000, with a view to EDS commencing work straightaway and delivering the first customer contact centre by April 2001. However, EDS soon ran into difficulty and it became clear that it would be unable to deliver the project within the timeframe and budget that it had promised in its pitch.

BSkyB took over the running of the project in 2002, by which time the project was vastly over budget and nearly 12 months behind schedule. The new customer relationship management system was eventually finished in March 2006 at a cost of £265 million.

BSkyB issued proceedings against EDS in 2004, claiming £700 million in damages for breach of contract and misrepresentation. BSKyB claimed that it had been induced to enter into a contract with EDS on the basis of false representations made by EDS during the tender process. In particular, EDS falsely claimed that it had carried out a detailed analysis of the timings of the project and that it had reasonable grounds for believing that it could deliver the project within the timeframes put forward.

Decision

In his judgment, Ramsay J conducted a detailed analysis of EDS's proposals and submissions during the tender process.

As to EDS's representations about the timings of the project, he found that they were completely unsubstantiated. EDS claimed that it had carried out a detailed analysis of the time needed to complete the initial phase of the project and that it had reasonable grounds for believing that it could complete the project within the timeframe set out in its proposal. In fact, no such analysis had been carried out. Ramsay J went on to find that EDS's intention in making these claims was to induce BSKyB to award it the tender and that, accordingly, EDS was liable to BSKyB in deceit for those misrepresentations.

Turning to the issue of causation, Ramsay J found a clear causal link between EDS's misrepresentations and the losses suffered by BSKyB. Had EDS not made the misrepresentations to BSKyB when tendering for the contract, BSKyB would not have selected EDS to carry out the project but would have awarded the contract to PWC (EDS's closest competitor in the bidding process). As such, BSKyB was entitled to recover losses suffered as a result of entering into its disastrous contract with EDS.

Comment

The real importance of this judgment lies in BSKyB's ability to make out its claim for fraudulent misrepresentation.

It is a well established point of law that no contractual cap will be effective to limit liability for fraudulent misrepresentation. By succeeding in this claim, BSKyB was able to circumvent the contractual cap on EDS's liability of £30 million and pursue EDS for full damages. Although no final decision has been reached yet as to quantum, EDS's final bill is expected to run to hundreds of millions of pounds.

The decision serves as a timely reminder to suppliers of the need to take care when preparing proposals and tendering for work. While it still remains difficult to prove fraudulent misrepresentation (indeed only a few of BSKyB's claims of deceit were actually upheld by the court), suppliers can expect their tendering processes to be more closely scrutinised in the future.

Suppliers should respond to this judgment by reviewing their sales and tendering processes. In particular, sales and pitching teams need to think carefully about what they are promising and whether they will be able to deliver on these promises.