Introduction
The Technology Law community in the UK has waited with impatience and anticipation for the judgment in BSkyB v EDS ([BSkyB Limited and another v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) and another (2010) EWHC 86 (TCC), 26 January 2010]). The hearing commenced on 15 October 2007 and lasted for almost a whole court year, finally ending on 30 July 2008. Even then, there was a further 18 month wait for judgment. Since the start of proceedings, and certainly since the end of the trial, speculation mounted that this would be a truly ground-breaking decision that will change the shape and form of IT tender processes and fundamentally impact on the way IT suppliers participate in those processes. Now that we have Mr Justice Ramsey’s judgment, all 468 pages of it, does it live up to this billing? Does the judgment signal a major shift in law or practice in this arena?

The case itself does not raise any new legal concept or principle. Further, given the particular circumstances of this case, in all likelihood it will not fundamentally change the way customers or suppliers approach IT procurement in the longer term, although suppliers may be more cautious about the statements they make (particularly given reports last week that EDS have agreed to make an interim payment on account of damages of £200m), and customers may take extra care to express into their contracts the supplier statements they seek to rely on. However, to write off the judgment would be quite wrong. There is a substantial body of useful law and practice within the judgment, which all IT lawyers would be advised to digest. There are also some key messages for suppliers, customers and their respective advisors. Added to all that, it is actually a great read: in places reading more like a novel or film script than a judgment of the Technology and Construction Court.

The facts of the case
Given that the facts of the case are now well documented and fairly typical of many material IT contract disputes, only a summary of them needs inclusion here. In March 2000, BSkyB issued an Invitation to Tender for the design, development and integration of a new customer relationship management (“CRM”) system which, once successfully implemented in its call centre operations, would transform the BSkyB customer-care experience and its customer-facing business. EDS won the tender, in what had effectively become a two-way fight with PricewaterhouseCoopers, and executed a contract with BSkyB’s operating subsidiary Sky Subscribers Services Limited (“SSSL”) on 30 November 2000. The contractual baseline budget was around £50m, and there was a two-stage timeline for integration: nine months for the first-stage go live and 18 months for full completion. The project did not go well. Full functionality of the CRM system was not completed until March 2006, by which time EDS had been removed from its role as systems integrator, continuing only in a basic IT supplier role. The total project costs stood at £265m and BSkyB was claiming damages of £709m.
Impact on the law
Perhaps the greatest value of this judgment to the IT law community is in the detailed way it assesses many of the basic legal concepts one would anticipate having to advise on in this sector. The index of the judgment reads like the contents page of a practitioners manual on IT contracting, and Mr Justice Ramsey has included, for each area of law, both an assessment of the main precedent case law, as well as a clear and thoroughly readable account of the law’s application to the facts. As such it provides a reminder of the law on:

- Fraudulent misrepresentation and the tort of deceit
- Negligent misrepresentation
- S.2 Misrepresentation Act 1967
- Entire Agreement clauses, and their application to pre-contractual representations
- Duties of care, and how they won’t arise to circumvent contractual limitations on liability
- Interpretation of liability clauses, and in particular for loss of anticipated savings
- Privity of contract, with respect to representations made to or by group members of the contracting parties
- Breach of contract
- Repudiatory breach, and the relationship with contractual termination rights for cause
- Causation
- Mitigation.

The contract contained a financial cap on EDS’s liability of £30m, which fell well short of the £709m claimed by BSkyB. As liability for fraud cannot be limited by contract, it was critical for BSkyB to prove that EDS had been fraudulent in making certain pre-contractual misrepresentations. The interplay between breach of contract and the torts of negligent and fraudulent misrepresentation is addressed in some detail in the judgment. The contract contained a further clause excluding certain heads of direct loss, and BSkyB sought to prove that its lost anticipated savings were not excluded by that clause. As the judgment records, BSkyB was partially successful with the fraud claims, but unsuccessful with respect to the anticipated savings.

The judgment contains a number of instances where common complexities of technology projects are reduced to a useful level of understanding for those tasked with advising in this sector. For example, the judge relies on evidence of IT experts who enabled him to decide in the areas of software design and development, project planning and programme management, estimation of resource requirements and costs and measurement of losses.

Effect on supplier behaviours
BSkyB had claimed that EDS made misrepresentations (both negligent and deceitful) in its initial bid response, and in the pre-contract negotiation process, in order to ensure down-selection. Of the many predicted outcomes of this case, perhaps the most common therefore was that the case would lead to a change to IT supplier behaviours in tender processes.

Mr Justice Ramsey analysed, in detail, EDS’ approach in its bid response and the contract negotiations, as well as in settlement negotiations when the project was first going off the rails. In fact, EDS were found to have made actionable misrepresentations only as to the time required to complete the project. EDS were held to be not liable for their various statements made throughout the bid and contracting process in respect of resource requirements, costs estimates, technology capability or methodologies.
Furthermore, some of EDS’ liability for its ‘time to complete’ representations flowed from negligent misstatements, as opposed to deceit. These would likely have been excluded if a more up to date entire agreement clause, expressly excluding liability for any (non-fraudulent) pre-contractual statements, had been used in the contract (see Thomas Witter Ltd v TBP Industries Ltd (1996) 2 All ER 573, E A Grimstead & Son Ltd v McGarrigan [1999] WL 852482, Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd [1998] LLR 139 and other relevant cases). This would have left BSkyB with even less opportunity to recover against EDS’ bid response claims.

It is also clear from the judgment that Mr Justice Ramsey held one EDS employee in particular responsible for EDS’ deceitful representations. Joe Galloway, EDS’ bid team leader, was found by the judge to have made dishonest representations. He was also discredited as a witness when he perjured himself in claiming he had completed an MBA at Concordia College, St John, but he had in fact bought the qualification from a website providing online degrees. BSkyB’s lead Counsel (now infamously) purchased a similar MBA, albeit with better grades, for his dog “Lulu” from the same ‘educational’ establishment. The Judge’s damning verdict on the credibility of this witness makes for an entertaining read.

Many IT suppliers may therefore like to see this whole sorry story as the result of one ‘bad apple’ in the organisation, rather than a warning from the courts for a re-think on approach to bid response and negotiations. However, it is important that they review their internal procedures, protocols and training to ensure sales representatives do not make statements which cannot be backed-up or delivered against.

Suppliers are also likely to be evaluating their insurance options – particularly given the size of the interim payment (£200m) agreed in an ‘Order for Directions’ on the 3rd February and which was reported last week in the IT press. Whether they will be able to obtain adequate insurance against misrepresentation claims is uncertain (and unlikely in the case of fraud). In any event the costs of any such cover could severely dent any individual project business case. They may seek to pass through additional costs to customers, but will then risk becoming uncompetitive at competitive tender stage.

So, will suppliers fundamentally change their approach to bid responses? In the long run, probably not. However, there are timely reminders for all companies (customers and suppliers) of the severe and inherent risks that can arise where internal procedures and protocols are insufficient to control individuals.

Perhaps an equally important message will be for customers: if you are seeking to rely on pre-contract statements made by bidding suppliers, you really need to incorporate them expressly into the contract.

An increase in IT contract litigation?
Will other disgruntled customers follow BSkyB’s lead and litigate their disputes? Whilst headlines herald a great victory for BSkyB, it is still worth remembering the time, costs and disruption involved. For many, litigation remains a lengthy, potentially costly and uncertain process for resolving major IT disputes. It is not without risk even where one party appears on the face of it to be in clear contractual breach.

The size of the interim payment (£200m) agreed on 3rd February will have sent ripples through the IT supplier organisations. While we still do not yet know the full implications of the case (we await the final decision on damages and costs and Hewlett Packard - who now own EDS - have said they plan to appeal), it would be surprising if Hewlett Packard/EDS would agree to make an interim payment of this size if they thought the final damages (or at least the damages plus interest) would be significantly lower than this. If the final damages figure is in the region of £200m (or higher) this would show the success of BSkyB’s strategy to prove fraud and deceit to break through the £30m contractual cap, especially given how few of BSkyB’s deceit claims were actually upheld by the court. To date, fraud claims in civil proceedings have been rare, as a very high burden of proof applies. Following this case, however, we may see more examples of litigants attempting to circumvent contractual liability caps with allegations of fraud and deceit.
Lessons for lawyers

And for the lawyers? Whilst there may be no ‘new’ law in the BSkyB v EDS case, there is ample reason for lawyers to read the judgment. At its most basic, this is a major IT project that went seriously wrong. The judgment provides a step-by-step, document-by-document and chronological trip through the whole episode. There are plenty of insights into how clients (customers and suppliers) can get things wrong and how a dangerous cocktail of aggressive delivery deadlines, strong individual personalities and particular corporate cultures can have disastrous consequences. One wonders what role EDS’ and BSkyB’s respective lawyers had in the early days of this story. It is a reminder that the lawyers’ role should extend beyond that of mere contract ‘scribe’, and that they should be included in, or at least aware of, the making of early stage representations. They can then perhaps act as an internal ‘early warning system’ to the potential dangers that face both suppliers and customers.

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This article is due to appear in PLC Magazine (March 2010).