Butterworths Intellectual Property and Technology Cases/IP and T Cases/2010/BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another [2010] IP & T 597

[2010] IP & T 597

# BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another

[2010] EWHC 86 (TCC)

**QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)**

**RAMSEY J**

**15, 18, 22, 23, 31 OCTOBER, 1, 5–8, 12–15, 19–22, 26–29 NOVEMBER, 3–6, 10–13, 17–20 DECEMBER 2007, 14–17, 21–24, 28–31 JANUARY, 4–7, 11–13, 15, 18–20, 25–28 FEBRUARY, 3, 4, 6, 10–13, 17–19 MARCH, 7–11, 14–18, 21, 22, 24 APRIL, 6–9, 12–16, 19–22 MAY, 30 JUNE, 1, 2, 23–25, 28–30 JULY 2008, 26 JANUARY 2010**

*Information technology – Information technology services – Contract – Construction – Breach – Causation – Misrepresentation – Negligent misstatement – Entire agreement clause – Limitation and exclusion clauses – Mitigation of loss – Invitation to tender – Defendants making representations – Parties entering into IT services contract – Disputes arising – Claimants alleging misrepresentation – Claimants alleging repudiatory breach of contract – Whether entire agreement clause excluding liability for misrepresentation – Whether liability excluded or limited – Whether duty of care owed – Whether defendants liable for fraudulent and/or negligent misrepresentation – Whether repudiatory breach of contract – Whether defendants liable for negligent misstatement.*

The claimants, BSkyB and SSSL (Sky), provided satellite broadcasting and related services. The defendants, EDSL and EDSC (EDS), provided information technology services. Following a tender process in 2000, the claimants selected the defendants to design, build, manage, implement and integrate the process and technology for a new customer relationship management (CRM) system for use at the claimants' call centres. After an initial letter of intent, the parties entered into a contract (the prime contract) to provide the CRM system at the claimants' contact centres. The prime contract contained an entire agreement clause and, by cl 20, clauses relating to limitation and exclusion of liability. The claimants also obtained from the defendants a deed of guarantee that guaranteed the defendants' contractual obligations and liabilities. Following perceived poor performance on the part of the defendants of the prime contract, a letter of agreement was negotiated and entered into in July 2001 which amended the terms of the prime contract and effected a settlement of the then existing contractual liabilities. The letter of agreement stated, inter alia, 'The terms set out in this letter have been agreed between us, subject to the approval of our respective managements, in full and final settlement of: (a) all known claims which [the claimants] may have against [the defendants] or which [the defendants] may have against [the claimants] for any breach of the prime contract as of the date of both parties signing this letter; and (b) all unknown claims which [the claimants] may have against [the defendants] or which [the defendants] may have against [the claimants] for any

breach of the prime contract during [the specified period]' (para 17). Further problems

*[2010] IP & T 597 at 598*

occurred, including late completion of the first phase of the project, and, on 26 March 2002, the parties entered into a memorandum of understanding which reflected the fact that the claimants had taken over the performance of the defendants' role as systems integrator on 6 March 2002. The memorandum of understanding was expressed to be 'without prejudice and subject to contract'. The claimants went on to provide a CRM system, however they contended that the CRM system was completed four years later than planned and at substantially greater cost. The claimants served their particulars of claim in December 2003 in which they alleged that the defendants had made fraudulent misrepresentations which led to their selection as provider, to the letter of intent, the prime contract and the letter of agreement. The claimants sought damages for deceit for representations made pre-prime contract, or in the alternative, for negligent misrepresentation/misstatement. The following issues arose for the court: (i) whether the entire agreement clause in the prime contract excluded liability for misrepresentation; (ii) whether the limitation and exclusions clauses in the prime contract limited the exclusion to indirect losses (cl 20); (iii) whether para 17 of the letter of agreement compromised all known and unknown claims; (iv) whether the memorandum of understanding constituted a binding agreement which amounted to a compromise of any rights and liabilities and whether any new warranty provisions arose; (v) whether a duty of care was owed by the defendants to the claimants; (vi) whether the defendants were liable for fraudulent and/or negligent misrepresentation to the claimants; (vii) whether there had been a repudiatory breach of contract; (viii) if misrepresentations had been made by the defendants, whether the claimants would have engaged the defendants had the misrepresentations not been made; and (ix) whether the claimants had failed to mitigate their losses.

**Held** – (1) In the instant case, the entire agreement clause of the prime contract did not preclude the claimants from advancing a claim for negligent misrepresentation or misstatement against the defendants. Whilst a representor could modify or withdraw a prior representation at any time before it was relied on, the entire agreement clause in the instant case, upon its proper construction, did not amount to an agreement that representations were withdrawn, overridden or of no legal effect so far as any liability for misrepresentation might be concerned. That provision was concerned with the terms of the agreement. It provided that the agreement represented the entire understanding and constituted the whole agreement. It was in that context that the agreement superseded any previous representations; ie representations were superseded and did not become terms of the agreement unless they were included in the agreement. If it had intended to withdraw representations for all purposes then the language would have had to have gone further. There was no 'contractual renunciation of the right to rely' in the instant case. Further, the 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 of the agreement or collateral contracts from having contractual effect; it did not supersede those matters so far as there might have been any liability for misrepresentation based on them. Moreover, the entire agreement clause did not have the effect of excluding liability for non-fraudulent misrepresentation. It did not cover liability for misrepresentation rather than contractual liability for representations. Exclusion clauses were construed strictly and clear

*[2010] IP & T 597 at 599*

expression was needed to exclude liability for negligence. While there was reference to representations in the instant case, there was nothing in the clause that indicated that it was intended to take away a right to rely on misrepresentations. Although the final sentence of the clause, namely 'This clause does not exclude liability of either party for fraudulent mis-representation', was obviously an indication that the previous words of the clause would otherwise have that effect, in the absence of words which did have that effect, such a statement could not create an exclusion which it then negatived (see [382]–[389], [2324], below); *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910, [2008] 2 BCLC 22 distinguished; *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 and *Canada Steamship Lines Ltd v R* [1952] 1

All ER 305 applied; *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 considered.

(2) However, except for claims in deceit, cl 20.2(ii) of the prime contract, which provided that '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', had the effect of excluding EDSL's liability to SSSL for call rate reduction benefits. Further, the effect of cl 20.2 and cl 20.5 was to limit the defendants' liability for such negligent misrepresentation to £30 million and excluded certain heads of loss (see [410], [411], [535], [2325], below); *Hadley v Baxendale* (1854) 9 Exch 341 considered.

(3) Paragraph 17 of the letter of agreement was an exclusion clause for claims for breach of the prime contract between the defendants and the claimants as expressly set out in that clause but was not an exclusion of 'All known claims and all unknown claims' which the claimants could advance against the defendants on the basis of breach of contract. On a true construction of the terms of para 17 that provision was not sufficient to exclude claims for negligent or fraudulent misrepresentation. The words on their ordinary meaning and construed against the matters known to both parties at the date of the agreement would not be apt to cover a claim for misrepresentation. For parties to intend to exclude claims in negligence required clear words showing that intention. Moreover, an exclusion clause to that effect could not be implied into para 17. The purpose of the settlement was to wipe the slate clean in respect of claims for breach of the prime contract. If the parties had wished to, they could have incorporated words to include wider claims such as claims which could be advanced by way of breach of contract. They had not done so and it was not for the court to rewrite their bargain (see [434]–[437], [2326], below); *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20, *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961 and *Bottin (International) Investments Ltd v Venson Group plc* [2004] EWCA Civ 1368 considered.

(4) The whole of the memorandum of understanding was not a legally binding agreement when it was signed. It clearly was and was intended to be 'subject to contract' and it was clear that both parties envisaged a later contact which would govern the changed relationship between them. Further, it was not possible to spell any contractual relationship founded on conduct from the position after 6 or 26 March 2002. The parties proceeded on the basis that a new contract would be entered into but they had failed to do so. It followed that the memorandum of understanding did not give rise to any full and final



settlement nor did it give rise to new warranty provisions (see [441], [479], [480], [496], [2327]–[2329], below); *Fraser Williams v Prudential Holborn Ltd* (1993) 64 BLR 1 considered.

(5) A duty of care should not be imposed upon the defendants in favour of the claimants which would circumvent or escape the contractual exclusion or limitation of liability which the parties had put in place. That contractual structure negatived any possibility that such a duty of care should arise in those circumstances. Where the parties were in contract, a concurrent or alternative liability in tort would not permit a party to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. However, subject to that qualification, where concurrent liability in tort and contract existed the plaintiff had the right to assert the cause of action that appeared to be the most advantageous to him in respect of any particular legal consequence. Whilst in principle, subject to that limitation, there appeared to be no reason why a common law duty of care should not be owed by the defendants to the claimants in the instant case in relation to any pre-contract representations, the court had to consider the effect of the terms of the prime contract on that duty of care. In considering whether a contractual provision affected the existence or the scope or extent of a duty of care, the test was whether the parties had so structured their relationship that it was inconsistent with any such assumption of responsibility or with it being fair, just and reasonable to impose liability. In particular, a duty of care should not be permitted to circumvent

or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. The question for consideration was whether it was sensible or just for a duty of care to exist in the light of all the circumstances. In the instant case, the relevant terms of the prime contract, namely the entire agreement clause in cl 1.3, the warranties given in cl 7.2 and the limitation of liability clause in cl 20, could not therefore be ignored. The contractual documentation, whether taken at a straightforward contractual level, or looked at more widely, as an indication as to whether any common law duties of care arose, showed that the parties had specifically contracted upon the basis of a relationship which negated any possibility of a duty by or to other parties coming into existence (see [355], [356], [517]–[520], [540]–[543], [2330], below); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, *Pacific Associates Inc v Baxter* [1989] 2 All ER 159, *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 and *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) applied.

(6) In all the circumstances, (i) *Misrepresentations prior to the selection of EDS and the letter of intent*: EDS had made fraudulent representations as to time both prior to the selection of EDS and the letter of intent but otherwise Sky's other allegations of misrepresentation, including alleged misrepresentations as to cost and resources, would fail; (ii) *Misrepresentations prior to the prime contract*: EDS were liable to Sky in deceit for the false representation made by its representative that they had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go-live of the contact centre and held the opinion that, and had reasonable grounds for holding the opinion that they could and would deliver the project within the timescales referred to in the response. There had been no 'proper analysis' nor were there 'reasonable grounds'; (iii) *Misrepresentations prior to the letter of agreement*: The statements made by EDS had amounted to a representation that they had



developed an achievable plan, which had been the product of proper analysis and re-planning. EDS had not carried out a proper analysis and re-planning exercise to produce a programme which would have been achievable and the representation was therefore false and was made negligently. The misrepresentation was a material misrepresentation which EDS had intended Sky to rely upon and which Sky had relied upon in entering into the letter of agreement. EDSL were therefore liable to SSSL for negligent misstatement and under s 2(1) of the Misrepresentation Act 1967. Otherwise, EDS was not liable for any other misrepresentation prior to the letter of agreement; (iv) *Liability for misrepresentations*: The misrepresentations which were made prior to the selection of EDS and the letter of intent and also prior to the prime contract were only made on behalf of EDSL and not on behalf of EDSC but were made to both BSkyB and SSSL. EDSL had no liability to BSkyB for the negligent misrepresentations made prior to the letter of intent, the prime contract or the letter of agreement (see [304], [305], [606]–[620], [626], [631], [647], [648], [659], [660]–[689], [755], [771], [772], [804] [849]–[852], [939], [946]–[948], [961]–[964], [969]–[972], [1012], [1013], [1025]–[1028], [1045], [1046], [1061], [1062], [1111], [1124]–[1126], [1202]–[1204], [1220], [1221], [2331]–[2339], below); *Derry v Peek* (1889) 14 App Cas 337, *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 and *Downs v Chappell* [1996] 3 All ER 344 applied.

(7) The defendants had been in breach of the prime contract. They had failed to exercise reasonable skill and care or conform to good industry practice as there had been no effective programme management, the design and development of the solution had not been properly documented and they had not provided sufficient technical or managerial resources. However, neither the breaches alone nor the combination of breaches amounted to a repudiatory breach of the prime contract, as varied. Further, the evidence did not establish that there had been an acceptance of any repudiation (see [1254]–[1256], [1345], [1346], [1361]–[1380], [2340], [2341], below); *Heyman v Darwins Ltd* [1942] 1 All ER 337, *Lockland Builders Ltd v Rickwood* (1995) 46 ConLR 92 and *Amoco (UK) Exploration Co v British American Offshore Ltd* [2001] All ER (D) 244 (Nov) considered.

(8) Had the defendants not made the misrepresentations prior to their selection as preferred bidder and the

signing of the letter of intent, the claimants would not have continued with their selection and would instead have appointed an alternative provider. Further, if the defendants had not made the misrepresentations prior to the letter of agreement, the claimants would not have continued with the defendants but would have engaged an alternative systems integrator to continue with the CRM project and implement the ASI CRM system. Accordingly, the claimants were entitled to recover losses caused by entering into the prime contract on the basis of either the misrepresentations made prior to selection and the letter of intent or prior to the prime contract and the defendants were also liable for damages which represented damage for breach of the prime contract prior to July 2001, damages to be awarded on the basis of wasted costs, being effort expended less useful work, at £16.3 million. Further, the defendants were entitled to damages for breach of the prime contract as varied by the letter of agreement based on the costs of the effort incurred by the claimants after 6 March 2002 in reaching the stage of development that the defendants would have reached if they had expended the effort they had charged for in performing their obligations in accordance with their obligations under the prime contract as amended, agreed



at £52.8m including the value of the unpaid EDS invoices or £48.8m excluding those invoices, the sum recoverable being subject to the cap under cl 20 of the prime contract (see [1392], [1396]–[1398], [1402]–[1405], [1432], [1686], [1696], [1705], [2342], [2343], below); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 considered.

(9) The claimants had not failed to mitigate their loss by acting unreasonably in implementing the actual CRM system or by de-scoping or by failing to introduce self service functionality at an earlier date (see [1724], [1725], [1729], [1730], [1758], [1774], [1775], [1794]–[1796], [1797]–[1801], [2345], below).

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*Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, [1932] All ER Rep 181, HL.

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*Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA.

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2945 (Ch), [2005] 1 WLR 3456; *affd* [2006] EWCA Civ 3, [2006] 1 WLR 495n, [2006] All ER (D) 183 (Jan).

*Fraser Williams v Prudential Holborn Ltd* (1993) 64 BLR 1, CA.

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*Vitol SA v Norelf Ltd, The Santa Clara* [1996] 3 All ER 193, [1996] AC 800, [1996] 3 WLR 105, [1996] 2 Lloyd's Rep 225, HL.

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**Claim**

The claimants, British Sky Broadcasting Ltd (BSkyB) and Sky Subscribers Services Ltd (SSSL) (together 'Sky'), brought proceedings for breach of contract and/or fraudulent and/or negligent misrepresentation, against the defendants, Electronic Data Systems Ltd (now HP Enterprise Services UK Ltd) (EDSL) and Electronic Data Systems Corporation (now Electronic Data Systems LLC) (EDSC) (together EDS), in relation to an information technology services contract. The facts are set out in the judgment.

M Howard QC, A Charlton QC, A Haydon, F Pilbrow and M Lavy (instructed by Herbert Smith LLP) for the claimants.

M Barnes QC, A Gourgey QC, Z O'Sullivan and S Tudway (instructed by DLA Piper) for the defendants.

*Judgment was reserved.*

**26 January 2010. The following judgment was delivered.**

**RAMSEY J.**

## A: GENERAL BACKGROUND AND INTRODUCTION

### *Introduction*

**[1]** The claimants in these proceedings, British Sky Broadcasting Ltd (BSkyB) and Sky Subscribers Services Ltd (SSSL) provide satellite broadcasting and related services. The defendants, Electronic Data Systems Ltd (now HP Enterprise Services UK Ltd) (EDSL) and Electronic Data Systems Corporation (now Electronic Data Systems LLC) (EDSC) provide information technology services.

**[2]** There are issues as to the extent to which BSkyB can pursue claims and the extent to which EDSC has liabilities arising from the matters alleged in these proceedings. It is therefore generally convenient to refer to the claimants in the neutral term 'Sky' and the defendants as 'EDS' in this judgment as a general description of one or both of the claimants or defendants without entering into that particular debate when rehearsing and dealing with the facts and allegations.

**[3]** This case is concerned with the procurement of a new customer relationship management (CRM) system so that Sky could provide improved service to its customers focussed, at least initially, on telephone contact between customers and the Customer Advisors ('CAs' also known as Customer Service Representatives 'CSRs') at Sky call centres.

**[4]** Following a tender process in 2000, Sky selected EDS to design, build, manage, implement and integrate the process and technology for the CRM system. After an initial letter of intent, SSSL entered into a contract with EDSL ('the prime contract') to provide the CRM system at Sky's existing contact centres located at Dunfermline and Livingston.

**[5]** The relationship was not a success. There was a renegotiation in 2001 which led to a letter of agreement. Then in 2002 Sky took over the



performance of EDS's role of systems integrator and a memorandum of understanding was signed. Sky alleges that EDS made fraudulent misrepresentations which led to EDS being selected, to a letter of intent and to the prime contract. They also allege that EDS made negligent representations prior to the letter of agreement.

**[6]** Sky went on to provide a CRM system. Instead of the intended CRM project going live on 31 July 2001 and being completed by 1 March 2002 at a baseline budget of £47.6m, Sky contend that the functionality for the CRM system was only completed in March 2006 at a cost of about £265m. In the particulars of claim as they stood at the commencement of the hearing Sky claimed damages of some £709m.

***Sky customer relationship management***

**[7]** The main method of contact between Sky and its customers is a telephone call to one of Sky's call centres, which are also referred to as contact centres. In addition to the telephone there are other channels of communication including fax, e-mail, WAP, the internet and, in particular, Sky's digital set-top box.

**[8]** The CRM system is therefore important to Sky's business and forms an essential part of all contact centre dealings with customers, as well as other 'self-service' dealings by customers. It facilitates, governs and records all customer related transactions, such as setting up a new account, closing an account, reporting a fault, calling out an engineer or changing a package. It also allows Sky to bill and process payments from their customers.

**[9]** In 2000, Sky perceived an urgent need to replace the existing digital customer management system (DCMS). It was an old system built up over the years and there were concerns in its ability to allow Sky to deal with the increasing number of customers and services. It was also recognised that a new CRM system with enhanced functionality would bring business benefits to Sky, including a reduction in the number of customers who 'churn' or leave Sky each year, known as the 'churn rate'. Sky therefore decided to undertake a project, referred to as the Sky CRM project which included the provision of a new CRM system.

**[10]** At the time, Sky operated a number of legacy systems in addition to DCMS. In summary, the systems consisted of:

(1) DCMS—which included billing and payment processing.

(2) The subscriber card management system (SCMS): a system by which SSSL provided conditional access services to broadcasters including BSkyB and the management of 'smart' cards distributed to customers.

(3) The management of information for digital and analogue systems (MIDAS): this was a data warehouse for the storing and retrieval of marketing and financial information.

(4) The field management system (FMS): a system that provided for all aspects of Sky installations.

**[11]** The SCMS did not form part of the new CRM system but it was a system then integrated with DCMS and the ITT included a detailed interface specification for the interface with the CRM system.

**[12]** The new CRM system included the replacement of the DCMS and FMS systems and the implementation of a new telephony solution. It also needed to include functionality to replace billing and operational finance functionality in DCMS.



***Brief chronology***

**[13]** I shall have to deal with the facts in some detail but at this stage it is convenient to set out some of the major dates relating to the Sky CRM project and this litigation.

**[14]** The Sky CRM project effectively commenced with Sky's announcement to the City on 9 February 2000 that it was to spend up to £50m in upgrading its customer contact centres with state of the art technology and processes, to be operational within 12 months.

**[15]** To do this, Sky issued an Invitation to Tender (ITT) dated 17 March 2000. It was initially sent to Pricewaterhouse Coopers (PwC), Arthur Andersen (AA) and Andersen Consulting. Ernst & Young were subsequently sent it and then it was also sent to EDS on 22 March 2000. There followed meetings or workshops between Sky and the tenderers. Those between EDS and Sky took place on 10 and 27 April 2000.

**[16]** Tenders or responses to the ITT were received from PwC, AA and EDS. No response was received from Andersen Consulting or Ernst & Young. Each tenderer who prepared a response also made a presentation to Sky.

**[17]** EDS made their presentation to Sky on 1 June 2000 and also delivered their response to ITT on that day ('the EDS response').

**[18]** There then followed discussions between EDS and AA. This led to AA withdrawing its tender and to AA and EDS producing a Joint Delivery Teaming document on 29 June 2000 which made a joint bid to Sky. This meant that there were only two tenderers: PwC and EDS/AA. In terms of the main CRM software system, PwC proposed a Siebel package and EDS/AA proposed a Chordiant framework solution.

**[19]** Sky evaluated the tenders. On 7 July 2000 there was a further round of final presentations from PwC and EDS/AA. The decision to proceed with EDS/AA was made on about 20 July 2000 and communicated to EDS.

**[20]** In the EDS response and in meetings and documents sent by EDS to Sky, Sky alleges that EDS made fraudulent misrepresentations in relation to resources, cost, time, technology and methodology which led to EDS being selected and being awarded the letter of intent.

**[21]** A letter of intent was subsequently signed on 9 August 2000 between BSkyB and EDSL, pending the finalisation of the main agreement so that work could start straight away with a view to achieving '*New contact centre live*' by April 2001. This was a reference to a new contact centre which was to be built in Irlam, Manchester and be equipped with the CRM system, in addition to the refitting of the two existing contact centres at Dunfermline and Livingston.

**[22]** EDS and AA started work on about 24 July 2000. AA was in charge of the Process Workstream and EDS was in charge of the Technology Workstream. There was a project kick-off meeting on 27 July 2000.

**[23]** As a result of further discussions between EDS and Sky in September and October 2000, it was evident that the costs of the CRM project had increased. Further discussions on options led to Sky deciding not to proceed with the new contact centre in Manchester.

**[24]** Concerns were expressed in September and October 2000 as to the time within which EDS could implement the CRM project and various other matters. EDS provided a revised programme showing that they could achieve go-live in July/August 2001. Sky allege that EDS made further fraudulent misrepresentations in this period which Sky relied on in making the decision to enter into an agreement with EDS.

*[2010] IP & T 597 at 608*

**[25]** On 30 November 2000, a sytems integration contract ('the prime contract') was signed by Tony Ball, the CEO of BSkyB for and on behalf of SSSL and by Steve Leonard of EDSC, President of e.Solutions EMEA, for and on behalf of EDSL. It had a '*baseline budget*' of £47,637,000 and included an important milestone of 31 July 2001 for '*eCRM Live in One Hall*'.

**[26]** The performance of the prime contract did not go as anticipated. There was poor performance by EDS and on 16 July 2001 Sky and EDS signed a further agreement which amended the terms of the prime contract by that letter of agreement. Sky say that EDS made various negligent misrepresentations which led to Sky entering into the letter of agreement.

**[27]** The performance of the project then again ran into difficulties, with the first major stage of the project, phase 1, being completed late. After further negotiations, Sky took over from EDS as systems integrator from about 6 March 2002 and on 26 March 2002 a memorandum of understanding expressed to be 'without prejudice and subject to contract' was signed by Sky and EDS. There is an issue as to whether that document was a binding agreement.

**[28]** Under these new arrangements, Sky proceeded with the project on an incremental basis. Instead of phase 2 going live at the same time, referred to as the 'big bang' approach, the project was split into five stages, referred to as increments 2.1 to 2.5.

**[29]** Proceeding on this basis, increment 2.1 went live on 14 November 2002 and on 21 March 2003 increment 2.2 went live. Sky decided not to proceed, at least at that stage, with part of increment 2.3 and also increments 2.4 and 2.5. Increment 2.3 in its 'de-scoped' form went live on 1 September 2005 for new customers and on 31 March 2006 it went live for existing customers. The new system up to and including the de-scoped increment 2.3 is referred to as the 'Actual CRM System'.

**[30]** The disputes which had arisen between Sky and EDS then led to Sky providing EDS with draft particulars of claim on 19 December 2003. On 17 August 2004 Sky issued proceedings against EDS in the Commercial Court.

**[31]** Those proceedings were transferred to the Technology and Construction Court and directions were given on 8 November 2006 leading to a trial commencing in October 2007, initially for 20 weeks but later extended to end in July 2008.

**[32]** There were regular case management conferences dealing with applications and other matters which required to be resolved in advance of the hearing. The pleadings have been through a large number of amendments but for convenience I shall refer to them as the particulars of claim, defence, counterclaim, reply and defence to counterclaim, rather than the title of the multiple re-amended versions.

**[33]** There was a very substantial amount of documentation both in hard and soft copy and the trial bundle consisted of some 400 bundles. Documents which could only conveniently be viewed electronically were also displayed on a screen.

**[34]** The parties provided extensive written opening submissions. The hearing commenced on 15 October 2007 with oral opening submissions. Sky's factual evidence on liability commenced on 31 October 2007 and concluded on 18 December 2007. EDS's factual evidence commenced on 14 January 2008 and concluded on 19 March 2008.

**[35]** The parties provided written openings on the IT issues. Expert evidence from the IT experts was then heard commencing on 7 April 2008. The evidence



was dealt with in a number of sessions dealing with particular topics with Sky's experts and EDS's expert giving evidence in each session. The main IT expert evidence was concluded on 24 April 2008.

**[36]** Opening written submissions dealing with Sky's quantum claim for business benefits were then served. Starting on 6 May 2008 Sky called further factual witness evidence relevant to quantum. That concluded on 12 May 2008. On 13 May 2008 the parties commenced evidence from their expert witnesses who dealt with Sky's claims for lost benefits in the form of reduction in the churn rate. On 19 May 2008 evidence commenced from the experts dealing with Sky's claim for lost benefits in the form of call rate reduction. That evidence concluded on 22 May 2008.

**[37]** On 19 and 20 June 2008 after short further quantum evidence, the parties called expert evidence from the IT experts to deal with EDS's case that Sky had failed to mitigate its damages. Sky then called further factual witness evidence dealing with quantum, from 20 June 2008. Expert evidence on the details of quantum was then heard from the forensic accountant Quantum experts and this concluded on 2 July 2008.

**[38]** The parties served written closing submissions dealing first with liability issues, then business benefits and finally quantum. There were also reply submissions on liability and business benefits and Sky served a response on quantum during oral closing submissions which commenced on 23 July 2008 and concluded on 30 July 2008 which was Day 109 of the trial.

**[39]** The parties then provided electronic copies of all documents, including invaluable hyperlinked versions of their closing submissions. By September 2008 the final substantive documentation had been provided although the final agreed transcript corrections were received in December 2008.

***The parties***

**[40]** BSkyB is well known as a provider of pay-television broadcasting services in the United Kingdom and Ireland. It is a wholly owned subsidiary of British Sky Broadcasting Group plc.

**[41]** SSSL was until 2005 a wholly-owned subsidiary of BSkyB. Since 2005 it has been owned by another subsidiary of the group. SSSL provides ancillary services and other functions supporting the satellite television operations of BSkyB, including the management and operation of customer contact centres.

**[42]** EDSL is an English company which carries out design, development, integration and implementation of information technology solutions to businesses and governments together with the provision of related services.

**[43]** EDSC is a United States corporation and was at all material times the ultimate parent company of EDSL. It is based in Plano, Texas and carries on similar business to EDSL.

**[44]** In the 1990s, EDSC had been structured into Strategic Support Units or business units focused upon particular market sectors. It carried out business in four regions. Two of these were in the United States, the other regions being Asia Pacific and EMEA (Europe, Middle East and Africa). EDSL operated within the EMEA region.

**[45]** In about 2000, following the appointment of a new Chairman and CEO of EDSC, the business was restructured into four new global Lines of Business (LOBs): i.Solutions, e.Solutions, Business Process Management and AT Kearney.

**[46]** e.Solutions provided consulting services in the field of process and technology solutions. It was engaged to provide implementation, integration



and project management services. e.Solutions was divided into four practice areas, including one known as Digital Value Chain. Within that practice area there were a number of service lines or practices. The relevant practice in this case was the Customer Relationship Management or CRM Practice.

**[47]** Prior to the reorganisation and the formation of the CRM Practice, the business unit dealing with CRM work had been known as Centrobe. In early 1999 EDSC acquired the delivery and technology team from

MCI Systemhouse Ltd ('SHL'), a consultancy group with offices in Canada and the UK. That team had a number of people with experience of CRM systems.

***EDS's consortium partners***

**[48]** In preparing its bid EDS involved other participants who were specialists in particular fields. These participants were known as Consortium Partners and were mentioned in the EDS response. There were four Consortium Partners: Chordiant Software International Inc and Chordiant Software UK Ltd (Chordiant), Interdec Working Spaces (Interdec), Lucent (Lucent) and Sun Microsystems/Forte Software (Sun).

**[49]** Chordiant owned and licensed Chordiant CRM software which was a major element of EDS's proposal. Interdec was a fitting-out contractor for the alterations to the call centres. Lucent owned and licensed the billing package software, Arbor or Arbor BP. The division of Lucent which dealt with Arbor was called Kenan. Lucent also supplied the Computer Telephony Integration (CTI) components and services.

**[50]** In 2000 Sun purchased Forte and became the owners of a development framework called Forte 4GL (referring to Forte 4th Generation Language) and a middleware product, Forte Fusion. However, during the course of the bid and the course of the project, the owners of Forte Fusion and the Forte 4GL framework were referred to as 'Forte'. Sun also supplied the servers and the Solaris operating system.

**[51]** The main participants for each of the consortium partners were as follows:

(1) Chordiant: Stephen Kelly was the President of Chordiant Software Inc. The organisation's first representatives on the bid were David Hadden and Martin Bridge. They were later joined by Grant Branton who was the Chordiant Bid Project Manager and John Mitchell who was based at Canary Wharf assisting the bid team.

(2) Forte Software/Sun Microsystems: Sun Microsystems was represented in the bid principally by Scott Yarnell.

(3) Lucent: Pat Coster was the main representative on behalf of Lucent. He was assisted by John Winchester, Dave Gilbert and Tony de Gruttola.

***Arthur Andersen***

**[52]** From the 1990s AA had been involved in giving advice to Sky on various aspects of their business.

**[53]** In late 1999 Sky retained AA to conduct a review of its customer management system and to map out best practice for the building of a new call centre and call centre technology. In January 2000 AA produced three documents: a presentation entitled 'Creating the Contact Centre of the Future' and two studies called 'Building a Contact Centre for the New Economy' and 'Setting the Direction for the Contact Centre of the Future'.



**[54]** In the last of those documents AA set out what they envisaged for the 'Sky Contact Centre of the

Future'. As to the costs, they set out figures based on broad assumptions and said that 'it may be more reasonable to assume that the cost could be anything between £60m and £90m'. As to timescales they said that a 'best practice new facility could be operational in nine months, assuming that the building is ready to move into' and that conversion of the Scottish facilities would be 'complicated by the need to transition people and technology in a real time environment, thus would also probably take six-nine months and would again need to be developed after the initial new facility is operational'.

**[55]** AA carried out a further exercise between the end of January and early March 2000 and produced a document 'BSkyB Contact Centre of the Future—Initial Study'. Scott Mackay and Andy Waddell formed part of the team which produced this document. Subsequently parts of this document were included in the ITT.

**[56]** In May 2000 AA put in their own response to the ITT. AA and EDS then produced the Joint Delivery Teaming document on 29 June 2000 which made a joint bid to Sky.

**[57]** Under the prime contract with Sky, EDS was to carry out the Process, Technology and Implementation components of the CRM project. EDS then subcontracted with AA for the 'Business Process' workstream, which was managed by Rob Hornby on behalf of AA. In addition, AA contracted directly with Sky in relation to the 'Location' and 'People & Change' workstreams, which were managed by Tim Gardner of AA.

**B: THE MAIN DOCUMENTS**

***The ITT***

**[58]** The Invitation to Tender (ITT) was dated 17 March 2000. In the title, it described the project as being 'The Build and Implementation of a World Class Contact Centre for BSkyB and the further retrospective fitting of environment, culture, process and technology to existing sites.' The intention was to build the new contact centre and then carry out work fitting out the existing call centres in Scotland at Carnegie Campus, Dunfermline and Kirkton Campus, Livingston.

**[59]** At para 2 of the introduction, Sky made it clear that the tender document included work carried out by Sky which set out 'envisioned functions, processes, mechanisms and technology'. It said that the documents formed the high level definition of the end product and would require further analysis as the project progressed.

**[60]** At that stage para 3 identified four key areas: 'Location' being the internal design and 'kit' out of the new contact centre; 'Business Process Model' being the detailed definition and introduction of new business processes; 'Technology' which had to be sourced, integrated and implemented and 'Transition plan' which was the work to 'backfill' the existing Livingston and Dunfermline sites with the processes, technology, culture and environment delivered at the new contact centre.

**[61]** At para 2.4 it included a 'high level view of the business functions which the new contact centre will need to support'. It stated that it did not represent the future functional design of the new contact centre and was included purely to ensure that all potential suppliers 'understand the customer contact overview'.



**[62]** Paragraph 2.5 dealt with the launch of the new contact centre. At para 3.1 under the heading 'World Class Customer Experience' it was stated that 'at the heart of every aspect of this project is the absolute

requirement to provide world class customer management and for BSkyB to be in a recognised leading position in this regard'.

**[63]** At para 3.3 it was stated that the Sky design team had created a high level business process model which was included as App A to the ITT. That had been prepared by Scott Mackay of Sky using a Hyperknowledge tool. The purpose of the model was stated as being to set out the 'core business processes' that the new contact centre would need in order to support 'key strategic business objectives' of BSkyB. It stated that the model did not preclude any technical or functional solution.

**[64]** Paragraph 3.5.1 set out specific requirements for the technology response.

**[65]** Project Timing was dealt with at s 4. That stated that for the new contact centre 'BSkyB have an organisational desire to conclude the initial delivery of the contact centre within nine months of project commencement'. In relation to the existing contact centres (four halls at Livingston and two halls at Dunfermline), these were envisaged to be fitted out with the same package as the new contact centre, on a hall by hall basis, once that contact centre had been established. For both the new call centre and the existing centres, Sky requested that the responses should include milestone plans showing 'key commitment and decision dates' and also show 'detail within each key project phase (ie design, build, test, integrate, accept and implement)'.

**[66]** Section 5 referred to Supplier Resources and BSkyB Key Roles and Responsibilities. This included the following requirements:

> (1) At para 5.1.1 the supplier was to appoint an overall Programme Manager 'dedicated for the full project life cycle', who was to report directly to a person appointed by BSkyB.
>
> (2) At para 5.1.2 the supplier was to appoint workstream project managers for each workstream.
>
> (3) At para 5.1.3 staff were to be competent and qualified to work within the workstream.
>
> (4) At para 5.3.1 BSkyB were to appoint a Programme Manager who would have overall responsibility for all work within the scope of the ITT and associated contracts.
>
> (5) At para 5.3.2 BSkyB were to appoint two workstream managers; one to have overall responsibility for all business aspects of the project and one with overall responsibility for all technological aspects. These roles were, in the event, performed by Scott Mackay and Andy Waddell.

**[67]** Section 5 also included at para 5.4 various requirements for a project plan. At para 5.4.1 it stated that 'Before commencement of the project, a detailed project plan must be agreed with BSkyB and both parties will be responsible for delivering the tasks and milestones agreed.'

**[68]** Section 6 dealt with the detail of the Tender Response. It provided for a two week 'discursive period' from 17 March 2000 during which tenderers could ask questions by way of clarification; a two week 'incubation period' for the supplier to begin response preparation; a workshop with BSkyB to 'test early ideas

and ratify approach' and a final two weeks to complete the response. There was then to be a two hour presentation to Sky ending with the delivery of the tender response to Sky.



**[69]** Sky said at para 6.3 that they would evaluate the tender submissions on, amongst other things, cost and ability to provide access to appropriate skilled resource by workstream.

***The EDS response***

**[70]** The response to the ITT submitted by EDS ('the EDS response') was stated at the front to be 'proprietary to [EDSL], its parent company EDSC and any of that corporation's subsidiaries'. The copyright was stated to be that of EDSC. Gerard Whelan was the point of contact.

**[71]** At para 1.2 EDS set out the principles of their approach under the following headings: Rapidly identify specific BSkyB customer service failures; use proven leading edge technology; implement best practices as appropriate and deliver a comprehensive programme and change management capability.

**[72]** In para 1.3 under 'Why EDS' the participants in EDS and the consortium were identified and it was stated that this meant such things as 'Proven delivery experience', 'Global resources' and 'Powerful methodologies'. It also stated '*Selection of EDS by BSkyB will provide a unique World Class Customer Contact centre on time and on budget*'.

**[73]** At s 4 EDS set out 'Our Approach'. They said that they had divided their approach into four workstreams to cover:

(1) Business Process improvement and implementation

(2) Location design, build and implementation

(3) Technology design, build and implementation

(4) Transition approaches from the new Contact Centres into existing Contact Centres (process, location, technology and people)

**[74]** For the Business Process Workstream the objectives were to identify opportunities to improve current services; to confirm the vision for World Class Customer Service and to align the business processes with the vision and confirm the functional requirements for the New Contact Centre. This was to be done by two parallel 'strands': one 'SWAT' was to identify 'quick wins', that is changes to Sky's business processes which could be identified quickly; the other was 'Design', which was divided into two phases.

**[75]** The purpose of the first phase of the design 'strand' was to ensure that EDS and Sky had a 'mutual understanding and definition of World Class Customer Service for BSkyB'. To do this it was stated:

> 'We will lead a focused four-week workstream to define and agree the Vision for BSkyB for World Class Customer Service. The resources for this work will require two BSkyB and 2 EDS staff. The work needs to start on day one … .'

**[76]** The second phase of design was to validate the 'To-Be' design of the customer service processes. This was described as being 'the validation of the business processes in order to define and agree the bulk of the functional requirements'. It was stated that the objectives for this sub-team were to—

> 'agree the functional requirements of the key processes and [underlying] sub-processes develop an indicative view of resourcing levels develop the technical functional specification which will include the business class model – including all data items, instances and definitions.'

**[77]** The deliverables were stated to include:



> 'Agreed Use Cases (in the form of a Use Case Catalogue) and auto generated functional and technical requirement specification for the runner processes to input to the technical design for the new Contact Centre and [be] passed to the Technology workstream for coding and development.'

**[78]** There was then a diagram which indicated that, for the Business Process workstream, the first phase of design would start in Month 1 and lead to the conclusion of the second phase of design at about the end of Month 4.

**[79]** Section 4.3 of the response dealt with the Technology Workstream. It was stated that:

> 'To meet the high demands and ambition of BSkyB's existing and future business, the technical architecture has been designed with the following requirements in mind:
>
> —100% availability
>
> —Massive scalability
>
> —Open, modular and flexible architecture
>
> —Proven technology'

**[80]** The approach was stated to be as follows:

> '[T]hat activities will be performed in an iterative and incremental development framework. The workstream phases described below are designed to mark significant deliverables that will provide measurable evidence of progress toward the success of the project. Furthermore, the phases provide a mechanism to limit the commitment required to progress the project and to keep options open to flex the programme to support changes in the business objectives.'

**[81]** There were three phases to this work which were stated to have the following objectives:

(1) Phase 1 Design

'The objectives of this phase are to confirm the overall application architecture and to produce code from SELECT SE for use in the Chordiant application building on the work being progressed by the Business Process workstream team.'

(2) Phase 2 Build and Prototype

'The objectives of this phase are to develop the new Contact Centre applications and the migration routines.'

(3) Phase 3 Implement and Verify

'The objectives of this phase are to: ensure that the new applications are operational in the new Contact Centre, to verify performance, functionality integration and fully test the new applications. This will provide the technical platform on which to deliver World Class Customer Service.'

**[82]** There was then a diagram which indicated that, for the Technology workstream, phase 1—Design would take until about Month 8; phase 2—Build and Prototype would take until about Month 12 and phase 3—Implement & Verify would take until about Month 18, all starting from Month 1.



**[83]** Section 5 was headed 'Programme Management, Change Management & Communications'. At para 5.1 there was a 'transition plan' also referred to as an 'Overall Programme Plan'. The Transition workstream was concerned with the implementation of processes, technology and 'fit out' into the existing contact centres.

**[84]** By way of explanation of the plan, it was stated that:

'The transition plan below is based on the information provided in the ITT and our understanding of the current operations and technology. The high level plan below will be refined after further analysis of the current situation and business requirements.'

**[85]** The plan showed three dates: Contract at the middle to end of the second quarter of 2000; 'New contact centre live' in the middle of the first quarter of 2001 and transition complete at the end of the fourth quarter of 2001. This indicated about nine months from the contract to the new contact centre being live and about 19 months to transition to the existing sites.

**[86]** In relation to Estimating, EDS stated the following at para 5.4.2:

'For the purposes of this ITT response EDS have concentrated on estimating the size of the software development. Whilst further analysis of the requirement is needed, with BSkyB and EDS working closely together, we have used an approach which provides a high level of comfort.

Our approach has been adopted on many previous developments undertaken by EDS, including major travel reservations systems. Based on these projects it is reasonable to expect an estimating accuracy of between plus and minus 5% following detailed evaluation of the requirements.

Resource estimation is conducted from a 'top down' and 'bottom up' approach. Top down estimation involves function point counting together with a high level view of the project development methodology, and application of historical size and productivity data from similar projects, suitably tailored to the new environment and toolset, to generate an estimate of resource.

Bottom up resource estimation involves assessment of low level activities to be undertaken during the development lifecycle. Using in-depth knowledge of team capabilities and team sizes help validate the top down approach.

Essential to both of these approaches is a formal size measure of the system to be developed. Our estimating process makes use of Function Points and has been independently assessed by the Guild of Function Point Analysts, who approved of our approach. A Function Point is a unit of measure used as an indication of relative size of a software development in terms of the amount of business functionality delivered to the end user. For each discrete logical functional component of the required system the inputs, outputs and entities are counted and weightings applied to establish a function point count. Totalling the function points across all the identified functions then derives the function point count for the system. Schedule estimation then makes use of the function point count and productivity rate estimates to derive manday estimates.'

**[87]** At s 6 under 'Choosing the right partner' EDS said this at para 6.1:

'EDS is a leader in the design, development and implementation of Information Technology solutions and services to business and



government, offering customers a complete range of Systems Integration and Implementation services and guaranteed levels of delivery in a wide variety of industries including media and communications.

With more than 120,000 staff operating in 47 different countries, EDS offers an unparalleled global IT infrastructure supporting more than 9,000 customers including many of the world's leading global organisations. In the UK our operation leads the software and services market.'

**[88]** At para 6.4.1 EDS set out specific consortium examples and qualifications and included this:

'EDS worked with a large international telecommunications company (who also provided digital

and cable television) to design and implement a single Contact Centre framework within which Contact Centre Agents carried out their work providing a consistent level of service regardless of the channel used by the customer. The EDS Consortium (including Chordiant for the CRM Package and Forté for Enterprise Applications Interface Layer) delivered efficiencies while implementing scalable architecture and a flexible configuration for future business growth.'

**[89]** Section 7 set out the proposed team structure at para 7.1 with Dr John Chan as the Programme Director, Mahmoud Khasawneh dealing with Technology and Stephen Vine dealing with Transition. Paragraph 7.2.1 dealt with Programme Costs. It stated that:

'Our anticipated costs for delivering the program are set out below. As requested by the ITT they are split into two cost types: consultancy and expenditure.

Activity/Cost Schedule

All activities (excluding consultancy) related to the programme are shown separately as requested, and are also broken out by workstream, or workstream deliverable.

These costs are estimated at present, as detailed requirements for hardware, software and location items are yet to be defined.

Consultancy Costs

The associated consultancy costs for each workstream or workstream deliverable. These are based on EDS daily/hourly rates (see overleaf), and the anticipated resource requirements have been built up to produce the total costs of consultancy for each workstream, or workstream deliverable.

The daily/hourly rates are guaranteed not to change until 31 December 2000. The total cost will vary up or down depending on actual usage during the programme.'

**[90]** At para 7.2.2 it set out the overall budget in these terms:



'The overall budget combines the consultancy and expenditures for each workstream, and shows a volume based discount offer which is dependent on EDS being awarded all four workstreams as part of our contract with BSkyB.

Location-Activities – £8,490,803

Location consultancy – £1,444,389

Technology Activities – £31,035,896

Business Process consultancy – £775,980

Design Team consultancy – £2,464,000

Program & change consultancy – £2,210,577

Transition consultancy – £1,763,750

Technology consultancy – £6,009,638

*Total estimated project costs – £54,195,013*'

***The letter of intent***

**[91]** Sky decided to select EDS on about 20 July 2000. A letter of intent was then prepared and the final version was dated 24 July 2000 ('the letter of intent'). The letter of intent was addressed to Joe Galloway as Managing Director of EDSL. It was written on SSSL company notepaper. The parties who signed the letter of intent did so on behalf of BSkyB and EDSL.

**[92]** The letter of intent stated that it confirmed BSkyB's intention, subject to contract, to appoint EDS as the prime contractor for the implementation of the new contact centre and the fitting of the existing contact centres. It provided for EDS to perform services to be agreed between BSkyB and EDS and for EDS to be paid at rates which were subject to a substantial deduction which would be repaid when the contract was concluded.

***The prime contract***

**[93]** The prime contract between SSSL and EDSL, who was referred to as 'the Contractor', was entered into on and dated 30 November 2000. It was signed by Tony Ball on behalf of SSSL and Steve Leonard on behalf of EDSL.

**[94]** The recitals set out the position as follows:

> '(A) On 17 March 2000, SSSL issued an Invitation to Tender ('Tender') for the building and implementation of a new world class contact centre for SSSL and the retrospective fitting of environment, culture, process and technology to SSSL's existing contact centres located at Dunfermline and Livingstone (the 'Contact Centres').
>
> (B) The Contractor issued a document dated 31 May 2000 to SSSL in response to the Tender.
>
> (C) Subsequent to the Tender, SSSL decided not currently to proceed with a new contact centre and to proceed only with the re-fitting of the Contact Centres.

(D) SSSL wishes to appoint the Contractor and the Contractor wishes to be appointed by SSSL on the terms set out in this Agreement to design, build, manage, implement and integrate the process and technology for the refitting of the Contact Centres.'

**[95]** Clause 1.3.1 contained an entire agreement clause to which I refer below.

**[96]** Under Cl 2.1 SSSL agreed to engage EDSL upon the provisions of the prime contract to perform the 'Services' and EDSL accepted that engagement.

**[97]** In relation to the Services, the following relevant provisions applied:



(1) The Services were defined in cl 1.1 to mean 'the services to be provided and the Deliverables to be delivered by [EDSL] in accordance with the terms of [the prime contract]'.

(2) The Deliverables were defined as:

'[T]he detailed designs, documentation, software, hardware and other products, implementation and other deliverables to be provided by [EDSL] and delivered to SSSL under the Letter of Intent and [the prime contract], as the same are set out in s 4 of the Preliminary Specification, and the Bespoke Software Materials together with all other Deliverables agreed pursuant to Cl 17.2.'

(3) At cl 2.3 it was provided that 'Descriptions of the Services to be performed are listed in the Preliminary Specification'. That specification was at Sch 1 to the prime contract.

(4) Clause 2.4 then provided that EDSL 'shall deliver the component documents of the Full Specification on the dates set out for their delivery in the Project Plan'. Full Specification was defined in cl 1.1 to mean 'the detailed technical specifications for the Services, including the Acceptance Criteria for the Services, as may be agreed by the parties from time to time.' The Project Plan was defined as the plan in section 3 of the preliminary specification.

(5) Clause 7.3.3 provided that the deliverables should comply in all material respects with the full specification.

**[98]** In respect of cost, there were the following provisions:

(1) Clause 3.1 provided that:

'The Contractor shall be responsible for estimating, budgeting, reporting, forecasting and controlling all costs for which the Contractor is responsible incurred in carrying out the Services under this Agreement within the Baseline Budget and shall use all reasonable endeavours to proceed with the Services in a timely manner.'

(2) Clause 3.2 provided for a Project Management Committee (consisting of two representatives each from SSSL and EDSL) to meet to review actual and anticipated expenditure under the letter of intent and prime contract against the baseline budget.

(3) Clause 3.3 dealt with the situation where either party believed that the cost of performing the works under the letter of intent and the Services would exceed the Baseline Budget, other than because of breach by either party. In such case there was a process for the Project Management Committee to recommend authorising EDSL to exceed the Baseline Budget, subject to acceptance by SSSL. There were various provisions to cover default situations.

(4) Clause 3.4 then provided that:

'Subject to Clause 10.4, SSSL shall have no obligation to make payment to the Contractor for any costs or other sums … that are in excess of the Baseline Budget unless those costs have been previously agreed in accordance with Clause 3.3 or otherwise in accordance with this agreement.'

(5) Clause 9 dealt with 'Success Criteria' and methods by which success was measured, with 'Success Measures' in Sch 4. In brief if EDSL achieved the required Success Criteria then it was entitled to a percentage of Profit as set out in Sch 4. The relevant Profit was in Pt 2 of Sch 2.

*[2010] IP & T 597 at 619*

(6) Clause 10 dealt with payment to EDSL of Costs, sub-contractor or third party invoices and the appropriate percentage of Profit. At Cl 10.3 and 10.4 there were provisions relating to payment on completion to SSSL or EDSL depending on the extent to which the amounts paid or payable to EDSL exceeded or were less than the Baseline Budget.

(7) Clause 16 dealt with milestones and the effect of SSSL's non-acceptance.

(8) Clause 22 dealt with termination, including termination for material breach under cl 22.2.

**[99]** Clause 7 dealt with warranties and obligations, including at cl 7.2 the following provision:

'The Contractor warrants to SSSL that it has the knowledge, ability and expertise to carry out and perform all the 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.'

**[100]** The preliminary specification included the following relevant parts:

(1) Under s 1, Introduction & Purpose it stated:

'EDS have been selected by SSSL to act as the systems integrator for the SSSL eCRM Programme (forthwith referred to as the 'programme'). EDS will manage the design process, build and implementation of the eCRM system and act as systems integrator to ensure that

separate technological components of the programme are able to work together as an integrated whole to deliver the required benefits to SSSL.

The purpose of this document is to define the scope of EDS responsibilities within the programme. Specifically, EDS responsibilities cover Process, Technology and Implementation components, with SSSL being responsible for the other components, namely Location and People & Change. This document is intended to reflect EDS responsibilities.

Systems integration covers, people, process and technology (application, data, infrastructure) components, and EDS will work with SSSL and nominated 3rd Parties across these components to successfully deliver the programme.

The overall Sky CRM programme will be managed within a defined methodology agreed by all interested parties. EDS will supply appropriate management resource to make this happen.'

(2) Within s 1 there were Terms and Abbreviations which included the following passage, 'In Scope' being EDSL responsibility and 'Out of Scope' being SSSL responsibility:

'EDS has been chosen as the Systems Integrator (SI) for the SSSL eCRM project. Business change programmes affect both people and technology. There are five key components to any change programme.

People and Change, Location – These cover all people related activities including location.

Business Processes – These are the business processes to be re-engineered to meet the needs of the new strategic business model.

Data – These are the data required to support the new business processes.



Applications – These are the applications (software) which are being developed, or will be interfaced to, to support the new business processes, and new data structure.

Technical Infrastructure – This includes such things as physical hardware (PC's, servers etc) and works (Lan, Wan etc) components required to support new and existing applications.

The scope and responsibilities of the Systems Integrator are outlined below:

In-Scope: Process and technology including Application development, Data, Infrastructure components.

Out-of-scope: People and Change and Location (except management of the overall implementation of these workstreams co-ordinated across the Sky CRM programme).'

(3) Section 3 dealt with milestones. It consisted of the following introductory passage followed by a table of milestones:

'SSSL and EDS have agreed to 6 major milestones. Part of EDS's payment will be linked to success criteria and will be measured against the successful and timely meeting of these milestones. Each of the major milestones has key supporting milestones that must occur for each of the major milestones to be a success. Each supporting milestone has specific deliverables associated with it. Milestones shall be deemed met only once the relevant element has been 'Accepted' by SSSL in accordance with the provisions of the contract.'

(4) The Table in section 3 contained major milestones such as milestone 1, 2, 3 and supporting milestones such as milestone 2A, 2B, 2C. In particular there were these milestones, descriptions and dates for acceptance:

| Number | Milestone | Description | Date for Acceptance |
|---|---|---|---|
| 2A | Technical Architecture Documents | Detail definition of SSSL eCRM architecture including Infrastructure, Data, Telephony and Application | 25 October 2000 |
| 3A | Full Specifications Complete | All UML Use Cases and all non-Use Case functional specifications have been fully defined and delivered to the development team | 9 March 2001 |
| 4 | eCRM Live in One Hall | System supports new customers in one hall through the following components … | 31 July 2001 |

**[101]** Section 4 of the specification dealt with deliverables, including a table and it stated:

'The table below lists the deliverables known at the date of this preliminary specification, which fall within the scope of EDS's



responsibility to deliver. It is understood that there are many other deliverables required of the programme, however, these will be identified, documented, and managed as part of the IPO mechanism.

1. Due dates agree to the consolidated Overall Project Programme, dated 24 October 2000.

Deliverables shall be deemed delivered only once the relevant element has been 'Accepted' by SSSL in accordance with the provisions of the contract delivery.'

**[102]** Section 5 contained assumptions and ss 6 and 7 dealt with Process Scope and Technology Scope. At para 6.1 it was stated:

'This document is intended to define the objectives and high level requirements underpinning the redesign of SSSL's business processes as part of Sky CRM programme (the 'Programme'). As such it will form the definition of scope for the process redesign activity. The redesign activity will refine the definition of processes. The overall scope may require modification or enhancement as a result of this redesign activity to ensure an optimum solution. This will be managed through the Programme Office Change Control Process.

> This document represents current thinking based on our understanding of available information and views.'

**[103]** Section 8 dealt with Service Levels and Performance Characteristics and at para 8.3 stated the following in relation to Performance Characteristics, with Key Performance Indicators (KPIs) being included in App A:

> 'At this point in time, the technical architecture and functional specifications are not fully defined so that it is not possible to define specific service levels. When the functional specifications and technical architecture are completely designed and approved by the project, EDS and Sky will approve a Service Level Agreement Document that details specific measurable performance characteristics of Sky CRM. EDS understands that there do exist KPI limits, which the current CMS must support. The following target performance characteristics which are currently experienced on existing systems, will be required from the SKYCRM solution, in order to match business expectations: . . .'

**[104]** Schedule 2 contained a Rate Card of Costs at Pt 1, setting out the rates to be applied for the personnel provided by EDSL. Part 2 dealt with Profit in the sum of £7,440,000.

**[105]** Schedule 5 contained the Baseline Budget being £19,751,000 for Consultancy Cost and £20,442,000 for Technology Cost making a total of £40,194,000. When profit is added the total came to £47,637,000.

***The deed of guarantee***

**[106]** In addition to the prime contract, Sky also obtained from EDSC a guarantee of EDSL's contractual obligations and liabilities in the terms set out in a deed of guarantee dated 7 December 2000 made by EDSC in favour of SSSL ('the deed of guarantee'). It was signed on behalf of EDSC by John McCain, President of EDSC.

**[107]** The deed of guarantee provided as follows:



> (1) In the recitals, it was expressly recorded that the deed of guarantee was 'supplemental to a contract (the “Contract”) dated 30 November 2000 between [EDSL] of the one part and [SSSL] of the other part'.
>
> (2) By cl 1:
>
> '… the Guarantor guarantees unconditionally and irrevocably the punctual, true and faithful performance and observance by the Contractor of all its obligations, undertakings and responsibilities under and in accordance with terms and limitations of the Contract, including for the avoidance of doubt any amendments or additions thereto made in accordance with its terms, and the Guarantor agrees and undertakes that it shall forthwith make good any default thereunder on the part of the Contractor and that it shall pay or be responsible for the payment by the Contractor of all sums, liabilities, awards, losses, damages, costs, charges and expenses that may be or become due and payable under or arising out of the Contract in accordance with its terms or otherwise by reason or in consequence of any such default on the

part of the Contractor provided that the Guarantor shall be under no greater obligations or greater liability under this Guarantee than it would have been under the Contract if it had been named as the Contractor in the Contract and that the combined liability of the Contractor and the Guarantor should not exceed the liability of the Contractor under the Contract.'

(3) By cl 2:

'The obligations of the Guarantor under this Guarantee shall be those of a primary and independent obligor so that any amount which may not be recoverable from the Guarantor on the basis of a guarantee for any reason whatsoever shall nonetheless be recoverable from the Guarantor by way of an indemnity … '

(4) By cl 4:

'This Guarantee shall be a continuing guarantee and indemnity and shall remain in full force and effect until all obligations to be performed or observed by the Contractor under or arising out of the Contract have been duly and completely performed and observed and the Contractor shall have ceased to be under any actual or contingent liability to SSSL thereunder.'

**[108]** Sky contend that EDSC are therefore obliged to pay and be responsible for, and have their own liability in relation to, the damages that EDSL are liable to pay SSSL in respect of its breaches of the prime contract.

***The letter of agreement***

**[109]** The letter of agreement was signed by Richard Freudenstein and Steve Leonard on 16 July 2001. It varied the prime contract and effected a settlement of existing contractual liabilities.

**[110]** In summary, the letter of agreement provided that:

(1) The prime contract would continue in full force and effect except to the extent amended by the letter of agreement (para 2).

(2) A new schedule of milestones was agreed to replace those in section 3 of the preliminary specification (para 3). The new major and minor



milestones were set out in App 3 to the letter of agreement and the payment criteria and acceptance test procedure in App 4 (para 10).

(3) SSSL agreed to pay certain of EDSL's invoices and EDSL agreed to raise credit notes totalling £1.4 million against such invoices and absorb certain other costs relating to the additional expense of a phased implementation up to a maximum of £2.25 million (paras 4 and 7).

(4) Delivery of the functionality contracted for would be in two phases (para 5). Phase 1 comprised certain critical business functionality to be implemented by 19 October 2001. Phase 2 comprised the full functionality contracted for to be implemented by 31 July 2002.

(5) EDSL would make the necessary resources available to support the revised project plan (para 6).

(6) Variations were made to the manner in which any cost overruns were to be shared between SSSL and EDSL (para 8).

(7) The scope of the project would be reduced by the removal of the obligation to deliver a Strategic CFS (para 16).

(8) PwC was appointed to perform a quality assurance role and to assist SSSL in determining whether the revised milestones met the agreed acceptance criteria (para 10).

(9) Additional provisions were agreed for termination in the event that milestones were not met (para 11).

(10) EDSL agreed that the payment to it of Profit (as defined in Sch 2 to the prime contract) should be 'aligned to the realization of business benefits by SSSL and/or British Sky Broadcasting Ltd “BSkyB” upon the Implementation of the Full Functionality' (para 13). 80% of this Profit was to be:

'directly attributable to business benefits that are measured by reference to key performance indicators ('KPIs') thus enabling EDS to receive its Remaining Profit Balance as SSSL and/or BSkyB realizes business benefits as measured by reference to the KPIs. The categories of the KPIs are set out in Appendix 7. SSSL and EDS shall use all reasonable endeavours to agree within ten days of the date of this letter the metrics and measures used to calculate the profit allocation to the KPIs, in accordance with the provisions of Appendix 7.' (Paragraph 14.)

(11) The terms agreed were expressed to be—

'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.' (Paragraph 17); and

(12) The phase 1 functionality was defined in App 1, accompanied by a High Level Integrated Plan (App 2) and a phase 1 Resource List (App 8).

**[111]** There is an issue between the parties as to the scope of the settlement under para 17 of the letter of

agreement.

***The memorandum of understanding***

**[112]** There were discussions between Sky and EDS in early 2002 which led to a document being produced which was marked 'without prejudice and



subject to contract'. It set out proposed heads of agreement. On 6 March 2002 there was a telephone conversation between Richard Freudenstein and Steve Leonard which led to Sky taking over the role of systems integrator from EDS. Richard Freudenstein and Steve Leonard signed a document referred to as a memorandum of understanding on 26 March 2002.

**[113]** That document was headed 'without prejudice and subject to contract'. It was signed under a statement: 'We are both happy to have reached this agreement and are looking forward to agreeing further revised terms for our contract.'

**[114]** The document contains five un-numbered paragraphs above that statement, some with bullet points. The relevant paragraphs are:

> 'This note is the offer to EDS with regard to the changing of the CRM program and the relationship between SSSL and EDS on that program.
>
> After three meetings with representatives at EDS, both parties agree on the need to renegotiate and redraft the contract between them for SSSL's call centres. Both parties will strive to renegotiate and agree a new form of contract within the next three months. We both accept that that new agreement will be consistent with the following principles:
>
> – EDS will transfer the role of system integrator to SSSL. SSSL will assume that role effective from the time that an agreed memorandum of understanding is created and signed or verbally agreed between SSSL and EDS.
>
> – EDS has agreed to give up all future claims to profit sharing under the previous contract. This amounts to the sum of £6.7 m profit share plus £0.75m churn bonus. EDS shall also provide a credit of £300k as detailed below …
>
> It is clear that some changes would have to be made to the current commercial contract following this agreement.
>
> What follows is the agreed way forward for services provided from the date of this memo, and this is based on the discussions that have been on going with EDS and the conditions SSSL is willing to accept:
>
> – EDS will continue to work with SSSL on the project leaving a minimum of 190 resources on the project at the current rate card for the remainder of 2002. If the resources are not performing or SSSL wishes to remove them for any reason-then if requested EDS will find a

replacement for that resource at the same rate card and will be committed to putting acceptable resources in place …

– The warranties in the existing contract between EDS and SSSL shall only apply to work that has been done until the date of this memo. These warranties will only apply to phase 1 and work product accepted and in acceptance with SSSL. This means all deliverables accepted so far, including the August, October/November and December milestones that have been accepted and deliverables in these milestones that have been delivered and are currently undergoing acceptance. EDS warrants that appropriately qualified personnel have conducted the services that have been supplied and rendered, prior to the date of this memo, with all due skill and care. The warranty period for these deliverables will be in accordance with the current contract. EDS' only warranties in respect of its performance of work from now on are that it will be performed with all due skill and care and any other warranty normal and usual in a contract for the provision of services on a time and materials basis where the



services are provided under the management and control of the customer and where the service provider is not the system integrator. EDS will not be required to give a system warranty in respect of work performed after the date of this memo.

The principles for further arrangements in the revised contract will be:

– SSSL will pay EDS an incentive amount of £500,000.00 when increment 2.3 is delivered provided it is delivered on or before 31 March 2003. In this instance, 'delivered' is taken to mean a fully tested application and associated infrastructure ready to go live.

– Any cost reductions which bring the total EDS labour (to include Lucent and Chordiant labour) cost below the agreed amount of the excess costs estimated to date (currently that amount stands at £15m-to be confirmed after detailed planning has taken place) will be split 70:30 SSSL:EDS up to a maximum payment of £1.5 million to EDS.

– Expenses will remain fixed at a maximum of 12% as per the previous contract.

– If requested by SSSL, where existing EDS subcontracts with Lucent and Chordiant allow, or if EDS receives consent from Lucent and/or Chordiant, then EDS will assign these subcontracts to SSSL.'

## C: THE EVIDENCE

### *Sky's witnesses of fact*

### *Witnesses called*

**[115]** Sky's first witness was Tony Ball who was the CEO of BSkyB and a director of both BSkyB and SSSL between June 1999 and November 2003. He was the senior person at Sky involved in the project between June 1999 and about November 2003. He made all the relevant decisions in relation to the Sky CRM project

and EDS's involvement, albeit that he relied on advice from others within Sky.

**[116]** Sky then called Geoff Walters who joined Sky in February 1992 as Director of Engineering and became Chief Technology Officer for BSkyB. He was involved in the CRM project from the initial stages, including assessment of the bids until after the letter of agreement when his involvement ceased with the appointment of Simon Post. At the time of consideration of the EDS bid he had not been in favour of awarding the project to EDS.

**[117]** Sky's third witness was Richard Freudenstein who submitted two witness statements. He was a director of SSSL from September 2000 and a director of BSkyB from March 2001. He had overall responsibility for the CRM project and acted as the project's sponsor. He joined BSkyB as General Manager in August 1999 and became Chief Operating Officer of BSkyB in October 2000. He gave evidence of his involvement in the Sky CRM project from the ITT to the memorandum of understanding. He then kept in contact with the project but was not principally involved in it. He left Sky shortly after go-live in March 2006. Sky then called Martin Stewart who joined BSkyB in 1996 as Head of Commercial Finance and became Chief Financial Officer at BSkyB until 2004 when he left. He was also a director of BSkyB and SSSL. He gave evidence about the initial stages of the project from ITT until the signing of the prime contract but then had less involvement in the letter of agreement and memorandum of understanding.

**[118]** Sky then called Mike Hughes who submitted two witness statements. From April 2000 until June 2002 he was employed by SSSL as Managing



Director of Sky Services, an internal division covering SSSL and Sky In-Home Services Ltd. At Sky he was responsible for the customer services and related support functions of Sky's business and this included the Sky CRM project. He joined the Thomas Cook Group in 1977 and was Director of Systems and Operations from 1998 until 2000 and had been involved in a project for a Chordiant based CRM system which had been carried out by a Canada-based consultancy, Systems House Ltd ('SHL') which was subsequently acquired by EDS. He met Joe Galloway and Dan Barton when they worked for SHL prior to its acquisition by EDS. They had worked in 1999 on an upgrade to the Chordiant CRM system for Thomas Cook, to upgrade the system from version 1.4 to 1.6.

**[119]** Sky's next witness was Ian Proctor who provided two witness statements. He joined Sky in 1993 and became Finance Director of SSSL in 1999. He gave evidence of the relationship between SSSL and BSkyB and his involvement throughout the project. He also deals with missing invoices for costs claimed by Sky in response to the evidence of EDS's quantum expert, Timothy Hart.

**[120]** Sky's next witness was Ian Haddon who submitted two witness statements. He joined BSkyB in August 1998 and was employed as Customer Operations Projects—Head of Projects. He was the Billing Workstream Stream leader from July 2000 to about September 2001 and gave evidence of Billing and Operational Finance aspects of the CRM project.

**[121]** Sky then called Rob Hornby who submitted three witness statements. He was employed by AA and became involved in the CRM project in June 2000 when EDS invited AA to bid together. From July 2000 until about December 2001 he was leader of the Process Workstream for the CRM project. He joined the project again in March 2002 when Sky took over as systems integrator and remained there throughout the implementation of increments 2.1, 2.2 and 2.3. He became an employee of SSSL from 1 August 2002, taking up roles as Transition Manager, Delivery Manager and then in January 2005 became Programme Director until the project was completed in April 2006. Finally he was appointed as BSkyB's Head of Software

Delivery and Support until late June 2007 when he left Sky. He dealt with matters from bid stage to completion, including the preparation of the Functional Specifications.

**[122]** Sky's next witness was Andy Waddell who submitted three witness statements. He joined SSSL in 1992 and held various roles within the IT department. Early in 1999 he became Technical Services Manager for IT Scotland and in mid 2000 became involved in the CRM project as CRM Infrastructure Architect. He was involved in the project until late 2004 and in particular, when Sky took over as systems integrator in March 2002, he became responsible for the delivery of the technical and physical architecture and the resultant infrastructure platform. He gave evidence of his involvement from the ITT until late 2004. Since then he, like Scott Mackay, has been assisting Sky's solicitors with this litigation.

**[123]** Jeff Hughes was the next witness. He submitted two witness statements. He joined Sky in February 2002 on secondment from PwC as Programme Manager for the CRM project and was then employed by BSkyB as Group Director of IT and Strategy from May 2005. In November 2006 he became Executive Vice President of BSkyB. He dealt with taking over the role of systems integrator from EDS and the subsequent performance of the CRM project.

*[2010] IP & T 597 at 627*

**[124]** Rob Craig then gave evidence. He had joined EDS as a managing consultant from October 2001 and worked for them on the Sky CRM project from November 2001 until February 2003 when he left to work for Sky as a Systems Architect, leaving the project in May 2003. He was not involved with the implementation by Sky of the CRM system after that date. He dealt with his involvement with the project during the EDS phase.

**[125]** Simon Post submitted three witness statements. He joined BSkyB as a special technology adviser to Tony Ball in December 2001 and sat on the CRM Steering Committee. He became Group IT Director in about April 2002. He left Sky in January/February 2005. He gave evidence of his involvement until 2005, including his role in relation to the memorandum of understanding.

**[126]** Sky then called Scott Mackay who had submitted six witness statements dealing with a variety of matters. He joined SSSL as a Senior Business Analyst in January 1997. In January 2000 he began work on the CRM project and was asked by Richard Freudenstein to produce the ITT with assistance from AA and was involved in the subsequent evaluation of the responses. He then took up a role as the Sky workstream leader for the process workstream, working with the AA process team and reporting to Mike Hughes. He worked as the phase 2 Programme/Project Manager from July 2001. He was involved in all stages of the project, being the main contact point within Sky for the CRM project. He continued to work on the CRM project until September 2004 and was then engaged full-time in providing Sky's solicitors with assistance with this litigation.

**[127]** Richard Stobart was the next Sky witness. He submitted two witness statements. He was employed by an IT consultancy organisation and from about June 2001 worked as Chordiant Development Manager for EDS. He then worked in various roles in the Sky CRM project until September 2005, after the go-live of Plan B of increment 2.3 of the project. He dealt with the progress of Sky's work as systems integrator and EDS's criticisms of Sky's approach.

**[128]** Sky's next witness was Simon Montador who submitted three witness statements. He joined SSSL as Head of Finance Projects in October 1999 and in December 2000 became SSSL's Deputy Finance Director. After posts as Commercial Director and Customer Services Director, he became Director of Customer and Technical Services in December 2007. He gave evidence of his involvement in the CRM project and, in particular, the development and effect of self service, Merlin and case management functionality.

**[129]** Norman Macleod was the next witness. He provided four witness statements. He was the SSSL Development Manager responsible for the CRM project from about March 2002 until about June 2003. He gave evidence relevant to mitigation and causation. He also dealt with information on the source lines of code (SLOC) of the delivered CRM system and on the time reporting system (TRS).

**[130]** Karen Flanagan was originally employed from June 2001 to March 2002 by PwC and carried out a Quality Assurance role. Then from March 2002 until May 2005 she was seconded to BSkyB by PwC and was appointed Deputy Programme Manager in July 2002. She dealt with various aspects of the CRM project during her involvement.

**[131]** Robert Hughes submitted three witness statements. He joined EDS as a Test Lead in August 2001 and was part of the team responsible for testing the CRM system. He transferred to BSkyB in January 2003 and was CRM Programme Test Manager from April 2003 until go-live in March 2006. He dealt with various issues concerned with testing of the CRM system.

*[2010] IP & T 597 at 628*

**[132]** As part of the quantum evidence in this case, I also heard evidence at a later stage of the hearing from a number of Sky witnesses.

**[133]** First, I heard evidence from Jo Ashcroft who produced two witness statements. She was employed by Sky and had been involved with the CRM project since July 2000 working in the Process, Solution Architecture and Acceptance Teams. She provided evidence in relation to matters relevant to the churn and call rate experts.

**[134]** I then heard from John Ramdenee who submitted three witness statements. He joined Sky in September 2004 as Head of CRM. He became Head of Churn and then in April 2006 Director of Customer Solutions. He gave evidence in relation to Merlin, the customer churn 'wash out' and case management.

**[135]** Edwina McDowall was the next witness. She had produced two witness statements and was Head of Service and Repair within Supply Chain. In January 2005 she became Technical Services Director. She explained what the CRM system now enabled Sky to do in relation to Technical Enquiry functionality.

**[136]** I then heard from Mark Anderson who submitted two witness statements. He joined BSkyB in February 2006 and became Sky's Customer Marketing Director. He gave evidence relating to Sky's contribution forecasts and the claim for churn benefit. I then heard further evidence from Simon Montador.

**[137]** After a break and before I heard expert evidence concerning issues of mitigation, Sky called Simon Robson who joined Sky in 1997 and became Head of Business Planning in 2002. He is now Director of Group Reporting and Finance. In his witness statement he dealt with a five year plan produced by Sky in June 2006 and covering the financial years 2007/08 to 2010/11 and also with Sky's figure for contribution per subscriber.

**[138]** At the beginning of evidence on quantum, I heard further factual evidence. The first witness was Claire Macintosh (née Banbury) who provided three witness statements. She was employed by SSSL and joined Sky in June 2001 as a Financial Controller. She provided data, particularly data relevant to call rates.

**[139]** I heard next from Patrick Wynne who served four witness statements. He joined Sky in May 2001 as Commercial Manager within the Technology Department and then became BSkyB's Head of IT Procurement until March 2008. He dealt with maintenance and support costs. Interposed during Patrick Wynne's evidence, I heard short further evidence from Norman McLeod. The final factual witness was Richard Bartley. He produced two witness statements. He was BSkyB's Financial Controller of Technology Finance from September 2005, having joined Sky in July 2004. He provided cost information and dealt with the Time Recording System ('TRS').

***Sky witnesses not called***

**[140]** In addition to witnesses who were called I also had witness statements from a number of witnesses who were not called. First, Sky submitted a number of witness statements to deal with evidence which Joe Galloway gave about studying at Concordia College in St John in the US Virgin Islands. Those witnesses were not called. Their evidence proved to be unnecessary in the light of the position taken by EDS. Those witnesses were the Hon Liston Davies, a Senator of the Virgin Islands Legislature and Chairman of the Legislative



Committee of Education, Culture and Youth and David Phillips, a solicitor at Herbert Smith who visited the US Virgin Islands and produced two witness statements.

**[141]** Secondly, Sky submitted twelve witness statements in relation to issues concerning their lost benefit claims which were not challenged by EDS. Those witness statements were from:

(1) James Cotton who joined Sky as a Corporate Finance Analyst with BSkyB in April 2000 and held various posts being latterly Head of Finance Supply from August 2005. He provided information about contribution.

(2) Scott Docherty who produced two witness statements. He joined SSSL in March 2003 as Financial Analyst and in October 2004 took up his current role of Financial Controller CRM FA accounting.

(3) Neil Duckworth who joined BSkyB in February 2001 as Financial Controller and provided information on Pay Per View revenues.

(4) Samuel Fay who joined Sky in October 1996 and had a number of posts in relation to Sky's online business and was latterly Internet Services Manager in Sky.com. He provided information of customer support traffic on Sky.com.

(5) Katherine Gorton who joined BSkyB in March 2005 as a Financial Analyst and gave evidence of the average contribution per subscriber.

(6) Yvonne McFarlane who joined Sky in 1996 and held various roles becoming Head of Facilities Management from April 2005. She gave evidence about Sky's accommodation in Scotland.

(7) Craig McPhee who is employed by Sky in Human Resources. He gave evidence about training of CAs in relation to the CRM system.

(8) Mark Somers who is an analysis manager working as an independent contractor for Sky for periods since February 2005 and gave evidence on customers who churn and return within five years of leaving.

(9) Lucy Thomas who joined BSkyB in February 2000 as a Financial Analyst and became Financial Controller in Marketing Finance after August 2005. She gave details of Sky Magazine costs.

(10) Mark Thorne who joined Sky in January 2004 as a Financial Analyst and gave information of the number of Sky subscribers.

(11) Graeme Wilson joined Sky in March 2004 as a Financial Controller and gave evidence of Sales Upgrade data.

(12) Colin Yule joined BSkyB as a trainee accountant in November 2003 and gave evidence of Sky staff support costs in relation to Customer Service Advisors.

**[142]** Thirdly, Sky submitted a witness statement from Gary Innes who joined Sky in August 1992 as a Customer Adviser and after several roles in that department became Customer Service Development Manager in 2006. He dealt with what the functionality of the CRM system enabled Sky to do. The churn rate experts relied on his evidence but by letter dated 18 April 2008 Sky informed EDS that they did not intend to call him. EDS wish to rely on his evidence and, in the absence of any evidence to the contrary, it should be treated as being true.

**[143]** Fourthly, Sky served statements from Derek Stalley, Ian Williams and Gerrit Van Wyk but, as confirmed in EDS's written closing submissions on business benefits these were withdrawn and not relied on by Sky or EDS.

**[144]** Fifthly, there was evidence from the following Sky witnesses who were not called. First, in relation to the statement of Ruby Vega-Lozano, EDS agreed



that this could be put in without cross-examination. She joined SSSL and worked in relation to Sky's IT systems. She was seconded to work at Canary Wharf with EDS's configuration management team for the Sky CRM project in 2001. She gave evidence about her involvement in relation to configuration management. Secondly, the statement of Caroline Waterer, a solicitor who worked for Sky between 1999 and 2003, was not relied on. Thirdly, Penny Hicks was not called. She joined SSSL as a Senior Management Accountant in October 1996 becoming head of CRM Finance in June 2000 until April 2001 and left Sky in August 2005.

**[145]** There were, in particular, two people who were involved in the CRM project but did not provide witness statements. First there was Nicola Simpson who was employed by SSSL as Data Architect/Head of Business Solutions and reported to Andy Waddell. She was primarily concerned with the application architecture and was also involved in the bid process. Secondly, there was Deb Chakravarty who was

appointed by Sky as Programme Director in or about October 2000 and left in June 2001. He was replaced on 2 July 2001 by Chris Davies, who was himself replaced after less than one month.

***EDS's witnesses of fact***

***Witnesses called***

**[146]** The first EDS witness was Gerard Whelan. He produced four witness statements. He was employed by EDS from September 1999 until January 2001 and initially was EDS's bid manager for the Sky CRM project. In July 2000 he was promoted to director of consulting within the CRM practice. He left to work with Joe Galloway when the new CRM consultancy, ITIVITI, was set up. He gave evidence about the bid process through to the signing of the prime contract. From around April 2000 he moved to a role managing the business analysis team.

**[147]** Joe Galloway was the second EDS witness and provided four witness statements. He had been working in the Contact Centre practice of SHL from October 1998 until EDS bought SHL in 1999. As a result he moved to an EDS subsidiary, Centrobe, responsible for Customer Relation Management and other related areas. In late 1999 there was a reorganisation within EDS and Centrobe ceased to exist. Instead EDS set up a CRM Practice within the e.solutions line of business for the Europe, Middle East and Africa (EMEA) region. Joe Galloway became Managing Director of that CRM Practice, reporting to Barry Yard, the UK head of e.solutions who, in turn reported to Steve Leonard, the head of e.solutions in the EMEA region. He had been involved in an upgrade for the Thomas Cook CRM project in 1999 whilst at SHL and had come into contact with Mike Hughes. In early 2000 he was contacted by Mike Hughes and this led to EDS being sent the ITT for the Sky CRM project. Joe Galloway was the mastermind for EDS's response to the ITT which was presented to Sky on 1 June 2000 and was closely involved in all subsequent developments. He left EDS in December 2000 to form a CRM consultancy, ITIVITI. A number of staff from the EDS CRM Practice also joined ITIVITI. He later was employed by EDSC in the US from 2006 as an IT consultant but was dismissed from that role during the course of this trial in circumstances which are set out below.

**[148]** The next EDS witness was Andrew Sollis who joined EDS in 1988 and became involved in EDS's bid for the Sky CRM project in March 2000. He transferred to another EDS project in May 2000 but gave evidence about his involvement in the bid process up to that time.



**[149]** EDS then called Chris Moyer who joined EDSC in March 1985. By 2000 he was the Chief Technical Officer for EDS's e.solutions line of business in the EMEA region. Together with Chris Rogers he carried out a Technical Design Review for the bid on 12 May 2000 and they produced a document setting out points which they thought the bid team should consider.

**[150]** The next witness was Peter Rudd who had worked for SHL and joined EDS on the acquisition of SHL by EDS in 1999. He became Director of Development Services within the CRM Practice and was responsible for building up the group in 2000 and had responsibility for developers within the practice. He gave evidence about staff resources for the Sky CRM project.

**[151]** Joe Galloway then returned to give further evidence before EDS called Gary Hill who had worked for EDS since 1984. In the summer of 2000 he was a CRM Centre of Excellence Manager within EDS and in August 2000 was approached to carry out the 'Sky Red Team Review'. That review was held on 21 August 2000 and a report was produced by Steve Dowle as the lead reviewer.

**[152]** I then heard from Amanda Cordingley who was employed by EDS from 1993 to 2007 in the Human Resources Department and gave evidence of the EDS Terms and Conditions of Employment. She was not involved in the Sky CRM project.

**[153]** Gerard Whelan was then recalled to give further evidence and was followed by Steve Fleming who produced two witness statements. He joined EDS in May 1998 and transferred to the CRM Practice and to the Sky CRM project in about July 2000. He was project manager for the Chordiant development team as part of the Technology workstream on the project. He worked on the project until June 2001 and gave evidence of that involvement.

**[154]** I next heard from Barrie Mockett who joined EDS in 1999. Between March 2000 and January 2001 he performed a human resources role as director of management services within the CRM Practice. He gave evidence of the resourcing of the Sky CRM project.

**[155]** The next witness was Richard Durling who produced three witness statements. He was recruited by EDS to join the CRM Practice at an open day in July 2000, having previously worked in insurance. He worked on the Sky CRM project from August 2000 until his role reduced in March 2001 and he left the project in May 2001. He was appointed as the data team leader in September 2000 and was then involved in producing a scope document.

**[156]** EDS then called Dan Barton who provided three witness statements. He joined SHL in April 1995, working on the Thomas Cook Chordiant based project and he then transferred to EDS when it acquired SHL. He became part of the new EDS CRM Practice led by Joe Galloway. He started his involvement in the Sky CRM project as lead technical architect in about June 2000 and was based in Dunfermline designing the technical architecture. His role as technical architect ended in May 2001 when others from EDS's Telford team took over. He dealt with his involvement in 2000 and 2001.

**[157]** Steve Fleming was then recalled to give further evidence. He was followed by Karl Davies who provided two witness statements. He was working for EDS and joined the CRM Practice led by Joe Galloway. He was asked to join the Sky CRM project to work as data architect, in charge of producing a data model and did so from 11 September 2000. He gave evidence of his involvement in preparing the Logical Data Model and on other data issues.

**[158]** The next witness was Tony Dean who produced three witness statements. He was employed by EDS between 1993 and 2006 and was



appointed to be the Client Executive for the Sky CRM project in September 2000, managing the relationship between EDS and Sky. He reported to Elwyn Jones. He was replaced by Greg Hyttenrauch in around April 2001 but retained certain responsibilities on the project. He gave evidence of his involvement on the project from September 2000 until he left the project in about August 2002.

**[159]** The next witness was John Chan who provided four witness statements. He was a project manager and he joined EDS in 1991 when his former company was taken over by them. He was designated as the project manager for the Sky CRM project and took up that role in June 2000. In late October 2000 his role was taken over by Peter Jeffs but he continued to work on the project as Procurement Manager dealing with

commercial support matters. He gave evidence of his involvement from 1 June 2000 and his role as project manager until October 2000. He left EDS's employment in 2006.

**[160]** EDS's next witness was Greg Hyttenrauch who was EDS's Vice President of Applications Delivery for EMEA. He joined SHL after serving in the Canadian Army and then joined EDS when SHL was acquired by them. In February 2001 he came to the UK and in March 2001 was asked by Barry Yard to look at issues which had arisen on the Sky CRM project. This led to the 'Red Team' review of April 2001. He was then involved in the negotiations leading up to both the letter of agreement and the memorandum of understanding. He left EDS's employment in 2006.

**[161]** Steve Fleming then returned for a third time to give further evidence. He was followed by Steve Leonard who submitted three witness statements. He joined EDS in 1984 and in May 2000 became President of e.solutions in the EMEA region. He was therefore the superior to Barry Yard and Joe Galloway. He left EDS in July 2002. He was involved at the ITT and response stage and in negotiations for the letter of agreement and the memorandum of understanding.

**[162]** Tony Dean was then recalled to give further evidence. The next witness was Sean Smith who joined EDS in February 1999 and worked in the Corporate Audit Group for the EMEA region in 2001. He carried out a Corporate Audit review of the Sky CRM project which led to a final report being circulated in February 2002.

**[163]** EDS's next witness was Elwyn Jones who was a Client Delivery Executive ('CDE') for projects carried out by EDS's E.solutions line of business and for the Sky CRM project from December 2000. He was involved in the Discover VRB in April 2000 and was involved again at the time of the letter of agreement, the memorandum of understanding and subsequently. He reported to Barry Yard. He left EDS's employment in 2006.

**[164]** EDS then called Melanie Haydon who provided three witness statements. She joined EDS when her former employer was acquired by EDS in the 1990s. She worked in 2000 in EDS's E-strategy and Consulting Group and is still employed by EDS in a similar role. In April 2000 she was asked for a recommendation for a project manager for the Sky CRM project and put forward John Chan for that role. In mid-August 2000 John Chan sought her assistance for a short period in a programme management role setting up project documentation and templates and assisting in planning and resourcing the project. She was involved in the reprogramming exercise in mid-October 2000 and worked on the project until July 2001 but did not work at Dunfermline after May 2001.



**[165]** The next witness was Ed Lewis who provided two witness statements. He was employed by EDS from 1999 and worked on the Sky CRM project, first as Project Manager from October 2000 and then as Software Delivery Manager from June 2001.

**[166]** EDS then called Martin Jones who submitted two witness statements. He joined EDS in June 1998 and became involved on the Sky CRM project in mid-December 2000 after a brief period on the project in mid October 2000. He was a Technical Lead in EDS's Telford Development team which took responsibility for some discrete components of the system. From June 2001 he became the Technical Delivery Manager, managing the technical architects, software architects and product consultants. In March 2002 he became a software architect and continued in this role until 22 January 2003 when EDS ceased working on the project.

**[167]** I next heard from Nigel Lines who provided two witness statements. He had worked for EDS since 1996 and joined the Sky CRM project in January 2001. He became the middleware team leader until April 2002 when Sky decided to replace Forte Fusion with MQ Series.

**[168]** The next witness was Keshava Dhatariya who had provided two witness statements. He joined EDS in September 2000 and became involved in the Sky CRM project in early January 2001. He was the Project Manager of the Chordiant and Arbor Integration Team ('CAIT') and the Project Manager of the Billing and Operational Finance workstream on the project.

**[169]** Finally, I heard evidence by videoconference from Dan Zadorozny. He was employed by EDSC and became involved in the Sky CRM project between June and December 2002 after a request from Tony Ball to Dick Brown, Chairman and Chief Executive officer of EDSC. He was involved in commercial discussions with Sky in the latter half of 2002.

***EDS witnesses not called***

**[170]** In addition to the EDS witnesses who were called, witness statements were submitted from Patrick Dolan and Julian Stait who were not called. That evidence was admitted unchallenged, but with a reservation in relation to the limits of Julian Stait's witness statement. In relation to these witnesses:

> (1) Patrick Dolan has worked for EDS since October 1989 and has been a Senior Quality Assurance Analyst since 1998. He was co-ordinator for internal standards called Management and Control Standards (MACS) prepared by EDS and gave evidence about them. He was not involved in the Sky CRM project.
>
> (2) Julian Stait was a solicitor at DLA Piper and he produced a skills spreadsheet which contained information on the skills of EDS personnel who worked on the Sky CRM project. His evidence was essentially limited to exhibiting that spreadsheet.

**[171]** In addition, David Page's witness statements were admitted under the Civil Evidence Act. He produced two witness statements. He commenced work for EDS in January 1999 at Telford. He was an application architect on the Sky CRM project which he joined in December 2000 when EDS wanted to deploy experienced Forte staff on the project. He left the project in early December 2002.

**[172]** There were also witness statements from three witnesses who were not called: Thomas Levine, a solicitor in Allen & Overy who was involved in drafting the prime contract in late 2000 and gave evidence about the



negotiation of the limitation of liability clause in the prime contract; Karen Lightfoot who worked for EDS at Telford and gave evidence in relation to meetings on 28 March and 18 April 2001 and Jerry Chapman who worked for EDSC in the Global Risk Management group in Plano, Texas and gave evidence about the global risk management questionnaire prepared on 9 May 2000 by EDS for the Sky CRM project but was not involved in the Sky CRM project.

**[173]** In addition there were three particular people who were involved on the CRM project who were not called as witnesses. First, there was Steve Vine who was involved in producing two plans at the bid stage

and was then subsequently involved in the project. Secondly, there was Peter Jeffs who was the EDS Project Manager from November 2000 until April 2001. He left EDS's employment in 2004. Thirdly, there was Barry Yard who was the UK Head of e.solutions for EDS. He was the person to whom Joe Galloway reported and he, in turn, reported to Steve Leonard.

***Credibility of witnesses***

***Joe Galloway***

The Concordia MBA

**[174]** In his first witness statement at para 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's response to the ITT and in the various matters which are alleged by Sky to give rise to the misrepresentations in this case.

**[175]** It is necessary for me to set out in more detail the way in which the evidence relating to the Concordia MBA developed.

**[176]** When he first gave evidence, he was asked a series of questions on Day 37. He was shown a website for Concordia College and University which he said he did not recognise. He said that he was in St John in the US Virgin Islands and attended Concordia College for approximately a year which involved attendance at classes. He said that he had a diploma or degree certificate and transcripts of his marks which were, in the end, produced to the court. He was taken to the website for Concordia College which stated as follows:

> 'You may have done past courses and other learning which equals an Associate, Bachelor or Master degree but you accumulated that learning in a variety of contexts with no resulting degree outcome. Meeting your needs, Concordia College's online prior learning assessment process may conclude with an accredited degree in 24 hours, in the subject of your prior studies. Your transcripts then credibly document all of your learning.'

**[177]** One of the pages of the website referred to some of the successful Concordia College graduates and by clicking on a tab it showed Joe Galloway as one of those graduates. He maintained that he had not seen the website before.

*[2010] IP & T 597 at 635*

**[178]** 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. In addition, a recommendation letter was provided to Mr Galloway and the dog by a person who purported to be President and Vice-Chancellor of Concordia College and University in the following terms:

> 'As Head of Department at Concordia College & University, I am writing this academic letter of recommendation to you in respect of our alumnus Joseph Michael Galloway.
>
> Mr Galloway is conferred the degree, rank and academic status Master of Business Administration with a major in International Business effective 19 May 1996 upon as a consequence of our widely reputed degree programme, and of our guided academic research into then subjects.
>
> During his connection with Concordia College & University, we experienced Mr Galloway as a conscientious and orderly element who proved the habit of timely and correct study and research to be intrinsic to his person. He successfully completed all requirements of our Board of Examiners within the mutually agreed time limitations. Mr Galloway demonstrated that he is prepared and fully equipped to add valuable apprenticeship to our institution's activities by means of talented and profoundly investigated subject treatment.
>
> Hence it is our privilege to recommend the academic experience, methodical working and educational assiduity of Joseph Michael Galloway to you since we bear the true conviction that Mr Galloway shall not cease to expose his capacities as a meaningful acquisition to fitting your purpose.'

**[179]** Whilst the underlying lie was that Joe Galloway had quite evidently obtained a fake degree from the Concordia Collage website, he then gave evidence both on Day 37 and when he returned on Days 45 to 46 which was palpably dishonest both in answer to questions in cross-examination and also in answer to questions from the court.

**[180]** In that evidence he maintained that he had not purchased his MBA degree online. Rather he said that he had in fact attended classes at a building used by Concordia College at St John over the period 1994 or 1995 to 1996, studying to obtain the degree. He said that he attended Concordia College whilst he was employed by BSG/Alliance IT working on a project on St John for Coca Cola, which required him to be based for the majority of his time on St John. He said that he travelled to and from St John by plane, flying into and out of the island. He explained that when he attended Concordia College 'there were a number of buildings that I went to. I can remember three distinct buildings that we went to. Block, office block buildings in and around the locations of the commercial area that I was working in for Coca Cola.'

**[181]** He said he attended between five and ten classes, which were 'across multiple days. Multiple weeks, multiple months'. He said that they were 'once a week for three hours' across a term. Later he said in answer to a question from the court:



> '… an average programme would be one three-hour class per night per course. So if, for example, in one semester block, I would have three courses, I would have three nights each with one three-hour class per week. So for example, Monday, I might go for three hours, Wednesday I might go for three hours and Thursday, I might go for three hours.'

He said that there were 'exams at the end of each class' and that some class sizes 'were five people, some class sizes were eight to ten' but he did not ask anybody their name.

**[182]** He explained that he was working on St John on a project for Coca Cola and said 'it was a long project. We were there a total of 15 months, but I would be there for a time and then go away and then come back. Sometimes the gap would be a week, and sometimes the gap would be up to about three weeks, especially in the holiday period'. He said that he was living in 'a hotel environment'. He said that he 'was working with a number of independent Coca Cola Distributors that were in the area' and that whilst there was no Coca Cola bottling plant or anything of the nature there but there was a Coca Cola office which was clearly described as a Coca Cola facility with 'Coca Cola marketing, advertising materials around'.

**[183]** In relation to travelling to St John he said: 'As I recall, there was a small commuter flight that went back and forth to St Johns,' and which went 'From St Thomas which is the largest island to St John.' He said that it was a 'Four–six seater kind of airplane'. After he had been told there was no airport on St John and that St Thomas was two kilometres away he was later asked whether he maintained that he flew on to St John and he replied 'As I said before, I don't recall specifically'.

**[184]** He said that he could provide 'the graduate materials that I worked on, the work books, the books, that sort of thing. I am happy to pass those along to you.' He said that would be 'somewhere between five and ten textbooks', which were 'books that are associated with the class'. When he did provide a book EDS's solicitors said that Joe Galloway 'recalls having this for some time but cannot recall whether he used this as part of any of his studies'. That book was 'The Customer Connection' by John Guaspari and bore a barcode, stickers and pencil markings which linked it with the library of the St Charles, Missouri campus of Sanford-Brown College near his current home in St Louis, Missouri and evidently was a recent acquisition.

**[185]** In fact, as I have said, Sky produced two witness statements from David Phillips, a solicitor from Herbert Smith LLP who visited the US Virgin Islands during the trial and a witness statement from Senator Liston Davis, a US Virgin Islands senator, a former Superintendent of Schools, Commissioner of Education and member of the Board of Education in the US Virgin Islands and the current Chairman of the US Virgin Islands Legislative Committee on Education, Culture and Youth.

**[186]** This evidence, which was not challenged, showed that there was not and never had been a Concordia College & University on St John; there was not, nor ever had been a Coca Cola office or facility on St John; there was not, nor ever had been an airport on St John and it was not possible to fly onto the island. The closest island, St Thomas, is about two kilometres away.

**[187]** Sky submit that, as a result, Joe Galloway revealed himself in his evidence to be a person with a wholesale disregard for the truth, entirely willing to lie and to make things up in order to suit his needs. They say that he revealed himself as a man who could lie without any palpable change in his



disposition or any outward signs of unease and that he repeatedly perjured himself, deliberately and knowingly seeking to mislead the court. Sky submit that, overall, the court cannot but come to the conclusion that Joe Galloway's evidence as a whole is a complete lie.

**[188]** EDS accept that Joe Galloway lied to the court in relation to his MBA and he has been dismissed from his employment by EDSC as a result.

**[189]** EDS submit that it does not follow that all his evidence was false. They referred to the decision of Flaux J in *Grosvenor Casinos v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 All ER (Comm) 112 where the claimant relied on other incidents of wrongdoing on the part of the bank's officer as

evidence suggesting that he was prepared to tell lies. Flaux J said at [113] and [126] that there was force in a submission that the evidence demonstrated a propensity to act dishonestly 'but I consider the court must guard against merely concluding on the basis of this material that he was also dishonest on 8 February 2000 unless there is other cogent evidence to support that conclusion'. He said that whilst the other acts of dishonesty are obviously of some relevance in assessing whether he was a rogue banker:

> 'I do not regard the subsequent dishonesty in relation to the letter and the guarantees as cogent evidence that he made a knowingly false statement on 8 February 2000. There is no material before the court to suggest that any such false statements were made to assist, let alone at the behest of, the Ruler.'

**[190]** They also referred me to the decision of Peter Smith J in *Masood v Mohammad Zahoor* [2008] EWHC 1034 (Ch) at [130] where he said:

> 'Where cases turn on the credibility of witnesses it is important to consider the evidence as a whole. As I said in [*EPI Environmental Technologies Inc v Symphony Plastic Technologies* [2004] EWHC 2945 (Ch), [2005] 1 WLR 3456] whilst a witness' veracity is challenged successfully by demonstrating that the witness has lied it is important to differentiate between establishing that a witness has lied in respect of a particular point as opposed to whether or not his evidence as a whole is a complete lie …'

**[191]** I was also referred to the familiar *Lucas* direction (*R v Lucas* [1981] 2 All ER 1008, [1981] QB 720) in criminal cases and what Lord Taylor said in *R v Goodway* [1993] 4 All ER 894 at 900 that a jury 'must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour'.

**[192]** EDS submit that, Joe Galloway's evidence on the relevant issues was credible and he did not try to gloss the facts in favour of EDS.

**[193]** EDS accept, though, that in the light of his evidence concerning his MBA degree, Joe Galloway's evidence on other matters had to be treated with caution. They accept that the court will not be as reluctant as it normally would be to accept that he is wrong or even knowingly wrong in his evidence on other matters. However they submit that his evidence should, nevertheless, be accepted where it is supported by other evidence or appears inherently likely and indeed it should be accepted unless there is an objective reason to reject it. They say that, as in the *Grosvenor* case, the court should guard against merely concluding on the basis of the evidence that Joe Galloway was



dishonest in relation to his degree that he was also dishonest in relation to the making of representations to Sky in relation to the bid unless there is other cogent evidence to support that conclusion.

**[194]** This is not a case where there was merely a lie as to the MBA degree. Such a lie might have had a limited effect on credibility and might be explicable on the basis that Joe Galloway wished to bolster his academic qualifications and was embarrassed about the way he did it. However his dishonesty did not stop at that. 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.

**[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.

The 12 July e-mail

**[197]** Sky submit that Joe Galloway created a false e-mail which purported to be an e-mail which he sent at 17:06 on 12 July 2000 ('the 12 July e-mail') to Keith Russell, Gary Gordon and John Chan saying 'I apologise for this but the e-mail that I sent this morning verified the wrong spreadsheet. The following sheet gives the correct figures. Sorry for the confusion.'

**[198]** Sky say that this e-mail was never actually sent on 12 July 2000 but was created by Joe Galloway subsequently so as to cover up an error that he made in relation to the EDS 'rate card' which was to apply on the project.

**[199]** EDS submit that Sky's submission that Joe Galloway forged the e-mail was not made good on the evidence.

**[200]** It is necessary to consider the background to the 12 July e-mail.

**[201]** In a letter of 10 July 2000 Joe Galloway wrote to Richard Freudenstein, setting out certain points in relation to the commercial deal which EDS were prepared to offer. That letter explained EDS's pricing structure as follows:

> 'Our pricing structure is based on a cost plus mark-up model. EDS' average day rate plus a mark-up of 37.5% is the model that has [been] offered and has not changed since our initial response. In addition, because of our confidence in our ability to deliver this project on time and on budget, we are also committed to place 32.5% of margin at risk against agreed milestones.'



**[202]** Joe Galloway then sent an e-mail at 12:40 on 11 July 2000 which improved that offer by agreeing to reduce the mark-up by 5% from 37.5% to 32.5% with 27.5% being paid against the achievement of milestones.

**[203]** In response at 14:50 on 11 July 2000 Keith Russell of Sky sought 'for the avoidance of doubt' confirmation that the 5% discount being offered was effective on the rate card attached. That rate card took the form of an Excel spreadsheet entitled 'EDS Revised Rate Card 11-7-00.xls'. That rate card took the original rate and made alterations to arrive at what that rate would be if a 32.5% mark-up as opposed to a 37.5% mark-up was used.

**[204]** Joe Galloway was, however, in error when he thought that he had a 37.5% mark-up. Whilst his spreadsheet told him that he had a margin of 38.36% (with profit of £4,515,600 against a total price of £11,771,000), there were errors in it which meant that the actual mark-up was much less.

**[205]** Joe Galloway replied to Keith Russell by e-mail at 10:11 on 12 July 2000, with a copy to, among others, Richard Freudenstein and John Chan. In his e-mail he confirmed that the application of the discount in Sky's rate card spreadsheet was correct and stated:

> 'I should point out that because of our flexible commercial structure, we are taking this 5% off of the mark-up money. This will allow us to keep the same high level of resource on the project. In other management consultancies I have worked for, dropping the rate usually means substituting lower level resources to reduce the average daily rate.'

**[206]** The 12 July e-mail was timed at 17:06 on 12 July 2000.

**[207]** On 20 July 2000, after Joe Galloway had been informed that EDS had been selected, John Chan sent an e-mail to Barry Yard, copied to Joe Galloway. It attached seven documents and John Chan stated that 'Joe has requested that I send you the commercial documents relating to Sky'. One of the attachments was the 'EDS Revised Rate Card 11-7-00.xls' which had been confirmed as the applicable rate card by Joe Galloway at 10:11 on 12 July 2000. The spreadsheet attached to the 12 July e-mail was not included.

**[208]** On 24 July 2000, EDS received from Sky the draft letter of intent which referred at para 3 to the fact that 'EDS shall be entitled to charge BSkyB for services properly performed hereunder at the rates set out in the schedule to this letter'. The schedule set out the rates in 'EDS Revised Rate Card 11-7-00.xls' which had been confirmed as correct by Joe Galloway at 10.11am on 12 July. At this stage, it became plain to all within EDS what rates Joe Galloway had in fact agreed.

**[209]** On 26 July 2000, John Chan e-mailed Keith Russell and Gary Gordon of Sky referring to telephone conversations regarding the letter of intent and ending by saying: 'Schedule – please refer to the attached rate table upon which the costing was arrived at and note Joe's apology.' The attached document had the title 'MP Chord Third Pass Revised 12 July'. The reference to 'Joe's apology' was a reference to an e-mail from Joe Galloway to John Chan which said 'John, here was the e-mail I sent to Keith and Gary at 5:06pm on 12 July. Try to have a discussion with Keith and/or Gary about this' and enclosed the relevant e-mail timed at 17:06 on 12 July 2000 which Sky submit is a forgery.

**[210]** 'MP Chord Third Pass Revised 12 July' is a spreadsheet which was a variation on 'MP Chord Third Pass' which was the spreadsheet originally produced by Joe Galloway. The metadata shows that the last author was John Chan and that it was last saved at 4.03pm on 12 July. It properly applied a mark-up of 32.5% to EDS's actual internal costs, arriving at a series of rates for



resources significantly higher than those which were reflected in the letter of intent. This document also

corrected errors in the spreadsheet, with the result that it accurately recorded the overall price to be £12,296,448.00, the profit as £3,257,808.00 and the margin to be 26.49%. The rates contained in this document, and indeed the overall price derived from it, represented a significant increase from the prices originally quoted by Joe Galloway and which he offered to reduce on 11 July, as opposed to a reduction of them.

**[211]** Keith Russell responded to John Chan's e-mail at 17:37 on 26 July 2000, stating that he and Gary Gordon had never received the 12 July e-mail. He said: 'Our decision to select EDS as our partner is in part based on this information as confirmed! Please advise me of your intention as any changes to these rates is absolutely unacceptable to us at this stage.'

**[212]** On 27 July 2000 at 07:58, Joe Galloway sent an e-mail in which he stated that he would accept the rates he had confirmed on the morning of 12 July 2000. He did not say that Sky had been sent the 12 July e-mail merely that he had asked EDS's IT team to search for the delivery notification for that e-mail.

**[213]** Also on 28 July 2000, a financial review meeting took place at Canary Wharf. Steve Tudor-Price produced a New Business Analysis document of the same date which recorded that EDS in fact only had a 12.6% margin.

**[214]** On 2 August 2000, Barry Yard sent an e-mail to Steve Leonard, copied to Joe Galloway, Gerard Whelan, Jonathan Malin, Terry Daniels and Alex Kreymer about the Sky deal. This expressly recorded: 'The LOI has been returned by Joe, and by implication we have accepted rates lower than our standard rates. Need to consider how we can improve this.'

**[215]** When Joe Galloway returned the letter of intent to Sky, he noted in his covering e-mail that 'The only change that we have made is to section 3 where we have added some verbiage around the schedule listed in the letter being valid until 31 August or until the contract is signed'. The 'verbiage' was a provision designed to ensure that the agreed rates would only last for a short period of time and to provide EDS with an agreed mechanism to revise them upwards.

**[216]** Gary Gordon of Sky responded to this and said:

> 'The way the clause is now written means the Rate Card we have agreed would be valid until either 31 August 2000 or to the point we agree a full form contract. It would them seem that the Rate Card could be re-negotiated. The Rate Card we have agreed is for the duration of the project, the LOI must reflect this point in such a way that there can be no room for misunderstanding. We will therefore keep the wording of the clause as previously written.'

**[217]** The letter of intent was then concluded in the terms of the original draft.

**[218]** Sky submit that the 12 July e-mail was not a genuine e-mail; that it was not ever sent to Sky and that it was fabricated after the event by Joe Galloway in a dishonest attempt to seek to avoid the consequences of his having agreed rates much lower than he should have done.

**[219]** Sky say that the title of the 12 July e-mail: 'Spreadsheet' is wrong. All the e-mails that precede and follow it in the chain have titles that flow from the title of the original e-mail: 'EDS Revised Rate Card 11-7-00.xls' with the addition of the usual automatic 'RE' or 'FW' depending on whether the e-mail has been

replied to or forwarded. Sky submit that if it had genuinely formed



part of the e-mail chain, it would either have had a title that was a variation on 'EDS Revised Rate Card 11-7-00.xls' or the e-mails subsequent to it in the chain would have taken their titles from the title 'Spreadsheet'.

**[220]** Sky say that whilst it is possible that the 12 July e-mail was copied and pasted into the e-mail chain from elsewhere, that is highly unlikely and can be discounted based on all the other evidence.

**[221]** Sky point out that the e-mail does not have any attachment and that genuine attachments can be seen in the chain attached to Gary Gordon's very first e-mail and are shown as '<<EDS Revised Rate Card 11-7-00.xls>>' and John Chan's e-mail of 26 July '<<MP Chord Third Pass Revised 12 July.xls>>' but there is no such attachment to the e-mail.

**[222]** Sky say that if Joe Galloway had genuinely sent the 12 July e-mail, it is unlikely that he would have been so casual in his language. They say that he was correcting an error in relation to a vital potential contract and was revising the overall price upwards, having the day before purported to give a 5% discount and that such a significant change would not have been dealt with so informally.

**[223]** Sky also point out that if the 12 July e-mail had been sent, John Chan would already have had it, and so it would not have been necessary for Joe Galloway to send it to him again at 15:57 on 26 July. Furthermore, Sky say that the language in the e-mail of 15:57 is peculiar: it is unnaturally precise in its identification of the e-mail: 'here was the e-mail I sent to Keith and Gary at 5:06pm on 12 July' if Joe Galloway were really reminding John Chan of a previous e-mail. They also say that, given that Sky had selected EDS on an incorrect basis as to the rates, the request by Joe Galloway for John Chan to 'try to have a discussion with Keith and/or Gary about this' would be a strange and informal approach rather than contacting Sky directly and instantly to raise the point. Sky say that if the 'MP Chord Third Pass Revised 12 July' was the operative rate card, then John Chan would have provided it to Barry Yard on 20 July 2000 rather than the e-mail at 10.11am on 12 July 2000 which referred to 'EDS Revised Rate Card 11-7-00'.

**[224]** If Joe Galloway had genuinely sent the e-mail, Sky say that he would have responded strongly when Sky responded to say that they had not received the e-mail and that whilst he said in his e-mail on 27 July 2000 that he had 'asked our IT team to search for the delivery notification of the e-mail that I sent at 5:06pm on 12 July', nothing further was ever heard on the subject. Sky say that if the e-mail had been sent, it would have existed on Sky's computer systems and would have been present in Sky's disclosure but was not.

**[225]** Sky refer to the fact that Joe Galloway said he did not remember any of the problems arising from the rates and they say that this cannot be true as the rates that he agreed had caused significant worry within EDS. Sky also say that Joe Galloway provided no proper reason for needing to re-send the e-mail to John Chan when he is said to have received it already. Sky submit that the explanation that the e-mail may have been accidentally erased or not read by John Chan does not explain why John Chan would have been unaware of 'MP Chord Third Pass Revised 12 July' which was a document that John Chan had himself prepared.

**[226]** Sky say that Joe Galloway's evidence that the 5% discount he had given was not a significant matter cannot be true because, as Steve Tudor-Price's analysis showed, it resulted in a margin for EDS of 12.6%, before overheads, corporate contributions and similar matters were taken into account. Sky refer to John

Chan's evidence that the question of the mark-up became very



significant and attracted the attention of 'other people much higher than me were involved in that process, Steve Leonard, Barry Yard but not me'. Sky also refer to John Chan's evidence that the documents he sent to Barry Yard on 20 July 2000 were the commercial documents as they then stood and that the rate card was the rate card of 11 July.

**[227]** EDS say that Sky's submission that the 12 July e-mail was forged is not made out on the evidence. They say that the accusation is based, first, on the absence of other copies of Joe Galloway's e-mail in the disclosure of the parties. EDS say that Joe Galloway commented that there had been a number of other documents that he recalled and had asked for when writing his witness statement, but he had been told they could not be found. EDS point out that the e-mail chain containing the 12 July e-mail reproduced a total of eight e-mails and that whilst the authenticity of seven is not disputed, three of these other undisputed e-mails do not appear elsewhere in the disclosure.

**[228]** EDS refer to the second point relied on by Sky, namely that the subject heading 'Spreadsheet' was not the same as the subject heading on other e-mails in the chain. EDS say that Joe Galloway could very well have named his e-mail 'Spreadsheet'.

**[229]** EDS also say that other points on the format of the 12 July e-mail were equally insubstantial. Gary Gordon's name appears as 'Gordon, Gary' as opposed to 'Gary Gordon' in the first e-mail of the chain as well as the 12 July e-mail and this therefore provides no indication of impropriety on the part of Joe Galloway. The fact that the 12 July e-mail contained no reference to an attachment is irrelevant as it is not always the case that the name of an attachment is recorded in the text of an e-mail. The fact that John Chan sent Barry Yard a copy of the rate card from 11 July 2000 rather than the updated rate card is consistent with the fact that John Chan and the other intended recipients of the 12 July e-mail had not received that e-mail.

**[230]** EDS also point out that the metadata showed that the document 'MP Chord Third Pass Revised 12 July' attached to the 12 July e-mail was created on 10 May 2000 and was last modified on 12 July 2000 which is consistent with it having been sent by Joe Galloway on that date.

**[231]** The background to the 12 July e-mail is that Joe Galloway made an error in agreeing to the rates set out in the spreadsheet 'EDS Revised Rate Card 11-7-00' attached to the e-mail sent to him by Keith Russell on 11 July 2000. In such circumstances, it would be expected that he would put the error right as soon as he became aware of it. The metadata for the spreadsheet 'MP Chord Third Pass Revised 12 July' shows that it was saved by John Chan at 16:03 on 12 July 2000. It is not evident when it was sent to Joe Galloway or when he became aware of the fact that he had made an error.

**[232]** The 12 July e-mail has a number of features which make it unusual. First, it was not received by Keith Russell or Gary Gordon, according to the e-mail of 26 July 2000 and does not appear to have been received by John Chan. Secondly, it lacks any sign that there was an attachment either in the form of an Icon or text '<<MP Chord Third Pass Revised 12 July.xls>>'. Whilst Joe Galloway was correct to state that the way in which attachments are shown varies, there is usually an indication on the face of the e-mail that there was an attachment. Equally on 26 July 2000 John Chan had to add in the attachment because it had obviously not come from the e-mail chain from Joe Galloway. Thirdly, whilst the title to the 12 July e-mail of 'Spreadsheet' would be explicable on the basis that Joe Galloway was copying and pasting an e-mail into the chain the context is strange. It would be expected that Joe Galloway

would forward the e-mail sent by him on 12 July at 10:11 and include his apology rather than creating a completely new e-mail with a subject matter 'Spreadsheet'. That is obviously what he did on 26 July because of the use of 'FW: EDS Revised Rate Card 11-7-00.xls' as the subject heading. Equally on 26 July when he 'forwarded' the 12 July e-mail he adopted the unusual method of copying and pasting the e-mail rather than forwarding the e-mail with a subject heading 'FW: Spreadsheet'. Fifthly, if the 'MP Chord Third Pass Revised 12 July.xls' was seen on 20 July 2000 as the relevant commercial rate card then it would have been expected that John Chan, who created it, would have been aware of it and sent it to Barry Yard or that Joe Galloway would have identified that to John Chan as the relevant document or immediately have picked up that John Chan was sending the wrong rate card to Barry Yard when copied into that e-mail.

**[233]** Whilst each one of those unusual features might alone not cast sufficient doubt on the genuineness of the 12 July e-mail, taken together they make it implausible that Joe Galloway created and sent the 12 July 2000 e-mail contemporaneously. Having come to the conclusion that I have about his conduct in relation to the Concordia MBA and the evidence that he gave in court, I have no hesitation in finding that Joe Galloway simply created the 12 July e-mail to cover his error in the hope that he could convince everyone that he had spotted the error at the time and dealt with it.

ITIVITI

**[234]** When Joe Galloway left EDS in December 2000 he joined ITIVITI to set up a CRM group in another organisation. He was asked a number of questions in cross-examination concerning ITIVITI and Sky submit that his answers to those questions also revealed Joe Galloway's propensity to act dishonestly and his willingness to lie under oath.

**[235]** EDS submit that the matters concerning ITIVITI raised with Joe Galloway are irrelevant to the issues and that, to the extent that Joe Galloway gave evidence, Sky cannot, in any event, go behind the answers that he gave. They referred me to extracts from *Cross and Tapper on Evidence* and to *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1 at 18 to 19, [1929] All ER Rep 33 where Scrutton LJ stated that, in relation to answers given in cross-examination to credit, the party cross-examining is not allowed to call evidence-in-chief to contradict the answers. He pointed out that:

> 'To permit this would involve the court in an interminable series of controversies not directly material to the case on alleged facts of which the witness had no notice when he came into court, and which he or the party calling him might not be prepared without notice to meet.'

**[236]** In the light of my findings arising from the evidence given by Joe Galloway in relation to Concordia College, I do not consider that there is any benefit in dealing with the wide and diverse matters which are referred to by Sky in their closing submissions and which go to similar matters of credit. Indeed Sky state that they merely rely on these matters as confirming the picture of Joe Galloway that emerged from the Concordia evidence. The matters relied on by Sky concerned the timing and circumstances in which Joe Galloway became involved with ITIVITI; the extent to which he attempted to poach EDS staff to join ITIVITI; whether Joe Galloway arranged for ITIVITI to be awarded a contract with the Halifax for which EDS was also bidding at the same time and a number of matters relating to ITIVITI's activities and Joe Galloway's conduct when he was with ITIVITI.



**[237]** Whilst the credibility of Joe Galloway is evidently an important matter and there were potential issues in relation to ITIVITI which could have reflected on credibility, I agree with EDS that the question of whether

the evidence of Joe Galloway was accurate could not properly be resolved without advance notice and a subsequent proper investigation of these matters. In the absence of such a process, I decline to make findings on these issues which, in the circumstances, are not necessary for me to determine the central issues.

**[238]** The only aspect which might be relevant is the fact that, on any view, in the third quarter of 2000 Joe Galloway was involved in discussions about ITIVITI and he and other EDS staff then left to join ITIVITI. This is obviously relevant and had some impact on the Sky project, although the evidence of both Joe Galloway and Gerard Whelan indicates that the effect on the technical team of the Sky project was small.

Joe Galloway's Yahoo account and The Mail of 5 July 2000

**[239]** Sky rely on the fact that Joe Galloway used his Yahoo account to send his letter of 5 July 2000 to Richard Freudenstein as having significance. They say that he used that account to conceal the letter and its covering e-mail from EDS, both at the time he wrote it and once the litigation was under way. However, Sky also say that it is not true that, as Joe Galloway claimed, he had not had access to his Yahoo account since late 2000.

**[240]** The e-mail under which the letter of 5 July 2000 was sent was only disclosed late by Sky on 26 October 2007. In his fourth witness statement served on 11 January 2008, shortly before he gave evidence he said that the late disclosure revealed to him that the e-mail had come from his Yahoo account. He said that it was his common practice at the time, when either working from home or travelling, to use his personal Yahoo e-mail account because gaining access to the remote EDS servers was, at that point, laborious and slow, particularly when sending e-mails with attachments. He then said:

> 'I have not used my personal Yahoo account since late 2000, but, have recently managed to obtain access to it. I understand that a further copy of my e-mail of 5 July 2000 (together with the attached letter) will be disclosed along with this witness statement . . . .'

**[241]** Sky say that the question of whether he had used his Yahoo account was relevant to the issue of whether Joe Galloway had deliberately concealed the e-mail. Sky say this, in turn, raised the question whether it was possible for him to have accessed his Yahoo account if it had not been used at all since late 2000. He confirmed in his evidence on Day 40 that the account was an ordinary free Yahoo account as opposed to some other account. Sky obtained and put to him the statement as to policy in relation to dormant accounts, from the current Yahoo.com website and from an archived version of the website from October 2000. The 2000 document stated:

> 'dormant accounts are deactivated at the end of four months. A dormant account is one which has not been logged in to over a four-month period, regardless of whether or not e-mail has been received in the account during that time. Once an account has been deactivated, we cannot retrieve any of the information that was formerly stored in it.'

Sky submit that on this basis, given that Joe Galloway did successfully access the account in November 2007 it is impossible for that account to have been accessed last some seven years before because the account would have been



long dormant and its contents irrecoverably deleted. Sky say that the e-mail address must have remained in

sufficiently regular use by him throughout the period from 2000 to November 2007 for it not to become dormant.

**[242]** When the Yahoo terms were put to him on Day 44 Joe Galloway put forward an explanation which, as I understood it, meant that, as he had other Yahoo profiles and e-mail addresses which were or would have been associated with these profiles, this would cause his e-mail address to remain active. Following his evidence EDS's solicitors were provided with access to his Yahoo account and wrote on 28 February 2008 and 10 March 2008. They said that:

> 'Mr Galloway explained to us that he had a number of public profiles set up with Yahoo … He explained that he believed that each of these public profiles had an associated e-mail address … Our own investigations do not support the suggestion that each public profile has an associated e-mail address, at least currently.'

They said:

> 'We are aware of one personal e-mail account that Mr Galloway has with Yahoo … Mr Galloway explained to us that he had a number of public profiles set up with Yahoo … Mr Galloway explained that he believed that each of these public profiles had an associated e-mail address but that any mail to/from any of the addresses would be stored in the set of folders to which he gave us access. Our own investigations do not support the suggestion that each public profile has an associated e-mail address, at least currently. We are not therefore currently aware of Mr Galloway having more than one personal Yahoo e-mail account.'

**[243]** Sky say that this shows that his explanation was not supported by the investigations carried out by EDS's solicitors and that he must have been lying about his access to his Yahoo account to explain away the fact that he had concealed the e-mail.

**[244]** EDS say that there is no evidence before the court as to how efficiently Yahoo implemented the policy of making accounts dormant nor as to how the policy would apply in respect of accounts with multiple profiles. EDS therefore submit that Sky's conclusion that Joe Galloway had used the e-mail account is a matter of speculation.

**[245]** EDS say that there is no evidence from Joe Galloway's Yahoo account to suggest that his e-mail account had been used at all since late 2000. If his evidence that he had not used the e-mail account since late 2000 were correct, then his error in suggesting to the court that he had several e-mail accounts rather than profiles is, perhaps, easy to understand. EDS submit that the court should be very cautious about jumping to a conclusion on this weak basis.

**[246]** I have to say that I did not find his explanation when faced with the material from Yahoo on dormant accounts at all convincing. Further the letters from EDS's solicitors show that their investigations have provided no support for what he was saying. I regret that I simply do not believe his evidence that he had not had access to the e-mail account since 2000. This was another case where he made up what on the face of it was a potential explanation to cover his statement that he had not had access when that explanation on further investigation could not be supported. However, I can deal shortly with Sky's submission that his use of the Yahoo account was somehow intended to conceal from EDS what he was saying to Sky and was done in the knowledge that what he was saying was a lie. I do not accept that submission and agree

with EDS that the submission does not stand scrutiny. Joe Galloway had also sent his letter to Richard Freudenstein of 18 June 2000 via his personal Yahoo e-mail account, with a copy to Steve Leonard. The context for the letter of 5 July 2000 was Mike Hughes' request to send a letter to Richard Freudenstein as part of 'a final push' and the content of that e-mail did not, on Sky's case, go as far as the statement in Joe Galloway's e-mail of 11 July 2000 which was copied to people at Sky and EDS. Rather I consider it inherently likely that, as many people did in 2000 and still do today, Joe Galloway used his personal e-mail address when either working from home or travelling, because of difficulties in gaining access to his EDS e-mail account on the EDS servers.

The 12 October meeting

**[247]** There was an issue in the evidence as to what was said at a meeting on 12 October 2000 when Joe Galloway visited Dunfermline and the programme for the project was shortened, giving rise to allegations concerning representations prior to the prime contract. The way in which things were said and done on 12 October 2000 is also relevant to the approach of Joe Galloway to revising the programme on 12 October 2000.

**[248]** In his fourth witness statement, Scott Mackay said at para 41 that when Joe Galloway presented him with the revised plan he said words to the effect of 'This is the plan. You can either agree with it or we will take you out into the car park and kick the f*** out of you'. Scott Mackay then says:

> 'Leaving aside the language, I was absolutely taken aback by this comment. Whilst I appreciated that Joe Galloway had attempted to be funny, I had no doubt about what he was telling me, which was simply that this was EDS' plan, EDS knew how it was going to work and unless I was in agreement, my views were not wanted. I replied to the effect that I would happily fight him in the car park if that was what he wanted. Joe Galloway replied along the lines of being happy to do so, as long as he could bring his girlfriend, or wife – I cannot remember which – who was apparently some sort of martial arts expert.'

**[249]** This led to a denial from Joe Galloway: 'No, I never said that, nor have I ever said anything like that to a customer.' In his fourth witness statement at paras 10 to 12 and in his oral evidence on Day 46 he accepted that he did have a girlfriend who was trained in martial arts but he said that he did not meet her until a Halloween party on or about 31 October 2000. He said that his relationship with her did not become public knowledge until about a week or so later so that nobody knew about her until sometime in early November 2000. He also said that he did not recall ever meeting Scott Mackay after 12 October meeting. In his oral evidence he referred to the fact that there were other people in the room such as Dan Barton and John Chan.

**[250]** EDS submit that on the question of this conversation, the evidence of Joe Galloway should be preferred.

**[251]** EDS say that this evidence only appeared in Scott Mackay's fourth witness statement and is quite inconsistent with the account of the same conversation given in his first witness statement where he did not mention this incident but said that Joe Galloway showed him a Microsoft Project Plan which had been drawn up on a single piece of A4 paper and asked him what he thought of the plan to which he replied that he thought that the time period for system testing was too compressed. He then said that Joe Galloway replied that system testing would be done in parallel with development. He commented that 'I certainly didn't consider Joe's behaviour in presenting me

with the plan without any explanation of how it had been put together to be brilliant.' EDS say that, by contrast, in his fourth witness statement Scott Mackay, however, gave a materially different version of his conversation with Joe Galloway.

**[252]** EDS say that there is a clear inconsistency and that Scott Mackay's denial in cross-examination on Day 30 was untenable and that if the 'car park' conversation had really taken place, it is inconceivable that he would not have mentioned the conversation to Sky's solicitors and it would have been included in his first witness statement. EDS also say that there is no mention of the conversation in the contemporaneous correspondence, such as Scott Mackay's e-mail to Mike Hughes of 12 October 2000.

**[253]** EDS also say that Scott Mackay said that the conversation took place in front of others and would have been overheard by John Chan, Richard Durling and Dan Barton, all of whom have denied hearing any such conversation in their subsequent witness statements. EDS say that the oral evidence of John Chan and Richard Durling confirmed this.

**[254]** EDS also refer to the fact that Scott Mackay's account of the 'car park' conversation included reference to Joe Galloway's girlfriend being a martial arts expert and that, on Joe Galloway's evidence of when he met her, this could not have taken place until after 12 October 2000.

**[255]** EDS say that, despite Scott Mackay's adamant confirmation of his evidence: 'I absolutely, to the day I die, maintain that happened', his evidence should not be accepted.

**[256]** Sky evidently maintain that Scott Mackay's evidence should be preferred. They refer to evidence from Melanie Haydon and Penny Hicks of Joe Galloway's threatening behaviour towards members of his own team and his use of foul and inappropriate language towards clients and say that this evidence was consistent with Scott Mackay's evidence of 12 October meeting.

**[257]** Whilst the evidence from Scott Mackay of the 'car park' conversation does, I accept, not lie completely consistently with his first witness statement and should have been mentioned earlier, it is not so conflicting as to make the later account not credible. In addition, given the breadth of evidence dealt with by Scott Mackay the absence of the evidence from the first witness statement is explicable.

**[258]** I do not find support, one way or another, in the evidence of Melanie Haydon that Penny Hicks had, on one occasion, complained that Joe Galloway had used inappropriate language in front of her or of Joe Galloway's treatment of Richard Durling on 12 October 2000. Her evidence was not supported by the witness statement of Penny Hicks or by the evidence of Richard Durling. Equally, though, this would not establish that Joe Galloway made the 'car park' comment on 12 October 2000.

**[259]** However for the following reasons I have come to the conclusion that Scott Mackay's evidence is to be preferred. Whilst, as I say, his evidence has to some extent been coloured or influenced by his involvement in the litigation, that is entirely different to making up an elaborate story which, on any view, whilst relevant is not of central importance. Furthermore, in relation to the reference to Joe Galloway's girlfriend and martial arts, that reference is entirely accurate and could have been said. The only issue would be that of timing. Based on Joe Galloway's evidence of timing, he only met the girlfriend later in October 2000. However, it is clear that after 12 October 2000 he had little involvement with Joe Galloway and it is therefore unlikely that

Scott Mackay mistook the conversation for a later one or is recalling matters which he heard



about later. That timing aspect is crucial. Whilst in other circumstances mistakes about timing might be attributed to lack of memory of dates, given my view of Joe Galloway I have no difficulty in finding that he has created the timing issue to cover what he said at the time.

***Gerard Whelan***

**[260]** Gerard Whelan was Bid Project Manager for EDS. He was therefore responsible for producing the response to the ITT although in doing so he clearly obtained most of the material from others in the bid team. He had worked for EDS from September 1999 until January 2001 when he left to join ITIVITI with Joe Galloway. His recollection of the detail of what happened during the bid process was not good. He referred very often to there being, or possibly being, other documents but I was not persuaded that he had any clear recollection that there were significant documents which were no longer in existence.

**[261]** He was not a forceful character and tended to agree with suggestions put forcefully to him in cross-examination without giving careful consideration to his answer. He therefore gave evidence which was not always reliable. I consider that he was an honest witness in relation to what he recalled. He was evidently someone who could organise a bid submission but on the important aspects relevant to the matters which give rise to the alleged misrepresentations he relied on others and, in particular, Joe Galloway for the accuracy of the information which was being provided to him. He was, as Sky submit, very much the junior partner to Joe Galloway.

**[262]** He gave evidence on two occasions. On the first occasion he clearly was concerned to distance himself from the detail and some of his answers were evasive. He was much more open when he returned to give evidence.

***John Chan***

**[263]** John Chan was the EDS Project Manager for the Sky CRM project named in the response and he held this position until October 2000. He was obviously an experienced project manager but his oral evidence was unsatisfactory and at times incomprehensible. He did not react well to intense questioning and his answers often differed over time. Even making allowances for the fact that English was not his first language, his explanation of entries on the risk register was particularly difficult to understand and was evasive. Having said that he did not strike me as being dishonest but rather as reacting badly to the pressures of giving evidence.

***Tony Dean***

**[264]** Tony Dean became involved as Client Executive on the project in September 2000 and was the senior person with responsibility for EDS's relationship with Sky. His evidence was often defensive and at times his answers were evasive.

***Steve Leonard***

**[265]** Sky withdrew its claim of dishonesty against Steve Leonard. I found him an honest and straightforward witness.

***Scott Mackay***

**[266]** Scott Mackay was involved in the project throughout. He was then involved in giving instructions to Sky's solicitors for the purpose of this



litigation. His evidence, at times, was coloured by this involvement and reflected Sky's case. This affected his perspective and the emphasis which he gave to the facts rather than the honesty of his evidence.

***Andy Waddell***

**[267]** Andy Waddell had similarly been involved in giving instructions to Sky's solicitors in relation to this litigation over a prolonged period of time. He, too, showed a tendency to emphasise matters which benefited Sky's case but, like Scott Mackay, I do not consider that this affected the honesty of his answers.

***Expert evidence***

**[268]** In this case the issues raised matters which required expert evidence relating to four disciplines: IT, customer churn, call avoidance and quantum.

**[269]** Directions were given at an early stage for the experts to agree on the expert issues which arose from the pleaded case. This led to the production of a document which set out 21 expert issues attached to an order made on 12 June 2006 which provided focus for the expert evidence.

***IT expert evidence***

**[270]** Sky instructed PA Consulting Services Ltd ('PA') to provide expert evidence and three experts from that organisation gave expert evidence, each dealing with particular aspects. Ian Murray was responsible for PA's opinion evidence in respect of estimating and planning, resources and quantum, except for Function Point Analysis which was the responsibility of Neil Douglas. Mark Britton was responsible for all opinion evidence relating to methodologies and performance. EDS instructed Robert Worden of IT consultancy, Charteris plc. He covered all aspects of IT expert evidence.

**[271]** Ian Murray joined PA in 1985 and became head of PA's Global Systems Integration and Solutions Group which specialises in the implementation of software solutions and covers software development, systems integration and package software implementation. His background was in software engineering and he has managed a number of successful system implementation projects and has advised clients extensively on software and systems architectures, delivery strategies and lifecycle methodologies. He has also carried out a number of audit roles for major system development projects in the public and private sectors. Between 1998 and 2004 he was responsible for the development of PA's initiative on Customer Relationship Management (CRM) which involved leading a team dealing with all aspects of CRM, from strategic objectives such as customer value, churn and retention, customer lifecycle to technology options for building CRM solutions. He has also led a number of CRM projects which included the delivery of IT systems to support

call centre operations, specifically in the telecommunications and utilities industries.

**[272]** Mark Britton is a Chartered Engineer, Member of the Institution of Engineering and Technology (formerly IEE) and has been employed by PA since October 1992. His background is in systems implementation and he has worked on a number of successful implementation projects. He has experience of working to both Rapid Application Development (RAD) and waterfall development lifecycles, and his roles have ranged from that of developer to being the system architect. He has also conducted project reviews of a number



of systems implementation projects of varying complexity, gaining experience of development methodologies, and the causes of project and programme failure.

**[273]** Neil Douglas is a Fellow of the British Computer Science Society, a Chartered IT Professional, Certified Management Consultant and a member of the PA Management Group. He has been employed by PA since November 1993. He specialises in the planning and management of complex IT delivery projects and has led development, testing and implementation teams on a number of major system delivery projects. He is an experienced project manager and a system architect. He has particular expertise and experience in the field of formal estimating techniques and systems integration. In particular he has been involved in the development of Function Point Analysis as a technique and is a member of the Counting Practices Committee of the UK Function Point User Group. He has produced a book, 'Sizing and estimating software in practice: Making Mk II Function Points work' which was published by McGraw-Hill in 1995.

**[274]** Robert Worden joined the IT company, Logica, after research in theoretical high energy physics. He designed a relational database management system, RAPPORT. He moved to Logica's research centre at Cambridge and ran a project to build a medical expert system. He managed the research centre from 1986 for four years and during that time built expert systems, neural nets, advanced user interfaces and speech/language interfaces. This involved object orientation and mathematical specification and VLSI. He then left Logica to join Charteris.

**[275]** Sky challenge the reliability of Robert Worden as an expert witness. They submit as follows:

> 'He showed himself to be willing to advance an opinion on anything and everything, irrespective of the limits of his expertise, irrespective of the facts and irrespective of the pleaded issues. He advanced opinions that were not thought through and in many instances were wholly unsubstantiated; his approach to calculations was slapdash; he failed to correct his opinions even when he knew them to be wrong. His evidence was the epitome of what expert evidence should not be.'

They criticise him for lack of expertise in CRM and function point counting and his failure to correct errors as to Sky's productivity and the Siebel e-communications suite. They also rely on what His Honour Judge Peter Bowsher QC said about his evidence in *Pegler Ltd v Wang (UK) Ltd* (2000) 70 Con LR 68.

**[276]** EDS reject those criticisms. Having read Robert Worden's reports and heard his evidence and having also read the reports and heard the evidence of Ian Murray, Mark Britton and Neil Douglas over a number of days during the trial, I do not consider that Sky's wide ranging criticism of Robert Worden's evidence is justified. Having said that, there were various reasons why, on analysis, the opinions expressed by Robert Worden or by Ian Murray, Mark Britton or Neil Douglas could not be accepted on certain issues. That

depends, however, on the particular expert issue, the experience of the expert on that issue and the reasoning used by that expert. Whilst in some cases, particularly ones with limited issues, it might be possible to reject the whole of the evidence of one expert, I do not consider that such an approach is either appropriate or justified in this case.



**[277]** Robert Worden was more in the way of a generalist in the field of IT with some experience of dealing with CRM systems but with good general knowledge of the estimating, systems integration and the types of problem which can arise on projects such as the Sky CRM project. Each of the experts from PA Consulting had particular fields of expertise and whilst they might have had more experience on some aspects of the project, there was, for instance, a need for Mark Britton to learn about Siebel for the purpose of this litigation.

**[278]** With court decisions and other documents now being available in searchable electronic form it is common for those advising parties in litigation to carry out a search for, amongst other things, the names of witnesses and experts to see whether this opens lines of cross-examination. In this case Richard Durling had previously been involved in *Sphere Drake Insurance Ltd v Euro International Underwriting Ltd* [2003] EWHC 1636 (Comm), [2003] Lloyd's Rep IR 525 and Robert Worden was an expert in *Pegler Ltd v Wang (UK) Ltd* (2000) 70 Con LR 68. Whilst that approach is understandable, it frequently raises more issues than it resolves and creates satellite investigations which are of little benefit in assessing matters in the context of the present case. It is clear that Judge Bowsher rejected Robert Worden's views and approach in a number of respects and in robust terms. That was in the context of a case some nine years ago, with different issues. Doubtless any expert would learn from and take heed of what was said or otherwise would find it difficult to continue to act as an expert. Whilst such criticisms are noted the focus must be on the evidence given in this case.

**[279]** I shall deal with the particular expert evidence in the context of each of the issues. Before I do that I can make some general comments. I accept that Robert Worden, as a Sectiongeneralist, tended to give evidence on the basis of general experience rather than detailed particular knowledge of this particular type of systems integration project. He also tended to be more discursive in his answers which at times was not helpful to a proper understanding of the issue or his evidence. Many of his calculations were formulated from broad estimates and were therefore more difficult to analyse. This also meant that when some assumption or parameter changed, it was not easy to see the consequence. Ian Murray was a person who obviously had more detailed knowledge but, at times, his evidence was less compelling than that of Robert Worden and, as he accepted, he had made errors. His approach to effort estimates and the way in which they changed I found less than convincing. Similarly, in the very specialist field of function point counting, where Neil Douglas is undoubtedly a leading expert, the figures which were derived under his supervision could not be supported and had to be changed. Mark Britton was an impressive witness who evidently had a great deal of experience in systems and system integration. However, as mentioned above, he needed to learn about Siebel for the purpose of the issues in this case.

***Customer Churn expert evidence***

**[280]** Sky called Professor Merlin Stone and EDS called Dr Helen Jenkins.

**[281]** Professor Merlin Stone is a Director of Nowell Stone Ltd, an organisational development and consulting company specialising in improving businesses' capabilities in key account management, sales management, sales performance, interactive marketing, CRM, e-business, customer service and information technology ('IT'). He works as a consultant, lecturer and trainer

for businesses in many sectors, including financial services, utilities, pharmaceutical, telecommunications, travel and transport, retailing, automotive, energy, IT, information services and the public sector.

**[282]** He holds posts as a part-time Professor at Bristol Business School, a Professor Associate at Brunel Business School, and a Visiting Professor at a number of Business Schools. He has expertise in CRM and has worked on CRM projects for 25 years. He specialises in advising companies on how to deploy customer information, CRM systems and customer management processes in order to improve how they acquire, retain and develop customers cost-effectively so as to meet their marketing, sales and service objectives.

**[283]** Dr Helen Jenkins is Managing Director of Oxera Consulting and an experienced professional economist. Her expertise is in the analysis of consumer behaviour and markets from an economic perspective, predominantly in the field of competition policy. She has worked across a wide range of sectors and industries, including the electronic communications sector.

**[284]** She has wide experience of analysing customer choice and has designed, supervised and analysed surveys of consumer choice and in particular switching decisions in broadcasting, credit cards, energy supply, mobile and fixed telephony sectors.

**[285]** Within the communications practice, she has advised TV broadcasters and dealt with a wide range of regulatory, strategic and competition issues that required an understanding of the UK pay-TV services sector and customer choice within this sector. She has supervised and analysed consumer surveys on switching behaviour in pay-TV to understand the choices made by customers. She has also analysed pricing practices such as margin squeeze prediction, targeted discounting and excessive prices in wholesale and retail broadcasting and telecoms markets.

**[286]** She has advised the BBC, the European Commission, Comreg (the Irish communications regulator) and OFTA (the Hong Kong telecommunications regulator) on matters relating to broadcasting markets, pricing and customer choice. She has appeared as an expert witness in court and before competition authorities in the UK, Republic of Ireland and other EU Member States, and Hong Kong.

**[287]** Sky submit that Merlin Stone has much more relevant expertise to express a view on the ability of the Sky CRM system to reduce customer churn. EDS submit that Helen Jenkins' has relevant expertise and that her approach to the issue is to be preferred because Merlin Stone, whilst having CRM expertise which Helen Jenkins lacks, did not provide reliable evidence.

**[288]** It is clear that Merlin Stone is a person who has a great deal of relevant experience in this field and could provide a valuable opinion on the effect of the CRM system on Sky's customers. However, I found that his evidence failed to live up to expectations. It seemed that he had little grasp of the detailed facts and had not properly understood some features which were necessary to make churn predictions for Sky. For example, his initial evidence on the relevance of Syscan was, at the very least unclear, and his explanation of the position was not convincing. Equally, he did not seek to do any detailed analysis of the effect of the CRM functionality until very late. He did, though, have some useful insights into effectiveness of that functionality in preventing churn. As he accepted, making churn predictions in the case of Sky raised a number of difficulties and this meant that the court needed to have more justification for his figures than he was able to give.

**[289]** Helen Jenkins had no expertise in considering or analysing the churn reduction effect of a CRM system. She was therefore at a disadvantage in assessing the effect of CRM functionality. Despite that disadvantage, she was able to draw from experience of customer reaction from her competition work. This allowed her to provide reasons for her predictions and carry out more analysis from the available documentation. She gave her evidence impressively and was able to give answers which were based on evidence and reliable.

**[290]** In approaching the expert evidence I have therefore had to balance these factors which distinguish the evidence of Merlin Stone and Helen Jenkins.

***Call avoidance expert evidence***

**[291]** Sky called Mr Simon Roncoroni and EDS called Mr Neil Spencer-Jones.

**[292]** Mr Simon Roncoroni is a Director of Simon Roncoroni Consulting, which he set up in 2000 as a call centre consulting business. He has expertise in the area of call centres, having worked in this sector since 1979. From his experience he has developed an understanding of how the application of technology impacts upon a call centre business. He has observed in detail the operation of CRM systems in call centres, including the use of both Chordiant and Siebel. He is familiar with the user functionality of each of these systems.

**[293]** With others he was responsible for starting the first commercial outsourcing call centre in the United Kingdom in 1979 and later ran the outsourcing call centres for British Telecom. In 1989 he formed his own consulting business called the L&R Group which was involved in the strategy and planning of many direct contact operations such as Norwich Union Direct and First Direct. He was also responsible for running all the consumer care call centres for Unilever. When L&R was sold to Sitel Corporation in 1997, he worked as Head of Consulting in Europe at Sitel. He completed international call centre and customer service studies for organisations such as General Motors and Philips. He has been a non-executive Director of Merchants, the South African call centre business which publishes the Global Call centre Benchmarking Report.

**[294]** Neil Spencer-Jones is an Associate Consultant for NCC Group plc and works for a number of consultancies. He has specialised in voice and data communication with specific interest in the development of Internet solutions.

**[295]** He started his career in medical laboratories and developed an interest in IT and worked for GEC Plessey Telecommunications as an Analyst Programmer, IT Projects Manager and Business Systems Manager. He then took up the post of IT Manager in hospitals. He has worked for BT Global Industry as an Internet Protocol Sales Manager involving integrated 'multi-channel' solutions including traditional telephony, call centres and web-based solutions. As a consultant he has gained experience of CRM solutions and integrated voice and data solutions and an understanding of communications, call centre and CRM technology. He has been appointed as an Expert Witness in a number of cases.

**[296]** Simon Roncoroni is very experienced in the Call Centre industry, having worked in that area for many years. He also had experience in traffic and resource forecasting in call centres. His evidence developed over time and it was only in the third Joint Memorandum that he set out his reliance on the 22 Elements of functionality as delivering benefits in terms of FTR and Call Avoidance and this differed from his first report. Also in oral evidence he

provided new and important changes to the evidence which he had set out in his report. Whilst I accept that he was not accustomed to giving evidence, these aspects detracted from the weight that could be given to his expert evidence.

**[297]** Neil Spencer-Jones has less experience in the Call Centre industry but is experienced in technology and its functionality. His evidence was helpful but tended to concentrate on ways in which solutions might have been found to creating similar functionality with the DCMS or by interim solutions in advance of the actual CRM System. This reflected his background which was in finding such technical solutions. His evidence on certain aspects therefore lacked the practical insights on the use of functionality in the context of a CA in a call centre. Despite that, I found much of his analysis useful.

***Quantum expert evidence***

**[298]** Sky called Mr Richard Boulton and EDS called Mr Timothy Hart.

**[299]** Richard Boulton is a part time Director of LECG Ltd. He has 25 years' business experience as an accountant and management consultant and is a Fellow of the Institute of Chartered Accountants in England and Wales and a Fellow of the Academy of Experts. Before joining LECG he was at Arthur Andersen until 2001, becoming a global managing partner and member of the firm's global leadership team. He had acted as Head of Litigation Services for Arthur Andersen for Europe, the Middle East, India and Africa.

**[300]** He has experience of large IT projects from a management point of view and an understanding of the business issues associated with implementing large scale change using technology, focusing principally on strategy, finance and economic consulting. His particular expertise is in complex damages calculations and he has been instructed as an expert in over 100 cases and given expert evidence in court and before tribunals. He has also performed fraud and other investigations.

**[301]** Timothy Hart was a Managing Director and leader of Navigant Consulting Inc's global Disputes and Investigations practice, and is now of Huron Consulting Group. He is a Certified Public Accountant in the United States and a Certified Fraud Examiner. He has specialised over the past twenty years in forensic accounting. He was previously a partner with Arthur Andersen and worked with them until 2002.

**[302]** He has served as a consultant and acted as an expert witness in a wide range of commercial and investment disputes in courts and arbitrations around the world, dealing with quantum or accounting and finance issues. His practice has included accounting investigations, insolvency work and a variety of transactional advisory assignments. He has led several major investigations on behalf of public company boards of directors or management, usually in response to inquiries by regulators. He has also assisted clients involved in significant insolvency issues.

**[303]** The quantum experts have managed to make very good progress in agreeing figures. This meant that the issues between them were more limited. Both Richard Boulton and Timothy Hart were impressive witnesses and although their approaches on particular issues differed, this was the result of opinion on such matters as validation of costs. I have therefore been able to see clearly what their views are and decide which view I prefer on particular issues.

**D: THE LAW OF DECEIT AND NEGLIGENT MISREPRESENTATION**

***The law on deceit***

**[304]** The following basic principles of law are relied upon:



(1) Fraud is proved when it is shown that a false representation has been made (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false: *Derry v Peek* (1889) 14 App Cas 337, [1886–90] All ER Rep 1 (HL) per Lord Herschell.

(2) However negligent a person may be, he cannot be liable for fraud if his belief is honest; mere carelessness or incompetence, is insufficient: *Derry v Peek*.

(3) The burden of proof lies with Sky. The more serious the allegation, the higher degree of probability that is required to establish it: *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970 at 973, [1957] 1 QB 247 at 248; *Re H and R (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1, [1996] AC 563.

(4) If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion: *Smith v Land and House Property Corp* (1884) 28 Ch D 7 per Bowen LJ.

(5) A person who allows a false statement by a third person to the representee to go uncorrected may also make a representation: *Pilmore v Hood* (1838) 3 App Cas 459 at 465 per Lord Cairns; *North British Insurance Co v Lloyd* (1854) 10 Exch 523 at 529 per Alderson B; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211 per Viscount Maughan and at 220 per and Lord Wright.

(6) Where a statement relied on is ambiguous, the person relying on it must first prove that he understood the statement in a sense which is in fact false: *Smith v Chadwick* (1884) 9 App Cas 187, (1884) 53 LJ Ch 873, [1881–5] All ER Rep 242. If there was a fraud and a statement was intended to mislead, its ambiguity would not be a defence: *Low v Bouverie* [1891] 3 Ch 82 at 113 per Kay LJ.

(7) A claim in deceit may be made where responsibility and the relevant knowledge is divided among several servants and agents: *Armstrong v Strain* [1952] 1 KB 232 at 244 per Singleton LJ.

(8) A representation having been made for the purpose of an intended transaction will normally be regarded as continuing until the transaction is entered into or completed, unless varied or withdrawn in the meantime: *DPP v Ray* [1974] AC 370 at 379, 382, 386, 391.

**[305]** In order to establish a cause of action in deceit Sky must show:

(a) that EDS made a representation;

(b) that the representation was false;

(c) that EDS knew it to be untrue or was reckless as to whether it was true;

(d) that EDS intended that the claimant should act in reliance on the representation; and

(e) that Sky relied on the representation to its detriment: See *Clerk & Lindsell on Torts* (19th edn, 2006) at 18–101.

**[306]** When determining the meaning of an express representation or whether a statement is implicit from it, the court generally applies an objective test. When, however, the court turns to consider (a) whether EDS knew or was reckless as to the truth of the representation or (b) whether Sky relied upon the



representation, the court takes a subjective approach as to the meaning of the representation, namely what EDS believed it was representing or what Sky understood to be the meaning of the representation.

**[307]** Sky must prove the claim in deceit to the civil standard of preponderance of probability and not to the higher criminal standard. However, the court will require more convincing evidence to establish fraud. As Lord Nicholls said in *Re H and R (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1 at 16, [1996] AC 563 at 586:

> '… the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'

**[308]** Dealing with each of those matters in turn:

***The making of a representation***

**[309]** The representation must be a representation of a past or existing fact not of opinion. However, a representation as to opinion can amount to a statement of fact to the extent that it is an assertion that the maker does in fact hold the opinion: see *Brown v Raphael* [1958] 2 All ER 79 at 81, [1958] Ch 636 at 641.

**[310]** The statement of opinion may also involve a further implied representation of fact that the person stating the opinion has reasonable grounds for his belief or knows of facts justifying his opinion. In each case whether there is such an implied representation depends on the particular facts. As summarised by the Court of Appeal in *Society of Lloyds v Jaffray* [2002] EWCA Civ 1101:

> '[59] These cases seem to us to show that all depends upon the circumstances. In each case it is necessary to ask the question identified above, namely what would the reasonable person in the position of the representee understand by the words used in the document. In our opinion

> there is no rule of law that any particular statement carries with it any particular implication. All depends upon the particular statement in its particular context. So, here, as already stated, the question is whether the particular brochure or set of globals relied upon would be reasonably understood by the ordinary applicant for membership of Lloyd's to have the meaning alleged. That meaning might either be explicit in the words used or implicit (and in that sense implied) from the words used.'

**[311]** Where a statement relates to the representor's own intended future action, the statement will often amount to a promise. Such promises are usually actionable by way of breach of contract. But again, a statement of fact might be implied from the promise to the effect that the representor held the particular intention or that the statement of intent was based on reasonable grounds. However, allegations based on such implied statements must be distinguished from allegations that the intention was not carried out. As Elias J said in *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 at [131] dealing with representations relating to future intentions:

> 'By definition, the claimant is always complaining in circumstances where the intention has not been carried into effect. It is only because of



> that fact that the claimant can allege that the representation made was false. The difficulty facing many, if not most, claimants, is that their real complaint is that the intention was not carried out. But absent some contractual undertaking to do so, there never was a representation that it would be. The point is succinctly made in *Spencer Bower on Actionable Misrepresentation*, 4th edn, para. 17:
>
> "What the representee is generally found to complain of is the failure to carry out the intention, which shows that what really induced him to alter his position was his belief that the intention would be carried out. In other words, he relied upon the statement as if it were a promise, not as a representation. His belief that the representor had a present intention to act according to his statement would not have influenced him unless he had also believed that the intention would be carried out." '

**[312]** A representation of fact may be made by conduct. As Lord Maugham said in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211:

> 'The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit …'

Lord Wright said [1941] 2 All ER 205 at 220: that 'any person who, though not a party to the fraudulent original representation, afterwards learns of it and deliberately and knowingly uses the delusion created by the fraud in the injured party's mind in order to profit by the fraud' may be guilty of fraud.

***The falsity of the representation***

**[313]** As Rix J said in *Avon Insurance plc v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573 at 579:

> '… a representation may be true without being entirely correct, provided it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts.'

***Knowledge or recklessness as to the truth***

**[314]** To establish an action of deceit, there must be proof of fraud: *Derry v Peek* (1889) 14 App Cas 337 at 374, where Lord Herschell defined what must be proved, as follows:

> 'Secondly, 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 from being fraudulent, there must, I think, always be an honest belief in its truth.'

**[315]** Mere negligence, even gross negligence, will not suffice: *Derry v Peek* (1889) 14 App Cas 337 at 373.



**[316]** In assessing whether a party knew that the statement was untrue there often is an issue as to what the statement meant. Where a statement is capable of being understood in more senses than one, it must be established that the party making the statement should have intended it to be understood in a sense which is untrue or should have deliberately used the ambiguity for the purpose of deceiving the Claimant: see *Clerk & Lindsell* para 18–023, cited with approval by Tugendhat J in *Crystal Palace FC (2000) Ltd v Dowie* [2007] EWHC 1392 (QB) at [20], [2007] IRLR 682 at [20].

**[317]** In *Akerhielm v De Mare* [1959] 3 All ER 485 at 503, [1959] AC 789 at 805 the principle was stated as follows:

> 'The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made.'

**[318]** To establish deceit, Sky must therefore prove (i) that EDS knew the representation was untrue, or at least had an absence of belief as to the truth of the representation, and (ii) that EDS understood the representation to have the express or implied meaning advanced by Sky.

**[319]** In the case of companies, it is 'directing mind and will' of the corporation which must be considered to determine whether the corporation had knowledge. As stated by Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713:

> '… a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'

**[320]** In *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 696 the approach of the Court of Appeal was reflected in the judgment of Nourse LJ who stated:

> 'It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point.'

**[321]** Rose LJ [1994] 2 All ER 685 at 699 and Hoffmann LJ at 706 took similar approaches. Hoffmann LJ explained at 702 that knowledge can be imputed to a corporation through its agent in certain circumstances.

**[322]** In *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [156] Moore-Bick LJ applied these principles as follows:

> 'It is obvious that, because it is a fictitious person, a company can only act through one or more natural persons and therefore, as the decisions in *El Ajou v Dollar Land Holdings plc* and [*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, [1995] 2 AC 500] show, in order to determine whether the company is liable in respect of any particular act or omission it is necessary to identify the natural person who represented the company for that particular purpose and who [can]



> therefore can be regarded as embodying for that purpose what is sometimes called its controlling mind and will. When seeking to identify the person who is to count as the company for the purposes of a substantive rule of law it is necessary to consider the nature and policy of that rule. The essence of fraudulent misrepresentation, so far as is relevant for this case, is making a statement that is known to be untrue intending that the person to whom it is made will rely on it. Liability therefore depends on the conjunction of a false statement and a dishonest state of mind. In a case where it is said that a company has made a fraudulent misrepresentation the first step must be to see whether a false statement has been made by someone who is authorised to speak on the company's behalf. Once that has been established the starting point in deciding whether the company acted dishonestly must be to enquire into the state of mind of the person who made the statement. However, if that person was unaware that the statement was false, it may be necessary to enquire into the state of mind of other persons who directed him to make it or who allowed it to be made.'

**[323]** The court therefore has to determine who made each representation; whether that person was authorised to speak on behalf of the corporation; whether that person had the required state of mind and, if not, whether some other person who directed the representation to be made had the required state of mind. If the person who made the statement or directed it to be made did not have a dishonest state of mind, then the claim for deceit fails: see *Armstrong v Strain* [1952] 1 All ER 139, [1952] 1 KB 232.

***Intention that the other party should act upon the representation***

**[324]** The representor must have made the statement with intent to deceive, that is with intent that it shall be acted upon by the representee: see *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211.

***Detrimental reliance of representation***

**[325]** The representee, Sky, must show that the representation induced it to act to its detriment: see *Downs v Chappell* [1996] 3 All ER 344 at 351, [1997] 1 WLR 426 at 433 per Hobhouse LJ. The representation need not be the sole cause of the claimant acting as he did, provided that it substantially contributed to deceive him: see *JEB Fasteners Ltd v Marks Bloom & Co (a firm)* [1983] 1 All ER 583 at 589 per Stephenson LJ at 589 and at 588 per Donaldson LJ.

**[326]** In the *Avon Insurance* case Rix J said this ([2000] 1 All ER (Comm) 573 at 580 (para 18)):

> 'I derive from that case the distinction between a factor which is observed or considered by a plaintiff, or even supports or encourages his decision, and a factor which is sufficiently important to be called a real and substantial part of what induced him to enter into a transaction.'

**[327]** Where a claimant alleges that a representation has a particular meaning, the claimant has to establish that his understanding as to the meaning of the representation at the time was the same as now alleged: see *Smith v Chadwick* (1884) 9 App Cas 187.



***The law of negligent misstatement or misrepresentation***

**[328]** The modern foundation for claims for economic loss caused by negligent misstatement is the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465.

**[329]** In *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, Lord Goff identified the principle in the *Hedley Byrne* case as being assumption of responsibility by the defendant along with reliance by the claimant. In determining whether there was an assumption of responsibility an objective test is applied; see Lord Goff [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181.

**[330]** In *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514 at 534, [1990] 1 AC 831 at 862, Lord Griffiths said:

> 'The phrase “assumption of responsibility” can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.'

**[331]** As Lord Oliver said in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 589, [1990] 2 AC 605 at 637:

> '[Voluntary assumption of responsibility] is a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted on. It tells us nothing about the circumstances from which such attribution arises.'

**[332]** The passages in *Smith v Eric S Bush* and the *Caparo* case were also cited in *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2006] 4 All ER 256, [2007] 1 AC 181 by Lord Bingham at [5] and Lord Mance at [88].

**[333]** In the *Caparo* case Lord Bridge identified a threefold test ([1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618):

> (1) That the damage caused must have been foreseeable.
>
> (2) There should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood'.
>
> (3) The situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of given scope upon the one party for the benefit of the other.

**[334]** Lord Bridge observed [1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 618 that the concepts of proximity and fairness are—

> 'not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.'

**[335]** He continued by referring to the incremental approach and said:



> 'Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, where he said:
>
> "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'." '

**[336]** In *Customs and Excise Comrs v Barclays Bank plc* [2006] 4 All ER 256 at [71], [2007] 1 AC 181 at [71] Lord Walker said:

> 'The increasingly clear recognition that the threefold test (first stated by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618) does not provide an easy answer to all our problems, but only a set of fairly blunt

tools, is to my mind progress of a sort. I respectfully agree with the observation of Kirby J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 684, (1999) 198 CLR 180 at 284 (para 283):

"As against the approach which I favour, it has been said that the three identified elements are mere 'labels'. So indeed they are … Labels are commonly used by lawyers. They help steer the mind through the task in hand." '

**[337]** In addition, Lord Hoffmann said [2006] 4 All ER 256 at [36], [2007] 1 AC 181 at [36] of the *Barclays Bank* case:

'It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like "assumption of responsibility" and "fair, just and reasonable".'

**[338]** Lord Bingham said this [2006] 4 All ER 256 at [8], [2007] 1 AC 181 at [8]:

'… it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.'



**[339]** Lord Bridge observed in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at , [1990] 2 AC 605 at 627:

'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:

"The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

(See *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 48 per Brennan J.)'

**[340]** This observation was applied by Chadwick LJ in *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910 at [48], [2008] 2 BCLC 22 at [48].

**[341]** EDS submit that, given the high level of abstraction at which the tests for the existence of a duty of care operate, the court must consider the detailed circumstances of the case and the relationship between the parties to determine whether it is sensible and just for a duty of care to be found to exist. That, I consider, is a sufficient summary of the position which the law has reached so far as the general test for the existence of a duty of care. I now turn to consider the impact of the contractual regime on the existence of a duty of care.

**[342]** The starting point for a consideration of the effect of the contract is *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145. At [1994] 3 All ER 506 at 529, [1995] 2 AC 145 at 191 Lord Goff referred to *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481. He said:

> 'Le Dain J, delivering the judgment of the Supreme Court of Canada, conducted a comprehensive and most impressive survey of the relevant English and Canadian authorities on the liability of solicitors to their clients for negligence, in contract and in tort, in the course of which he paid a generous tribute to the analysis of Oliver J in the [*Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571, [1979] Ch 384]. His conclusions are set out in a series of propositions (at 521–522); but his general conclusion was to the same effect as that reached by Oliver J. He said (at 522):
>
> "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence."
>
> I respectfully agree.'

**[343]** In the course of considering liability Lord Goff said this ([1994] 3 All ER 506 at 531–532, [1995] 2 AC 145 at 193–194):

> 'My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a
>
> 
>
> rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.'

**[344]** He concluded ([1994] 3 All ER 506 at 532, [1995] 2 AC 145 at 194):

> 'But, for the present purposes more important, in the present case liability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may

give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.'

**[345]** He said this ([1994] 3 All ER 506 at 533–534, [1995] 2 AC 145 at 195–196):

'I wish, however, to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short-circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility. This was the conclusion of the Court of Appeal in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791 at 803, [1988] QB 758 at 781. As Bingham LJ put it:



"I do not, however, see any basis on which [the nominated suppliers] could be said to have assumed a direct responsibility for the quality of the goods to [the building owners]; such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make."

… Here however I can see no inconsistency between the assumption of responsibility by the managing agents to the indirect names, and that which arises under the sub-agency agreement between the managing agents and the members' agents, whether viewed in isolation or as part of the contractual chain stretching back to and so including the indirect names. For these reasons, I can see no reason why the indirect names should not be free to pursue their remedy against the managing agents in tort under the *Hedley Byrne* principle.'

**[346]** The earlier decision of the Court of Appeal in *Pacific Associates Inc v Baxter* [1989] 2 All ER 159, [1990] 1 QB 993 illustrates the way in which a contract between two parties may affect the existence of a duty of care between one of those parties and a third party. In that case the contractor sought to bring a claim in tort against a firm of engineers who acted as the Engineer under the contract between the contractor and the employer. That contract contained a clause disclaiming any liability of the engineer.

**[347]** Purchas LJ said this ([1989] 2 All ER 159 at 170, [1990] 1 QB 993 at 1010–1011):

> '… where the parties have come together against a contractual structure which provides for compensation in the event of a failure of one of the parties involved, the court will be slow to superimpose an added duty of care beyond that which was in the contemplation of the parties at the time that they came together. I acknowledge at once the distinction, namely where obligations are founded in contract they depend on the agreement made and the objective intention demonstrated by that agreement whereas the existence of a duty in tort may not have such a definitive datum point. However, I believe that in order to determine whether a duty arises in tort it is necessary to consider the circumstances in which the parties came together in the initial stages at which time it should be considered what obligations, if any, were assumed by the one in favour of the other and what reliance was placed by the other on the first. The obligations do not, however, remain fixed subject only to specific variations as in the case of contract. I would not exclude a change in the relationship affecting the existence or nature of a duty of care in tort.'

**[348]** He said ([1989] 2 All ER 159 at 171, [1990] 1 QB 993 at 1011):

> 'The central question which arises here is: against the contractual structure of the contract into which the contractor was prepared to enter with the employer, can it be said that it looked to the engineer by way of reliance for the proper execution of the latter's duties under the contract in extension of the rights which would accrue to it under the contract against the employer? In other words, although the parties were brought into close proximity in relation to the contract, was it envisaged that a failure to carry out its duties under the contract by the engineer would foreseeably cause any loss to the contractor which was not properly recoverable by it under its rights against the employer under the contract?'

*[2010] IP & T 597 at 665*

**[349]** Ralph Gibson LJ said ([1989] 2 All ER 159 at 187, [1990] 1 QB 993 at 1032):

> 'Nevertheless, in agreement with Purchas LJ, it seems to me to be neither just nor reasonable in the circumstances of the contractual terms existing between the contractor and the employer (absent the disclaimer clause) to impose a duty of care on the engineer to the contractor in respect of the matters alleged in the statement of claim, namely the alleged failure to certify and final rejection of the plaintiff contractor's claims. So to do would be to impose, in my judgment, a duty which would cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered, including in particular the machinery for settling disputes.'

**[350]** Russell LJ expressed the question in these terms ([1989] 2 All ER 159 at 191, [1990] 1 QB 993 at 1037):

> 'In my opinion the following question is worthy of being posed. Given the contractual structure between the contractor and the employer, can it be fairly said that it was ever within the contemplation of the contractor that, outside the contract, it could pursue a remedy against the engineer?'

**[351]** In addition [1989] 2 All ER 159 at 179, [1990] 1 QB 993 at 1022–1023 Purchas LJ considered what had been said about the existence of an exclusion clause in a relevant contract:

'Before leaving the question of disclaimer I should refer to the speech of Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 2 All ER 145 at 155, [1986] AC 785 at 817. Lord Brandon was commenting on the speech of Lord Roskill in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 at 214, [1983] 1 AC 520 at 546 in which he was considering whether an exclusion clause in the main contract might affect the position as between one party to that contract and a third party:

"My Lords, that question does not arise for decision in the instant appeal, but in principle I would venture the view that such a clause according to the manner in which it was worded might in some circumstances limit the duty of care just as in the Hedley Byrne case the plaintiffs were ultimately defeated by the defendants' disclaimer of responsibility."

With reference to this passage Lord Brandon said:

"As is apparent this observation was no more than an obiter dictum. Moreover, with great respect to Lord Roskill there is no analogy between the disclaimer in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, which operated directly between the plaintiffs and the defendants, and an exclusion of liability clause in a contract to which the plaintiff is a party but the defendant is not. I do not therefore find in the observation of Lord Roskill relied on any convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A is, but B is not, a party."

There can be no doubt of the force of Lord Brandon's comment as it stands. However, with great respect to the learned and noble Lord the absence of a direct contractual nexus between A and B does not necessarily



exclude the recognition of a clause limiting liability to be imposed on A in a contract between B and C, when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B. The presence of such an exclusion clause while not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract.'

**[352]** As an illustration of a recent consideration of the effect of the contractual structure I was referred to the decision of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) in which the existence of a duty of care between various entities in Chase and Springwell, an investment vehicle, was in issue. At [475] and [498], after referring to *Henderson v Merrett* she dealt with the relevance of the contract upon the existence of a duty of care between Springwell and other Chase entities. She said:

'[475] In my judgment the various terms of the principal contractual documents upon which Chase relies (ie the Relevant Provisions), and which I have set out above clearly show that Springwell and Chase were dealing with each other on a stipulated and accepted basis that, whatever advice or recommendations may have been given by Chase in the course of their trading relationship (ie the sale by CIBL/CMIL to Springwell of emerging markets securities, and the financing by CMB of various of Springwell's purchases), no obligations to give appropriate investment advice, or duties of care as an investment advisor, were being assumed by either the Private Bank, CMB, or the Investment Bank, as the entity actually selling Springwell the

> relevant securities, (ie CIBL or CMIL), whether in relation to Springwell's emerging markets portfolio or, more generally, as to what Springwell should do, given the existence of that portfolio. Thus I accept the submissions made on behalf of Chase that the contractual documentation, whether taken at a straightforward contractual level, or looked at more widely, as an indication as to whether any common law duties of care arose, showed that the parties specifically contracted upon the basis of a trading and banking relationship which negated any possibility of a general or specific advisory duty coming into existence …
>
> [497] Springwell contends that the MFA was entered into between CIBL and Springwell and that it related solely to the forward sale contracts to be entered into between Springwell and CIBL; thus its terms could only avail CIBL, and only in respect of transactions between CIBL and Springwell; that it did not seek to address unleveraged transactions (of which there continued to be a number between Springwell and CIBL and, after April 1996, between Springwell and CMIL); that CIBL was the only Chase entity party to the MFA and that, accordingly, its provisions cannot affect the claims against CMB, CMIL or CMSCI; further, since the MFA ceased to be used after 3 October 1997, and, from that date, leverage was provided pursuant to the GMRA, of all the assets in respect of which Springwell claims, only 8 transactions out of 67 were pursuant to the MFA.
>
> [498] As a matter of contract, the MFA, and the various confirms, govern each purchase of an instrument made under the MFA, and all and



> any claims made in respect thereof. However my primary conclusion, as already set out above, is that the MFA and the MFA confirms (like the other contractual documentation) reflect the broader relationship between the parties, and thus their evidential relevance is not just to the particular contracts entered into thereunder. Rather they support the position that none of the Chase entities were assuming any investment advisory responsibility.'

**[353]** EDS referred me to *McCullagh v Lane Fox & Partners Ltd* (1995) 49 ConLR 124, [1996] 1 EGLR 35 where there was a disclaimer of responsibility in an estate agent's particulars that repeated a (mis)representation that had previously been made orally by the estate agent. Hobhouse LJ held that the disclaimer was effective in that it made it wholly unreasonable for the purchaser to rely on the earlier oral representation. Hobhouse LJ referred to the *Hedley Byrne* case and the speeches of Lord Reid [1963] 2 All ER 575 at 586–587, [1964] AC 465 at 492, Lord Morris [1963] 2 All ER 575 at 595, [1964] AC 465 at 504 and Lord Devlin [1963] 2 All ER 575 at 613, [1964] AC 465 at 533 on the relevance of the disclaimer and summarised the position as:

> 'Thus the relevance of the disclaimer is to negative one of the essential elements for the existence of the duty of care. It negatives the assumption of responsibility for the statement. It implicitly tells the recipient of the representation that if he chooses to rely upon it he must realise that the maker is not accepting responsibility for the accuracy of the representation. The disclaimer is part of the factual situation which the court has to take into account in deciding whether or not the defendants owed a duty of care to the plaintiff. Put another way, the question is whether the plaintiff was entitled to treat the representation as one for which the defendants were accepting responsibility.'

He also drew a distinction between a disclaimer and an exclusion clause when he said:

> 'The judge avoided this conclusion by approaching the disclaimer as if it were a contractual

> exclusion. On such an approach it would need to be strictly construed and the argument was available that it did not as such cover an oral statement. But that is not, in my judgment, the right approach. It is not an exclusion to be construed. The right approach, as is made clear in *Hedley Byrne*, is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement.'

**[354]** I was referred by Sky to the Court of Appeal decision in *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226, [1983] 1 WLR 1136 in which Robert Goff LJ said ([1983] 3 All ER 226 at 228, [1983] 1 WLR 1136 at 1153):

> '… what impact does the existence of the contract have on the claim in tort? In my judgment, on ordinary principles the contract is only relevant to the claim in tort in so far as it does, on its true construction in accordance with the proper law of the contract, have the effect of excluding or restricting the tortious claim.'

I do not consider that case of relevance as it was considering the impact of a contract on a claim by an employee for personal injury based on *Donoghue v Stevenson* principles and not whether a duty of care existed on *Hedley Byrne v Heller* principles.



**[355]** From what I have said it follows that I accept Sky's submission that the correct approach is first to consider whether, absent the prime contract, a duty of care would arise as between the relevant parties, and, if the answer to this question is positive, then to consider whether the existence of and the terms of the prime contract have the effect of excluding or restricting the duty of care.

**[356]** In my judgment, in considering whether a contractual provision affects the existence or the scope or extent of a duty of care, the test is whether the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility or with it being fair, just and reasonable to impose liability. In particular, a duty of care should not be permitted to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

**[357]** I shall consider the question of whether there is a duty of care when I have dealt with a number of points of construction of documents.

## E: ISSUES OF CONSTRUCTION OF DOCUMENTS

### *Introduction*

**[358]** It is convenient at this stage to deal with a number of issues of construction which arise. First, there are issues concerning the terms of the prime contract and, in particular, the entire agreement clause at cl 1.3, the Warranty provision at cl 7.2 and the Limitation and Exclusion provisions in cl 20. Secondly there is a question of the scope of the settlement of claims within the Letter of Understanding. Thirdly there is an issue as to the enforceability and effect of the memorandum of understanding.

### *The entire agreement clause*

**[359]** Clause 1.3.1 of the prime contract under the heading 'Entire Agreement' provides as follows:

> '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 mis-representation.'

***EDS's submission***

**[360]** EDS contend that the entire agreement clause has the following effect upon the claims by SSSL against EDSL:

> (1) No duty of care was owed by EDSL to SSSL in respect of pre-prime contract representations and/or it was not reasonable for SSSL to have relied on such representations when entering into the prime contract.
>
> (2) No claim for non-fraudulent misrepresentation can be advanced in respect of pre-prime contract representations because the entire agreement clause treats such representations as overridden and/or withdrawn and/or of no continuing effect.
>
> (3) Liability to SSSL for non-fraudulent misrepresentation by EDSL is excluded by the entire agreement clause.



**[361]** EDS submit that cl 1.3.1 goes further than fulfilling the purpose of a basic entire agreement clause and contend that:

> (1) If cl 1.3.1 were only intended to limit the contractual terms to those contained in the prime contract, the clause would not need to provide, as it does, that all prior representations are superseded;
>
> (2) If the clause were limited to depriving all pre-contractual discussions, negotiations and statements of having contractual force, the clause would not need to provide that liability for fraudulent misrepresentation was not excluded. That statement strongly suggests that non-fraudulent misrepresentation was being excluded.

**[362]** EDS say that the entire agreement clause has the effect of being an agreement that any representation is withdrawn or overridden or of no legal effect. They refer to the principle that a representor can modify or withdraw a prior representation at any time before the agreement is concluded and refer to the speech of Lord Tucker in *Briess v Woolley* [1954] 1 All ER 909 at 918–919, [1954] AC 333 at 354. They say that there is no reason why he could not do so by suitable wording in the agreement itself and rely on the decision of Moore-Bick LJ in *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [125]

to [128] as illustrating this. They also rely on the decision of Moore-Bick LJ in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at [56], [2006] 2 Lloyd's Rep 511 at [56] which was cited by Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) at [547] to [556].

**[363]** EDS also submit that, in any event, the effect of the entire agreement clause is to exclude EDSL from liability for non-fraudulent misrepresentation in respect of prior representations and rely on the decision of Rix J and the Court of Appeal in *Deepak Fertilisers and Petrochemicals Corp v Davy McKee (London) Ltd* [1998] 2 Lloyd's Rep 139 and [1999] 1 All ER (Comm) 69 at [34], [1999] 1 Lloyd's Rep 387 at [34].

**[364]** For these reasons, EDS submit that the entire agreement clause does more than simply provide certainty as to the terms of the contract between the parties but has the further effect set out above.

***Sky's submission***

**[365]** Sky's case is that the effect of the clause is simply to provide that pre-contractual representations do not form part of the prime contract. They contend that EDS's submission is in error both on the language of the clause itself and on the basis of the authorities.

**[366]** Sky submit that there is consistent case law which demonstrates that entire agreement clauses operate to defeat any suggestion of a collateral warranty or contract or other such side agreement, but they are not effective, without more, to exclude liability for misrepresentation. Sky refer to the decision of the Court of Appeal in *Deepak Fertilisers and Petrochemicals Corp v Davy McKee (London) Ltd* [1999] 1 All ER (Comm) 69, [1999] 1 Lloyd's Rep 387, in particular at [39] and also to *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 at [7] to [8], [2000] 3 EGLR 31 at [7] to [8].

**[367]** Whilst Sky accept that every clause is be construed on its own terms, they submit, in light of the authorities and the terms of cl 1.3.1, that the first sentence is not effective to exclude liability for misrepresentation, fraudulent, negligent or innocent. Rather Sky submit that the clause does not deal with exclusion of liability for misrepresentation.



**[368]** In relation to EDS's submission that the exclusion of liability for non-negligent misrepresentation arises by inference from the wording of the last sentence of cl 1.3.1, Sky submit that, whilst that inference is, in theory possible, the natural and logical inference is that the final sentence has been included out of a mistaken abundance of caution because the first sentence does not exclude liability for misrepresentation.

**[369]** Whilst Sky accept that since *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, [1980] AC 827, the law has moved away from adopting unnecessarily strained constructions of exemption clauses, they say that exemption clauses are construed strictly giving 'due allowance [to] the presumption in favour of the implied primary and secondary obligation', [1980] 1 All ER 556 at 568, [1980] AC 827 at 851 per Lord Diplock.

**[370]** Sky also rely on the fact that any ambiguity in an exemption clause is to be resolved contra proferentem and refers to Lewison *The Interpretation of Contracts* (2nd edn, 1997) para 12.05. They also draw support from Lord Morton's speech in *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305, [1952] AC 192 that an exemption clause will not relieve a party from liability for negligence unless it does so expressly

or by necessary implication.

**[371]** Sky submit therefore that the entire agreement clause is not effective to exclude EDSL's liability to SSSL for misrepresentation of any sort. Even if it were effective to exclude EDSL's liability for pre-contractual misrepresentations, Sky submit that it cannot, on any view, extend to the representation made in cl 7.2 of the prime contract itself.

***Analysis***

**[372]** The issue in this case is whether cl 1.3.1 of the prime contract excludes liability for misrepresentation. Whilst the effect of that clause depends on the particular wording, it is of assistance to review the principles that the courts have applied in construing similar provisions.

**[373]** In *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611, [2000] 3 EGLR 31 Lightman J held that an entire agreement prevented a claim based upon a collateral warranty. The clause in question differs greatly from the one in this case. In coming to his conclusion Lightman J said [2000] 3 EGLR 31 at 33:

> 'The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search, and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.'

**[374]** He also observed [2000] 3 EGLR 31 at 33 that 'An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force cannot affect the status of a statement as a



misrepresentation'. He referred to the leading case of *Deepak Fertilisers and Petrochemicals Corp v Davy McKee (London) Ltd* [1998] 2 Lloyd's Rep 139, affirmed [1999] 1 All ER (Comm) 69, [1999] 1 Lloyd's Rep 387 in which the relevant clause, cl 10.16, read as follows:

> 'This CONTRACT comprises the entire agreement between the PARTIES, as detailed in the various Articles and Annexures and there are not any agreements, understandings, promises or conditions, oral or written, expressed or implied, concerning the subject matter which are not merged into this CONTRACT and superseded hereby. This CONTRACT may be amended in the future only in writing executed by the PARTIES.'

**[375]** The Court of Appeal held that this provision was not sufficient to exclude representations. Stuart-Smith LJ giving the judgment of the court said 'But we do not think the opening words themselves exclude misrepresentations and they cannot be brought within the specific words. In our judgment the judge was right on his construction of art 10.16'.

**[376]** At first instance Rix J had said this about cl 10.16 [1998] 2 Lloyd's Rep 139 at 167:

> 'Deepak submit that this article excludes liability for neither misrepresentation nor collateral warranties, and that in any event any such exclusion would be limited by the phrase 'concerning the subject matter'. Davy submit that it excludes liability for all pleaded misrepresentations and collateral warranties. It is common ground that it does not cover tortious liability in negligence.
>
> I agree with Deepak's submission so far as concerns misrepresentation. Thus the clause's language—"agreements, understandings, promises or conditions"—is not apt, expressly or impliedly, to include representations.
>
> This was the view of Browne-Wilkinson J in [*Alman and Benson v Associated Newspapers Group Ltd* (20 June 1980, unreported)]:
>
> "Clause 11(1) provides that the written contract constitutes 'the entire agreement and understanding between the parties with respect to all matters therein referred to'. It is to be noted that it does not in terms refer to representations. The Defendants, however, submit that the word 'understanding' covers the representation alleged in this case. I cannot accept this submission. Although it is true that, in one sense, the common assumption by all parties that the Plaintiffs were to be in charge of the day-to-day running could be called 'an understanding' between them, the Plaintiffs are not suing on that bilateral 'understanding', but on the representation of intention implicit in it. Clause 11(1) plainly excludes any contractual claim based on a bilateral understanding, but it does not go further. In my judgment the word 'understanding' is directed to excluding any claims arising from warranties collateral to the main agreement. If it were designed to exclude liability for misrepresentation it would, I think, have to [be] couched in different terms, for example, a clause acknowledging that the parties had not relied on any representations in entering into the contract. I therefore hold that the word 'understanding' in this contract is not apt to cover representations, and accordingly does not exclude the Plaintiffs' claim."
>
> The addition of the words "promises or conditions" in this case seems to me to take the matter no further: neither of those expressions refers to a



> representation as distinct from some undertaking. In *Thomas Witter Ltd v TBP Industries Ltd* (1994) 12 Tr L 145 at pp 167–170 Jacob J held that even a clause which goes on to provide for an acknowledgement that a party has not been induced to enter into a contract by any other than scheduled representations does not exclude liability in misrepresentation arising out of some other representation, if that party can succeed evidentially in proving, despite that acknowledgment, that he was induced by it. He said (at p 168C):
>
> "Unless it is manifestly made clear that a purchaser has agreed only to have a remedy for breach of warranty I am not disposed to think that a contractual term said to have this effect by a roundabout route does indeed do so. In other words, 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." '

**[377]** In *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) Moore-Bick LJ considered a provision at s 14.10 of a contract which provided as follows:

> 'This Agreement together with the Ancillary Agreements constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties. 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 … Nothing in this Section 14.10 shall affect any Party's liability for fraud or fraudulent misrepresentation.'

**[378]** He then said at [127] to [128]:

> 'While recognising that this clause specifically excludes fraud from the scope of its operation, Mr Vos submitted that it clearly was intended to prevent the purchaser from seeking relief of any kind based on innocent or negligent misrepresentations. He argued that either MN relied on representations or it did not. It made no sense to say that MN did not rely on representations if they were made innocently or negligently, but did rely on representations if they were made fraudulently.
>
> I can see the logic of that submission, but in my view it fails to have sufficient regard to the parties' intentions in including this provision in the agreement. The first two sentences are in my view intended to make it clear that the agreement contains the definitive statement of the parties' rights and liabilities arising out of the negotiations. Although the second sentence is worded in terms of an absence of any representations etc outside the agreement itself, it does in fact operate as a contractual renunciation of the right to rely on anything said or done in the course of the negotiations as giving rise to a ground of complaint, or indeed for any other purpose. To that extent the clause does alter the parties' positions,



> but it is subject to the exception in the final sentence which makes it clear that they did not intend to give up the right to hold each other liable for fraud or fraudulent misrepresentations made before entering into the agreement. For these reasons I am satisfied that s 14.10 does not prevent MN from holding Freightliner liable for the fraud of Mr Ellis.'

**[379]** I now turn to consider whether the entire agreement clause in this case has the effect of modifying or withdrawing the representations which were alleged to have been made pre-prime contract.

**[380]** I accept the principle that, as stated by Lord Tucker in *Briess v Woolley* [1954] 1 All ER 909 at 918–919, [1954] AC 333 at 354 that a representor can modify or withdraw a prior representation at any time before it is relied on. It is obviously right that if a representor wrongly represents something then he must be able to modify or withdraw it before it is relied upon. Does the entire agreement clause have that effect?

**[381]** The relevant words of cl 1.3.1 are:

> '… 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 …'

**[382]** Those words do not, in my judgment, amount to an agreement that representations are withdrawn, overridden or of no legal effect so far as any liability for misrepresentation may be concerned. The provision is concerned with the terms of the agreement. It provides that the agreement represents the entire understanding and constitutes the whole agreement. It is in that context that the agreement supersedes any previous representations. That is, representations are superseded and do not become terms of the agreement unless they are included in the agreement. If it had intended to withdraw representations for all purposes then the language would, in my judgment, have had to go further.

**[383]** In *MAN Nutzfahrzeuge AG v Freightliner Ltd* the clause went wider and stated that:

> '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 …'

That expressly referred to the fact that the parties were not relying on any other information or discussion in entering into and completing the transactions. In his judgment Moore-Bick LJ said in relation to this second sentence:

> 'Although the second sentence is worded in terms of an absence of any representations etc outside the agreement itself, it does in fact operate as a contractual renunciation of the right to rely on anything said or done in the course of the negotiations as giving rise to a ground of complaint, or indeed for any other purpose.'



It is therefore the 'contractual renunciation of the right to rely' which makes the difference in that case. That is absent here.

**[384]** Whilst I accept that there can be a contractual estoppel, I do not consider that EDS's reliance on *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 takes the matters further. The principle was summarised by Moore-Bick LJ at [56] in these terms 'There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not'.

**[385]** In this case the 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 of the agreement or collateral contracts from having contractual effect. It did not supersede those matters so far as there might be any liability for misrepresentation based on them.

**[386]** Does the clause have the effect of excluding a duty of care between EDSL and SSSL in relation to representations? There is no doubt that the clause does refer expressly to representations unlike *Deepak Fertilisers and Petrochemicals Corp v Davy McKee (London) Ltd* and *Alman and Benson v Associated Newspapers Group Ltd* but like *Thomas Witter Ltd v TBP Industries Ltd* and *MAN Nutzfahrzeuge AG v*

*Freightliner Ltd*. Also, like *MAN Nutzfahrzeuge AG v Freightliner Ltd* it concludes with a statement that it does not exclude liability for fraudulent misrepresentation. It therefore falls somewhere in between the decided cases. However I have come to the conclusion that it does not have the effect of excluding liability for non-fraudulent misrepresentation. First, I do not consider for the reasons set out above that it covers liability for misrepresentation rather than contractual liability for representations.

**[387]** Secondly, while there is reference to representations, there is nothing in the clause that indicates that it is intended to take away a right to rely on misrepresentations. As Browne-Wilkinson J said in *Alman and Benson v Associated Newspapers Group Ltd*:

> 'If it were designed to exclude liability for misrepresentation it would, I think, have to [be] couched in different terms, for example, a clause acknowledging that the parties had not relied on any representations in entering into the contract.'

Equally, as Jacob J stated in *Thomas Witter Ltd v TBP Industries Ltd*:

> 'In other words, 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.'

I consider that clear words are needed to exclude a liability for negligent misrepresentation and that this clause does not include any such wording. As Sky submit exclusion clauses are construed strictly and clear expression is needed to exclude liability for negligence: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 851 per Lord Diplock and Lord Morton's well-known test in *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305, [1952] AC 192.

**[388]** Thirdly, the reference in the final sentence to 'This clause does not exclude liability of either party for fraudulent mis-representation' is obviously an indication that the previous words of the clause would otherwise have that



effect. However, in the absence of words which do have that effect, I do not consider that such a statement can create an exclusion which it then negatives. Put another way, on my construction of the clause it does not exclude liability for fraudulent misrepresentation. It would be strange if the addition of the last sentence then had the effect of imposing liability for non-fraudulent misrepresentation when what it says is correct. The clause does not exclude liability of either party for fraudulent misrepresentation.

**[389]** As a result, for the reasons set out above, I do not consider that the entire agreement clause precludes SSSL from advancing a claim for negligent misrepresentation or misstatement against EDSL.

***Clause 7.2 of the prime contract***

**[390]** Clause 7.2 provides:

> '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.'

**[391]** EDS rely on this clause to show that the parties incorporated into the prime contract as warranties any representations which they considered to be of importance. For the reasons given above I consider that this provision is an example of a matter which is incorporated as a term of the prime contract and therefore supersedes any prior representations for the purpose of forming a term of the contract or a collateral contract but not in relation to any claim for misrepresentation.

**[392]** Sky rely on cl 7.2 for a different purpose. Sky submit that, as between EDSL and SSSL, cl 7.2 of the prime contract gives rise to an estoppel. This estoppel argument formed one of the amendments to para 51 of the particulars of claim for which permission was given on 7 September 2007, but that EDS's responsive defence at para 154 does not contain any response to this amendment.

**[393]** Sky say that by the terms of cl 7.2, EDSL made a clear and unequivocal statement 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'. In addition EDSL 'acknowledges that SSSL relies on the Contractor's knowledge, ability and expertise in the performance of its obligations under this Agreement.'

**[394]** Sky say that the first part of the statement amounts to a representation of fact that EDS possessed certain knowledge, ability and expertise. In my judgment that provides for a contractual remedy by way of breach of warranty but cannot, in itself, give rise to any independent claim by way of misrepresentation.

**[395]** In relation to the second part EDS contend that it does not contain an acknowledgment of reliance at the point of entering into the prime contract, but rather contains merely an acknowledgment that SSSL would rely in the future on EDS's knowledge, ability and expertise. Sky submit that this is equivalent to saying that SSSL 'will rely' rather than that SSSL 'relies' on EDSL's knowledge, ability and expertise which is not what the clause says.

**[396]** Sky contend that the statement was a representation of fact that SSSL were there and then in fact relying on that knowledge, ability and expertise. Sky also say that it is clear from the words that the representation was of a



nature to induce SSSL, was made with an intention to induce SSSL and did in fact induce SSSL to alter its position to its detriment, by entering into the prime contract with EDSL.

**[397]** I consider that the reference to an acknowledgement by EDSL that SSSL 'relies' is, as Sky submit, an acknowledgment that Sky was relying on EDSL's knowledge, ability and expertise at the time of the prime contract. I also consider that, to the extent that EDSL deny that SSSL so relied at the time of the prime contract, that would contradict this statement and EDSL would be estopped from asserting that SSSL did not rely on EDSL's knowledge, ability and expertise.

***Limitation and exclusion of liability: cl 20 of the prime contract***

**[398]** Clause 20 contains two provisions which are relied on by EDS. First, cl 20.2 which provides that 'Save as provided in Cl 20.1, 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'.

**[399]** Secondly, cl 20.5.1 which provides as follows:

> 'Subject to Clauses 20.1, 20.2, 20.3, 20.4 and 20.6, the total aggregate liability of each party at the time of the relevant claim (other than SSSL's obligations under Clause 10) and its officers, employees and agents to the other 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:
>
> (a) in respect of the Contractor, the sum of all amounts paid to the Contractor under Clause 10 at the time of the relevant claim (the 'Liability Cap'); and …'

**[400]** Clause 20.5.2 provides in following terms the practical effect of which is that the Liability Cap shall be not greater than £30 million 'Subject to Clauses 20.5.3, 20.6 and 20.7, the Liability Cap for the Term shall not at any time be less than £6 million (six million pounds), nor greater than £30 million (thirty million pounds)'.

**[401]** Clause 20.8 defines 'liability' to mean 'any liability, whether under statute or in tort (including negligence), contract or otherwise …'

***Clause 20.2***

**[402]** EDS submit that cl 20.2 affects the claims which are brought by SSSL against EDSL in this case.

**[403]** EDS say that the losses claimed by Sky, for example at para 108.1 of the particulars of claim, fall into three categories: development costs of implementing the CRM system, operating costs and loss of profits and other business benefits.

**[404]** EDS contend that, absent deceit, SSSL's claims against EDSL for lost profits and business benefits in respect of reduced Call Handling Costs are excluded by cl 20.2.

**[405]** Sky contend that all losses are 'direct losses' and are therefore outside cl 20.2.

**[406]** EDS submit that Sky's argument, which depends on a distinction between direct and indirect losses, should be rejected. They say that cl 20.2



does not limit the exclusion to indirect losses. It specifically excludes 'loss of profits, revenue, business, goodwill and/or anticipated savings', which does not depend on whether such losses are categorised as direct or indirect.

**[407]** EDS say that SSSL's claim in respect of Call Rate Reduction benefit is one for the loss of savings in the form of reduced staff costs which Sky say would have been made had the CRM system been in place earlier. EDS submit that this is a claim for loss of 'anticipated savings' which falls within cl 20.2(ii).

**[408]** Sky submit that the losses arise within the first limb of *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145, [1843–60] All ER Rep 461 and are therefore direct losses. They say that they are therefore not 'consequential' or 'indirect' which phrases refer to losses within the second limb of *Hadley v Baxendale*. They refer to the decision in *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, 8 BLR 20 and to subsequent court of Appeal authorities which, they submit, have consistently upheld this view.

**[409]** I accept that the reference to 'consequential' losses in cl 20.2(i) is a reference to 'indirect' losses within the second limb of *Hadley v Baxendale*, as consistently held in the Court of Appeal starting from *Millar's Machinery Co Ltd v Way & Son* (1935) 40 Com Cas 204 and *Croudace v Cawoods* and the recent cases cited in *McGregor on Damages* (17th edn, 2003) at para 1–037.

**[410]** However, cl 20.2(ii) excludes liability for 'loss of profits, revenue, business, goodwill and/or anticipated savings' and, as EDS submit, that part of cl 20.2 is a separate exclusion and does not depend on such losses also being 'consequential' or 'indirect' under cl 20.2(i).

**[411]** EDS submit that SSSL's claim in respect of Call Rate Reduction benefit falls within the exclusion in cl 20.2(ii). That claim is based on the premise that the Sky CRM system reduces inbound subscriber calls to the call centres, thereby enabling Sky to reduce the number of CAs required to answer calls. Sky also claim that the reduction in calls will enable it to reduce the number of 'CTI Support' and 'Sales Support' staff who manage the CAs. I accept EDS's submission that cl 20.2(ii) would exclude liability for this loss on the basis that it is loss of 'anticipated savings'. Thus, except for claims in deceit, cl 20.2(ii) has the effect of excluding EDSL's liability to SSSL for Call Rate Reduction benefits.

***Clause 20.5***

**[412]** Sky plead as follows in relation to the cap:

> 'On a true construction of the Contract, clause 20 is effective to limit to £30 million EDSL's liability to SSSL in respect of breach of contract and negligent misrepresentation, but is not effective to limit: (i) EDSL's liability to SSSL for deceit; (ii) any liability of EDSC; or (iii) any liability to BSkyB Ltd.'

**[413]** In opening oral submissions Sky said that a claim based on negligent misrepresentation, under the Misrepresentation Act 1967 or at common law, or a claim for breach of contract would be subject to the cap of £30 million.

**[414]** It is evident that Sky accept that the cap applies to the following claims against EDSL:

> (1) SSSL's claim for negligent misrepresentation or under the Misrepresentation Act 1967 pre-prime contract.
>
> (2) SSSL's claim for negligent misrepresentation pre-letter of agreement and for breach of contract prior to July 2001.

(3) SSSL's claim for damages for repudiatory or non-repudiatory breach of the prime contract as varied by the letter of agreement.

**[415]** It is common ground that the cap does not apply to any claim by SSSL or BSkyB against EDSL or EDSC for fraudulent misrepresentation pre-prime contract.

**[416]** On their pleaded case Sky also contend that the cap does not apply to a claim by BSkyB against EDSL or EDSC for negligent misrepresentation pre-prime contract or negligent misrepresentation pre-letter of agreement. They also contend that the cap does not apply to claims for breach of the warranties in the memorandum of understanding.

**[417]** As a matter of privity of contract, Sky are evidently correct that a term in the prime contract cannot affect liability in relation to a claim for negligent misrepresentation against EDSC or by BSkyB who are not parties to the prime contract. Whether there is such liability is an issue I deal with below.

**[418]** In relation to the warranties under the memorandum of understanding, as I have found that there are no such claims, the point does not arise. In fact, it reinforces the view that the application of the Cap to any claim under the memorandum of understanding is precisely the type of matter which would have been dealt with in the agreement which the parties were seeking to negotiate.

***Scope of settlement in the letter of agreement***

***Introduction***

**[419]** There is an issue between the parties concerning the terms of the settlement provisions in para 17 of the letter of agreement.

**[420]** Sky submit that para 17 means that all known and unknown claims which SSSL had or may have had against EDSL for any breach of the prime contract were compromised.

***EDS's submissions***

**[421]** EDS submit that para 17 settled (1) All known claims by SSSL against EDSL for breach of contract; (2) All unknown claims by SSSL against EDSL up to 17 June 2001 for breach of contract; and (3) All known claims and all unknown claims (in the latter case up to 17 June 2001) which SSSL could advance against EDSL on the basis of breach of contract.

**[422]** EDS say that as a matter of construction or by way of an implied term the reference to 'claims … for any breach of the prime contract' in para 17 is a reference to all complaints which could be advanced on the basis of breach of contract. EDS therefore contend that not only have breach of contract claims brought by SSSL been compromised but so have the claims for deceit and/or negligent misrepresentation, since the matters relied upon as founding such claims would, if proved, constitute a breach of the warranties and obligations contained in cll 7.2, 7.3.8, 7.9 and 15.1 of the prime contract.

**[423]** EDS say that the phrasing 'all claims … for any breach of the prime contract' is consistent with the settlement covering not only claims in contract, but also claims in tort where the matters complained of constitute a breach of the prime contract. They submit that SSSL should not be entitled to circumvent the settlement provisions of the letter of agreement by choosing to frame its claim in tort rather than contract and rely on the decision of the Court of Appeal in *Bottin (International) Investments Ltd v Venson Group plc* [2004] EWCA Civ 1368.



***Sky's submissions***

**[424]** Sky say that the clause is clear and unambiguous and there is no basis on which to write words into the clause, as EDS seek to do. Sky also say that if the intention had been to compromise all claims arising under contract and tort, it would be unusual to do so by saying that the claims being compromised were all claims for breach of contract and claims 'which could be advanced on the basis of breach of contract'. Sky refer to the decision of the House of Lords in *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251 which, they say, supports their submission.

***Analysis***

**[425]** Paragraph 17 of the letter of agreement provides:

> 'The terms set out in this letter have been agreed between us, subject to the approval of our respective managements, 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.'

**[426]** On its face therefore the settlement under this paragraph was expressed to be settlement of claims for any breach of the prime contract.

**[427]** In construing the document, I bear in mind the principles of construction which have been set out by Lord Hoffmann in *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors'*

*Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 at 912 and *Bank of Credit and Commerce International SA (in liq) v Ali BCCI v Ali* at [39]. EDS submit that, given that the terms of the letter of agreement made provision for substantial sums by way of credit or payment by EDSL to SSSL then the intention of the agreement was to wipe the 'slate clean'.

**[428]** However, Sky say that this is not what the parties agreed. They refer to the decision in *Bank of Credit and Commerce International SA (in liq) v Ali* where the House of Lords had to consider the words of a release which was: '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' and decide whether this included damages for claims for misrepresentation and stigma damages.

**[429]** The House of Lords was faced with a situation which Lord Nicholls expressed in this way at [23]:

> 'The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean. Likewise, the problem which has arisen in this case is typical. The problem concerns a claim which subsequently came to light but whose existence was not known or suspected by either party at the time the release was given.'



**[430]** The House of Lords held, Lord Hoffmann dissenting, that the question to be determined was what the objective intention of the parties was in the context of the circumstances in which the agreement had been entered into and that neither party could realistically have supposed that the claim for damages for disadvantage on the labour market was a possibility and could not have intended the provision to apply to such claims.

**[431]** Lord Bingham said at [19]:

> 'On a fair construction of this document I cannot conclude that the parties intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. 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.'

**[432]** EDS rely on the decision of the Court of Appeal in *Bottin (International) Investments Ltd v Venson Group plc* [2004] EWCA Civ 1368 in which there was a claim for breach of warranties in a share sale agreement including one at cl 3(a) under which warranties were given and it was acknowledged that the other party was entering into the agreement in reliance on the warranties and they may be treated as representations inducing the party to enter into the agreement. The agreement contained provisions requiring, as a pre-condition for the bringing of a claim for breach of warranty, notice of the claim to be given within a particular time period.

**[433]** One of the issues in that case was whether the claimant could avoid the application of the notice provision by bringing the claim in tort for misrepresentation rather than in contract for breach of warranty. In giving a judgment with which the other members of the court agreed, holding that the claimant could not do so, Peter Gibson LJ said at [65]:

> 'To my mind it makes no commercial sense for the Agreement to impose conditions as to the giving of notice of a breach of warranty and as to the commencement of proceedings for such breach and limiting the maximum liability if Bottin was intended to be left free of those conditions and those time limits and the limits on liability by treating the same warranties as representations. Mr Glick was, in my judgment, plainly right to submit that the obvious commercial purpose in the conditions and limits was to enable the Warrantors to know that they would not be sued on the warranties if no notice was served in time and proceedings were not brought in time and that, if they were sued, there was a quantified limit to their liability. That purpose would be frustrated if the claim for breach of warranty could be regarded as a claim in misrepresentation. The final words of cl 3(a) would permit a claim for rescission of the Agreement. That gives sufficient effect to those words, without having to give them the meaning contended for by Mr. Wardell which flouts commercial good sense.'

**[434]** Considering the terms of the letter of agreement objectively, the parties were intending to amend the terms of the prime contract in terms of the milestones and payment provisions. The parties were therefore looking at the terms of the prime contract and making a compromise of claims for breach of the prime contract. There was no mention of any other claims and no wording that came close to the wording of the clause in *Bank of Credit and Commerce International SA (in liq) v Ali*. The words on their ordinary meaning



and construed against the matters known to both parties at the date of the agreement would not be apt to cover a claim for misrepresentation. For parties to intend to exclude claims in negligence requires clear words showing that intention: see *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305 at 312, [1952] AC 192 at 211 (PC). In addition, there is no wording which could justify exclusion of a claim in deceit. Indeed a clause which purports to exclude claims for deceit is generally ineffective at common law: see *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at [16], [2003] 1 All ER (Comm) 349 at [16] per Lord Bingham, at [76] per Lord Hoffmann and at [122] per Lord Scott.

**[435]** On a true construction of the terms of para 17 that provision is not sufficient to exclude claims for negligent or fraudulent misrepresentation. Nor do I consider that an exclusion clause to that effect can be implied into para 17. The test for an implied term may now be summarised as follows, from the principles as to the circumstances in which a court will imply a term which were set out by Lord Simon in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20:

> '… for a term to be implied, the following conditions (which may overlap) must be satisfied:
>
> (1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that “it goes without saying”;
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract.'

**[436]** I do not accept that requirements (2) or (3), which are alternatives (see: *Bradmount Investments Ltd v Williams de Broe plc* [2005] EWHC 2449 (Ch)), are satisfied. The purpose of the settlement was to wipe the slate clean in respect of claims for breach of the prime contract. If the parties wished to, they could have incorporated words to include wider claims such as claims which could be advanced by way of breach of contract. They did not do so. It is not for the court to rewrite their bargain. Whether Sky can bring a claim to circumvent para 17 depends on the wording of para 17 and the nature of the claim. If the court re-wrote an exclusion of contractual claims to exclude all claims which could be framed in that way, that would be to change the bargain which the parties had made. There is nothing necessary or obvious in such a term.

**[437]** I therefore find that para 17 of the letter of agreement is an exclusion clause for claims for breach of the prime contract between EDSL and SSSL as expressly set out in that clause but is not an exclusion of 'All known claim and all unknown claims (in the latter case up to 17 June 2001) which SSSL could advance against EDSL on the basis of breach of contract', as EDS contend.

***The memorandum of understanding***

***Introduction***

**[438]** Following a CRM Executive Steering Group Meeting on 20 December 2001 Sky decided to undertake a review of the project involving EDS, Chordiant, Lucent and Arthur Andersen, to consider how best to take the project forward. That process culminated in a 'CRM Programme Review' on 18 February 2002. There was a series of meetings between Sky and EDS on 15,



22 and 26 February 2002. The process ended with Sky taking over as systems integrator on 6 March 2002 and to Richard Freudenstein and Steve Leonard signing a memorandum of understanding on 26 March 2002.

**[439]** EDS contends that in relation to the memorandum of understanding:

(1) There was no termination by Sky of the prime contract, but rather that the memorandum of understanding represented a consensual variation by the parties of the prime contract, which continued in force save to the extent it was inconsistent with the memorandum of understanding;

(2) That the memorandum of understanding was or became a binding agreement and effected a compromise as between EDSL and SSSL so that 'EDSL was discharged from liability for breach of contract in respect of past performance save for claims for breach of warranty' under the continuing warranties contained in the memorandum of understanding; and

(3) That the memorandum of understanding preserved certain limited warranties in relation to certain work that EDS had carried out prior to the memorandum of understanding.

**[440]** Sky's position is set out in the reply and is:

(1) The memorandum of understanding was a non-binding statement of the 'agreement in

principle' which the parties hoped in the course of further negotiations to translate into a binding agreement which focused solely on the future, being concerned only with the nature of the parties' relationship following the removal of EDS as systems integrator.

(2) From the face of the memorandum of understanding itself and from its history and context and from the discussions that took place between the parties at the time, the memorandum of understanding does not have the effect of and was never intended or understood by the parties to have the effect of compromising any claims that Sky had or might have had against EDS.

**[441]** In summary the issues in relation to the memorandum of understanding are as follows:

(1) Did the memorandum of understanding constitute a binding agreement on 6 and/or 26 March 2002 or by the conduct of the parties in accepting the terms of the memorandum of understanding? Is EDS estopped from contending this?

(2) Did the memorandum of understanding amount to a compromise of any rights or liabilities, and if so of what rights or liabilities?

(3) What is the nature and effect of the ongoing warranties which were provided by EDS in the memorandum of understanding?

**[442]** It is common ground that the memorandum of understanding does not affect Sky's deceit claims or Sky's claims for negligent misrepresentation. It is only relevant to the claim advanced by SSSL for breach of contract following the letter of agreement.

***Did the memorandum of understanding constitute a binding agreement?***

**[443]** The memorandum of understanding was signed on 26 March 2002 by Richard Freudenstein and Steve Leonard and stated at the head of the front page that it was 'without prejudice and subject to contract'.

*[2010] IP & T 597 at 683*

**[444]** Sky submit that it is a long established principle of English law, as summarised in Lewison *The Interpretation of Contracts* (3rd edn) at para 15.03 that 'save in exceptional circumstances, an arrangement made subject to contract means that the exchange of a formal written contract is a condition precedent to any legal liability'. Sky say that there are no exceptional circumstances in this case to cause a departure from the ordinary rule but rather, it is plain that the parties understood and intended that a formal written contract would be exchanged and that the memorandum of understanding would be an 'agreement in principle' only.

**[445]** Sky also refer to the second paragraph of the memorandum of understanding which records:

'After three meetings with representatives at EDS, both parties agree on the need to renegotiate and redraft the contract between them for SSSL's call centres. Both parties will strive to renegotiate and agree a new form of contract within the next three months. We both accept that that new agreement will be consistent with the following principles.'

**[446]** Sky submit that the memorandum of understanding could not have become binding on signature, as EDS suggest, since such a conclusion is inconsistent with it being 'without prejudice and subject to contract'.

**[447]** Sky also submit that EDS are estopped from contending to the contrary, since the memorandum of understanding was signed on the basis of the representation made by David Walter, the in-house lawyer for EDS in his e-mail of 25 March 2002 to Caroline Waterer, the in-house lawyer for Sky. Sky say that it signed the memorandum of understanding in reliance on that representation and that in all the circumstances, it would be inequitable for EDS to resile from that representation.

**[448]** EDS submit that a binding agreement on the terms of the memorandum of understanding, as it then stood, was reached on 6 March 2002 when Steve Leonard and Richard Freudenstein had their telephone conversation, as a result of which Sky immediately took over the systems integrator role from EDS.

**[449]** Alternatively, they submit that the memorandum of understanding became binding on the terms signed on 26 March 2002 and that, if there was a binding agreement on 6 March 2002, then the signed version represented a minor variation to that agreement. EDS refer to a change to the first section of the memorandum of understanding which, following that change, provided:

> 'After three meetings with representatives at EDS, both parties agree on the need to renegotiate and redraft the contract between them for SSSL's call centres. Both parties will strive to renegotiate and agree a new form of contract within the next three months. We both accept that that new agreement will be consistent with the following principles: …'

**[450]** EDS say that this change reflected the proposal by Sky, accepted by EDS, that there needed to be a new long form contract incorporating the relevant provisions of the prime contract and the letter of agreement with the amendments agreed in the memorandum of understanding.

**[451]** EDS submit that the presence of the words 'subject to contract' at the head of the memorandum of understanding reflected the parties' intention as expressed in the first section of the memorandum of understanding that there would need to be an agreement making changes to the prime contract as varied in line with the principles which were set out in five bullet points.

*[2010] IP & T 597 at 684*

**[452]** However, EDS submit that the second section of the memorandum of understanding became binding, notwithstanding that the new long form contract had not been signed. EDS say that this section did not contemplate the need for any further agreement but stated: 'What follows is the agreed way forward for services provided from the date of this memo, and this is based on the discussions that have been on going with EDS and the conditions SSSL is willing to accept …'

**[453]** EDS say that the terms of the second section were intended to have immediate effect and the parties acted upon those terms. EDS refer to the third section of the memorandum of understanding and say that it returned to the principles for further arrangements in the proposed revised contract.

**[454]** EDS refer to the concluding words of the signed memorandum of understanding which stated that: 'We are both happy to have reached this agreement and are looking forward to agreeing further revised terms for our contract.' EDS say that this final sentence reflected the fact that the memorandum of understanding contained terms that the parties agreed should have immediate effect as set out in the second section and terms, set out in the first and third sections, which would form the basis for further negotiations

culminating in a redraft of the prime contract.

**[455]** On this basis EDS say that the parties reached a binding agreement for the provision of services from the date of the signed memorandum of understanding in the terms set out.

***Background to the memorandum of understanding***

**[456]** In February 2002 there was a series of three meetings between EDS and Sky which ultimately led to the memorandum of understanding. These meetings took place on 15, 22 and 26 February 2002 (DCC/203). The background to those meetings was as follows.

**[457]** At the CRM Executive Steering Group meeting on 20 December 2001, EDS had reported an eight week slippage in the implementation of phase 2 and was proposing a change in the approach to one of Joint Application Development (JAD). Sky in response questioned the appropriateness of the 'Big Bang' approach in which all the phase 2 CRM functionality was delivered at the same time. There followed a review which culminated in presentation of a CRM Programme Review dated 18 February 2002 by Simon Post and Jeff Hughes to Tony Ball and Richard Freudenstein. The Review made recommendations which included a change in implementation approach from a 'big bang' to an incremental approach and also that Sky should take a more active role in the project which it was said meant that 'commercial and legal changes maybe required'. The review set out the two possibilities as being the Big Bang approach with EDS as the systems integrator and an incremental approach with EDS not being the systems integrator.

**[458]** Meetings took place between Sky and EDS commencing on 15 February 2002 at which these changes were discussed. Greg Hyttenrauch summarised the conclusion of that first meeting as an agreement in principle that Sky would assume the role of systems integrator and the risk of overruns or warranty claims and that EDS would give up its claim to a profit share. On 18 February 2002, Jeff Hughes sent Greg Hyttenrauch a note setting out in more detail Sky's understanding of the discussions at the meeting which was broadly as set out above. The note stated that EDS would not be the systems integrator but would continue to work closely with Sky as a supplier of



resources and close partner in the success of the program and that EDS's profit sharing would be 'on the table' to compensate for the warranties and the System Integrator risk sharing which Sky was giving up.

**[459]** Further meetings which took place on 22 and 26 February 2002 were essentially concerned with the level of payment which EDS was to make to Sky in return for EDS giving up their role as systems integrator but continuing as a supplier of resources to the project. On 27 February 2002 Greg Hyttenrauch sent Mike Hughes an e-mail attaching two options, including an option of transferring the systems integrator role to Sky on terms. Greg Hyttenrauch said that he wanted to know whether there was agreement in principle to one of the options so that he could discuss the position with Steve Leonard and start work on a memorandum of understanding.

**[460]** On 28 February 2002, Simon Post sent Greg Hyttenrauch a draft term sheet setting out an offer to EDS which was headed 'without prejudice and subject to contract'. It was the genesis of the memorandum of understanding and followed Greg Hyttenrauch's first option. Versions of the term sheet then passed back and forth between the parties.

**[461]** On 6 March 2002, there was a telephone conversation between Richard Freudenstein and Steve Leonard.

**[462]** Richard Freudenstein says in his witness statement at para 142 that he understood that the memorandum of understanding which was being put in place would record the basis upon which Sky would take over the role of systems integrator whilst a legally-binding agreement was finalised. Richard Freudenstein made a note of what was said at the meeting in a notebook at 11:35am on 6 March 2002. He recorded Steve Leonard as saying 'fully working new approach as of now'. He said he thought that on this basis EDS were accepting that Sky would take over as systems integrator from that time. In an internal Sky e-mail on 6 March Richard Freudenstein said: 'we agreed that EDS would behave from today as though the new deal was signed and he would communicate that to Greg H'. He said in evidence on Day 11 that EDS were agreeing that they would stop being systems integrator and that the commercial terms would then be sorted out.

**[463]** Steve Leonard says in his witness statement that the telephone conversation lasted two minutes or so and was to give his and Richard Freudenstein's blessing to what had been agreed by their people. He recalled that Richard Freudenstein had the latest draft of the memorandum of understanding document in front of him. Steve Leonard says that he asked whether Richard Freudenstein was happy to go ahead and after saying that he felt that he had been let down by EDS he confirmed that he was going ahead and would sign the memorandum of understanding within 30 days. In oral evidence on Day 64 he said that the purpose of the telephone call on 6 March 2002 was to reach the agreement which triggered the cascade of changes in responsibility of what EDS and Sky were doing. He said that the conversation was to the effect that he confirmed that Richard Freudenstein had the document and was ready to sign it.

**[464]** After 6 March 2002 EDS took steps to transfer the system integrator role to Sky and the services provided by EDS to Sky were now under the terms identified in the draft memorandum of understanding, operating retrospectively with effect from January 2002.

**[465]** Simon Post sent an e-mail to Caroline Waterer dated 6 March 2002 stating that the memorandum of understanding needed to be converted by the lawyers into a 'fully functioning MOU'. On the same day, Caroline Waterer



responded by e-mail to Richard Freudenstein and advised that, having gone through the agreements, she did not think either side could safely sign a short memorandum of understanding. She proposed that the cleanest solution would be to terminate the existing contract and replace it with a new contract which repeated all the relevant provisions of the prime contract and the letter of agreement and appointed EDS as a service provider under Sky's control as systems integrator. She then proceeded to draft a new long form contract which she e-mailed to David Walter of EDS on 18 March 2002 who, in his response on 25 March 2002, said that an attempt was being made to reach agreement in principle by the end of the month and that this would give 'a little more time to settle the terms of the full form agreement'. On 26 March 2002, Caroline Waterer responded saying that Sky was happy to finalise the memorandum of understanding on a subject to contract basis.

**[466]** Following some minor amendments, the draft memorandum of understanding was signed by Steve Leonard and Richard Freudenstein on 26 March 2002.

**[467]** Richard Freudenstein says that his understanding of the position was that Sky and EDS would enter into the memorandum of understanding whilst the new contract was being drafted and that the memorandum

of understanding would be subject to contract, recording the agreement 'in principle' but not constituting a legally binding document. He says that he never considered that the memorandum of understanding was to be in full and final settlement. In his oral evidence he said that he thought that Sky would continue to pay EDS and he accepted that EDS had been paid on the basis of the rates in the memorandum of understanding, including a 33% increase referred to in that document. He said that he thought he had agreed commercial terms with EDS as of 6 March under which they stopped being systems integrator and under which Sky would continue paying EDS going forward. He said though that the document which he signed subject to contract was not a legally binding document.

**[468]** Steve Leonard says in his witness statement that his understanding was that anything in the existing contract, the prime contract as amended by the letter of agreement, which clashed with the memorandum of understanding was no longer effective. He says that he thought that the terms of the memorandum of understanding were binding and although it did not replace the existing contract in its entirety, it 'set the stage' for the modified contract to be put together. The new contract, not the memorandum of understanding, would then govern the relationship between Sky and EDS. He says that, like the letter of agreement, the memorandum of understanding involved a waiver of claims by Sky and that was the intention of the parties, although it has no express clause to that effect. In his oral evidence he said that the purpose of the memorandum of understanding was to 'freeze that agreement until such time as the lawyers could memorialise it' which he thought could take some months. In essence, he saw the signature on 26 March as being to give effect to what he had said on 6 March 2002.

***The 6 March 2002 phone call***

**[469]** The telephone conversation between Steve Leonard and Richard Freudenstein on 6 March 2002 was evidently the culmination of the process which had started at the end of 2001 and led to the review and the subsequent meetings between the parties. The result was a decision that Sky would take over the role of systems integrator from EDS and would do so on the basis that

*[2010] IP & T 597 at 687*

EDS would continue to supply staff. The detailed commercial terms on which that change was made had first to be agreed in principle and the parties evidently agreed that there then had to be a new contract which reflected the terms of the existing Prime Contract, as amended by the letter of agreement, as then modified by the terms agreed in the memorandum of understanding.

**[470]** The phone conversation was necessary so that the senior personnel in Sky and EDS could confirm that the commercial terms which their teams had negotiated at the meetings were terms which were acceptable to both parties so that the parties could go forward. During the telephone conversation both Richard Freudenstein and Steve Leonard either had a copy of the latest draft Memorandum of Agreement in front of them or were well aware of the terms of that document, including the reference to it being 'without prejudice and subject to contract'.

**[471]** The agreement that the terms were acceptable to both parties then opened the door to the process by which, first, the formal memorandum of understanding was to be signed, within it was thought 30 days, and subsequently a new contract drawn up and signed. In those circumstances, the parties deliberately used the phrase 'subject to contract' because they did not then intend to be bound by the terms of the current draft memorandum of understanding.

**[472]** The draft memorandum of understanding stated at the beginning that 'This note is the offer to EDS with regard to the changing of the CRM program and the relationship between BSkyB and EDS on that

program'. The document continued by saying that 'After three meetings with representatives at EDS, both parties agree in principal with the following statements'. There then followed five bullet points and then it stated:

> 'It is clear that some changes would have to be made to the current commercial contract following this agreement. What follows is the proposed way forward based on the discussions that have been on going with EDS and the conditions BSkyB is willing to accept: …'

This then had a number of bullet points listed. That reflected the 'subject to contract' nature of the agreement.

**[473]** However, because they had reached an agreement on that basis, they also decided that EDS should cease to be systems integrator and Sky should take over with immediate effect and that payment would be made on those terms. That was all done in contemplation that a legally binding agreement would be entered into which would reflect those changed obligations.

**[474]** In my judgment, there was no separate binding agreement made by Richard Freudenstein and Steve Leonard on 6 March 2002 other than the agreement in principle to proceed on the terms of the draft memorandum of understanding pending the finalisation or 'memorialisation' of the overall agreement.

***The signing of the memorandum of understanding on 26 March 2002***

**[475]** The first stage of the process was to have a document which recorded the terms on which Sky would take over as systems integrator from EDS. The document which was signed by Richard Freudenstein and Steve Leonard on 26 March 2002 again bore the notation at the top of 'without prejudice and subject to contract'. The signing of the agreement was evidently the formalisation of the agreement in principle which had been made in the telephone call on 6 March 2002. There were some changes between the



document signed and the version which Steve Leonard and Richard Freudenstein had before them on 6 March 2002 but the signed version obviously set out the agreement in principle which was still subject to the terms of the formal agreement which was contemplated.

**[476]** The opening paragraph of the document was changed to say:

> 'After three meetings with representatives of EDS, both parties agree on the need to renegotiate and redraft the contract between them for SSSL's call centres. Both parties will strive to renegotiate and agree a new form of contract within the next three months. We both accept that that new agreement will be consistent with the following principles: …'

The second part of the agreement stated 'What follows is the agreed way forward for services provided from the date of this memo, and this is based on the discussions that have been on going with EDS and the conditions SSSL is willing to accept'. There was then a further introduction to the final bullet paragraphs which stated: 'The principles for further arrangements in the revised contract will be: …'

**[477]** EDS accept that the first and third sections of the signed memorandum of agreement contemplated

that a new long form of contract was needed but submit that the second section became binding notwithstanding the fact that the new long form contract had not been signed. EDS submit that the second section is in different terms to the first section and does not contemplate the need for further agreement for it to take effect. They refer to the following words at the end of the signed Memorandum of Agreement just above the signatures of Richard Freudenstein and Steve Leonard: 'We are both happy to have reached this agreement and are looking forward to agreeing further revised terms for our contract.' They say that this final sentence reflected the fact that the memorandum of understanding contained terms that the parties agreed should have immediate effect (set out in the second section) and terms (set out in the first and third sections) which would form the basis for further negotiations culminating in a redraft of the prime contract.

**[478]** Given the blanket 'subject to contract' statement at the head of the memorandum of understanding, I do not consider that EDS are correct to divide the document up and try to distinguish between the terms of one section and the others. The fact that EDS accept that the first and third sections are consistent with the 'subject to contract' rubric is, in my judgment, strong support for the general applicability of that principle to the whole document. Indeed the terms of the second section clearly depend on the main points in the first paragraph being agreed and follow on from that position. I do not consider that there is or could be a distinction between the sections.

**[479]** On this basis, I consider that the whole of the signed memorandum of understanding was not a legally binding agreement when it was signed. It clearly was and was intended to be 'subject to contract' and it is clear that both parties envisaged a later contact which would govern the changed relationship between Sky and EDS dealing with the matters in the first, second and third sections of the document.

**[480]** By 26 March 2002 the parties were implementing the necessary changes to the role of EDS. This seems to have taken the pressure off the need for the new overall agreement and none was ever entered into.



***Subsequent conduct***

**[481]** EDS submit that, if the memorandum of understanding did not become binding on the parties upon signature, then the parties accepted its terms by their conduct both prior to and in anticipation of agreeing the terms of the memorandum of understanding and subsequent to execution of the document. EDS say that the parties did not wait for a new long form contract to be entered into, as contemplated by the first section of the memorandum of understanding, and no new contract was ever agreed.

**[482]** EDS rely upon conduct by the parties as giving rise to acceptance. In particular they say that the transfer of the systems integrator role and the announcement of the transfer to the teams by Jeff Hughes on 11 March 2002 in which he said: 'The BSkyB executive management and EDS senior management have agreed on a way forward that gives this programme the most support and the highest chance for success …' are conduct showing that the parties accepted the terms. EDS also rely on the fact that they provided services to Sky at the rates set out in the 2002 rate card and that invoices were issued monthly containing reference to the memorandum of understanding and a number of those invoices for April to October 2002 were paid by Sky. EDS also refer to the fact that they issued Sky with a credit note for £221,000 and gave Sky a credit the amount of £2m against labour invoices for January and February 2002. All of this, they say, was consistent with performance on the terms of the Memorandum of Agreement.

**[483]** EDS also rely on an internal Sky e-mail dated 17 April 2002 sent to Andrew Carney and Richard Freudenstein by Simon Post in which he referred to the right under the memorandum of understanding for

Sky to request the removal of all or part of EDS's personnel. EDS also rely on an e-mail dated 23 April 2002 from Jeff Hughes in which he referred to replacement of personnel under the memorandum of understanding terms. EDS refer to another e-mail from Ian Proctor dated 8 June 2002 to Simon Post and others in which he referred to the memorandum of understanding allowing 'for a 33% increase in EDS rates from 1 January 2003 …' EDS also refer to later references to the procedure in relation to EDS personnel.

**[484]** EDS submit that the conduct of the parties pursuant to the terms of the memorandum of understanding gave rise to an implied binding contract on the terms of the memorandum of understanding and they rely on the first instance decision of Field J in *ProForce Recruit Ltd v Rugby Group Ltd* [2005] EWHC 70 (QB) at [16] which was not reversed on this point in the Court of Appeal (see [2006] EWCA Civ 69). EDS therefore submit that the terms set out in the section of the memorandum of understanding signed on 26 March 2002 were accepted by the parties by their conduct as being binding upon them.

**[485]** Sky submit that EDS is incorrect in its submission that the parties, by their conduct both before and after the memorandum of understanding, accepted its terms so that the terms of the memorandum of understanding became binding upon them. Sky submit that conduct prior to 26 March 2002 cannot be said to evidence the conclusion of an agreement on that date and that so far as conduct after 26 March 2002 is concerned, that conduct was simply consistent with what the parties had expressly contemplated would take place in the non-binding agreement in principle which they had signed. Sky say that the performance of what was contemplated in an agreement cannot change the basis of the agreement.



**[486]** Instead Sky submit that there are two possible conclusions. First, that there was no contractual relationship in place between the parties at all, and accordingly that the parties simply operated 'at risk', in the expectation that contractual terms would be agreed between them. Secondly, that the parties operated under some form of ad hoc contractual relationship, containing only such terms as were necessary for that ad hoc relationship to operate.

**[487]** It is undoubtedly true that after the telephone conversation on 6 March 2002 and the signing of the memorandum of understanding on 26 March 2002, Sky and EDS conducted themselves on the basis of the terms of the memorandum of understanding in terms of performing the CRM project and dealing with payment. However, does that conduct show that the parties were accepting the terms as being agreed as binding or were the parties performing on the basis that they contemplated the signing of a contract which would set out their obligations in relation to such performance?

**[488]** In *Fraser Williams v Prudential Holborn Ltd* (1993) 64 BLR 1 (CA) similar questions arose. There was a 'subject to contract' proposal dated 3 March 1989 which was sent by one party to the other and a response of 10 March 1989 and a reply of 5 April 1989. Work had begun on 13 March 1989. No formal contract was ever entered into. There was an assertion that there was a binding agreement. The Court of Appeal (Dillon LJ dissenting) rejected that argument. Kennedy LJ said (at 10):

> 'In my judgment, when experienced business men use the words 'subject to contract' in a proposal, they mean more—and must be taken to mean more—than that the acceptance must be in writing. At the lowest, they are guarding themselves against being contractually bound without further action on their part.'

**[489]** At 13 he held that the—

> 'activity on both sides is easily explained on the basis that they both expected that in due

> course a formal contract would be agreed which would be … in general terms in accordance with Fraser Williams' proposals. Accordingly, although I, like the judge, recognise the risks to both sides of starting a substantial undertaking without a formal contract being in place, I do not reject as commercially improbable the notion that these parties did so.'

**[490]** Kennedy LJ said that in relation to the letter sent by Fraser Williams on 5 April 1989 that it 'came into existence and was treated as it was because both sides considered that the time had come to put in place the contract to which the proposal of 3 March was expressly stated to have been subject'. He also referred to this being consistent with an invoice being submitted by Fraser Williams and paid by Prudential. He said at 14 'In the end I am unable to share the judge's conclusion that neither party could contend that, as he put it, the 'subject to contract' provision in the proposal was still operative at the time of termination on 5 May 1989'.

**[491]** Sir Roger Parker said at 16 to 17 that there was no draft agreement to which subsequent conduct could be referable and that one party was 'about to have a first cut at an agreement'. He concludes at 17: 'there were important matters left to be discussed and, therefore, there was no basis upon which the subsequent conduct of the parties could be considered as being referable unequivocally.'

*[2010] IP & T 597 at 691*

**[492]** Dillon LJ held that no agreement had been concluded before Fraser Williams commenced work on 13 March 1989. He concluded at 18 that the finding of the judge that the 'subject to contract' provision in the proposal was not still operative because of the conduct of the parties up to the time of termination in May 1989 was not a perverse conclusion and was a finding of fact by an official referee on which leave to appeal had been refused.

**[493]** In the present case I consider that the 'subject to contract' rubric clearly applied to the memorandum of understanding. It was contemplated by both parties that a new contract would be entered into which would replace the prime contract, as amended by the letter of agreement, and would contain terms including those which had been agreed in principle in the memorandum of agreement. That was the position initially from 6 March 2002 and also subsequently from 26 March 2002.

**[494]** The general rule is that a party may accept an offer by conduct and thereby give rise to a contract. However, conduct will only amount to an acceptance if it is clear that the party did the act in question with the intention of accepting the offer. In my judgment it is evident that both parties conducted themselves on the basis of the terms of the memorandum of understanding but did so in the contemplation that those terms would subsequently form the basis of the new contract. Once the conduct of the parties started out on that basis then there would need to be some change in position to show that conduct which initially was on that basis was transformed into conduct by which one party intended there to be a new offer made and the other party intended to accept that offer. What happened in this case is that the parties proceeded on the basis that there would be a new contract but that process failed to come to fruition, partly because the immediate need for a new contract faded because Sky took over EDS's role as systems integrator.

**[495]** It is clear that the negotiation of a new contract would take some time and not be an easy task. David Walter at EDS decided to instruct Allen & Overy and Caroline Waterer clearly thought that the process would take some time. Although Caroline Waterer produced a first draft on 18 March 2002 there were clearly questions about how far the terms of the original Prime Contract would continue and what would be the rights and liabilities of the parties. Indeed, as can be seen from the current dispute, the question of whether there was a full and final settlement or how past liabilities were to be dealt with would have to have been dealt with, indicating the need for the 'subject to contract' rubric. Indeed the process of reaching agreement on the new contract seems to have foundered when EDS sought, through their lawyers, to introduce the

concept of settlement.

**[496]** On that basis I do not consider that it is possible to spell any contractual relationship founded on conduct from the position after 6 or 26 March 2002. I consider that the parties proceeded on the basis that a new contract would be entered into but they failed to do so. It follows that the memorandum of understanding does not give rise to any full and final settlement nor does it give rise to new warranty provisions.

**F: CLAIMS FOR NEGLIGENT MISSTATEMENT OR MISREPRESENTATION**

***Introduction***

**[497]** Both SSSL and BSkyB make claims for damages at common law for negligent misrepresentation/misstatement. Such claims are made, first, against both EDSL and EDSC in the alternative to the claims for deceit for representations pre-prime contract. The matters said to give rise to that duty



are those pleaded in relation to the claim in deceit. Secondly, SSSL and BSkyB make claims for representations pre-letter of agreement against only EDSL.

***EDS's submissions***

**[498]** In relation to the pre-prime contract representations, EDS submit that where the parties have structured their obligations so as to provide for contractual liability for certain non-fraudulent representations made by one of the contracting parties and so as to treat as of no effect other pre-contract representations, then these are relevant factors in determining whether a duty of care exists. They refer to the decisions in the *Pacific Associates* and *JP Morgan Chase* cases, referred to above.

**[499]** EDS submit that there were extensive negotiations of both the limitation and exclusion of liability clauses in the prime contract assisted by in-house and external lawyers. They say that Sky and EDS had worked out which company within their respective groups should be the contracting party and intended that, whichever it was, should be subject to the cap, the exclusion of liability and the entire agreement clause in the prime contract.

**[500]** On that basis EDS submit that no duty of care should be found to be owed by EDSL to SSSL as the existence of such a duty would be inconsistent with or circumvent the structure put in place by the parties and would not be sensible or fair, just and reasonable. They say that under cl 7, EDSL gave a series of warranties, breach of which would give SSSL a right to claim damages and that the warranty at cl 7.2 as to EDSL's knowledge, ability and expertise is also pleaded as being a pre-contractual representation. EDS submit that the parties have given contractual effect to certain pre-contract representations and provided a remedy for breach of such representations by way of damages for breach of contract.

**[501]** In relation to representations other than those forming warranties, EDS say that any duty of care as between EDSL and SSSL is excluded by operation of the entire agreement clause or that this clause excludes liability for non-fraudulent misrepresentation.

**[502]** In relation to each of the pre-letter of agreement representations EDS admit that EDSL owed a duty of care to SSSL but deny that they owed any duty of care to BSkyB because any pre-letter of agreement representations were made to SSSL and not BSkyB and that such representations related to services being provided under the prime contract, to which BSkyB was not a party.

**[503]** EDS contend that any duty of care owed by EDSL to SSSL was excluded by the terms of the prime contract and that EDSL owed no duty of care to BSkyB. EDS say that the parties arranged the contractual scheme so that EDSL owed no contractual obligations to BSkyB.

**[504]** In relation to EDSC, EDS say that the parties so arranged the contractual scheme that, save as guarantor, EDSC owed no contractual obligations to SSSL or to BSkyB. On this basis EDS submit that EDSC owed no duty of care to either SSSL or BSkyB.

**[505]** EDS submit that if the court were to find that a duty of care was owed by EDSL to BSkyB or by EDSC to BSkyB or SSSL, this would, on Sky's pleaded case, avoid the intended effect of such arrangement. EDS say that not only would, for example, EDSL have a liability to BSkyB, but the liability would be unlimited. Further, they say that the whole of the losses that BSkyB claim are losses that, if suffered by SSSL, would be excluded by cl 20.2 of the prime contract. But if EDSL owed a duty of care to BSkyB, that would leave EDSL



owing a greater liability to a non-contracting party than to a contracting party, despite BSkyB being involved in the negotiations and the decision that the contracting party should be SSSL and not BSkyB or BSkyB and SSSL jointly. Equally, EDS submit that it would also leave EDSC having a greater liability to SSSL than the prime contractor, EDSL.

**[506]** EDS submit that if a duty of care in tort is not established where the duty is concurrent with a limited liability duty in contract, then where the parties have structured their relationship to ensure that there is no contractual duty owed, for instance between EDSL and BSkyB, then the justification for refusing to recognise a duty of care in tort is even stronger.

**[507]** EDS submit that such a result would not be sensible or just or 'fair, just and reasonable' and that, in the circumstances set out above, no duty of care should be found to be owed by EDSL or EDSC to BSkyB or by EDSC to SSSL.

***Sky's submissions***

**[508]** Sky submit that EDS's contention that EDSL owed no duty of care to SSSL is unsupportable and is founded on a misinterpretation of the entire agreement clause in the prime contract and overlooks EDSL's liability under s 2 of the Misrepresentation Act 1967 in relation to which the question of a duty of care does not arise.

**[509]** Sky say that SSSL has a claim under s 2(1) of the Misrepresentation Act 1967 against EDSL and that to defeat this claim EDSL must prove that they 'had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true'. However, Sky accept that, as between EDSL and SSSL, cl 20 of the prime contract caps EDSL's non-fraudulent liability at £30 million and any claim would be capped to that figure.

**[510]** Sky also submit that EDS's contention that EDSL owed no duty of care to BSkyB and that EDSC owed no duty of care to either SSSL or BSkyB Ltd also rests on a misinterpretation of the entire agreement clause and is not supported, as EDS contend, by the existence of the prime contract between EDSL and SSSL and the inclusion of a limitation of liability in the prime contract.

**[511]** Sky say that EDS have not and could not contend that, in the absence of the prime contract, duties of care would not arise. Sky say that the representations were made on behalf of both EDSC and EDSL with the intention that those representations were to be relied on by both BSkyB and SSSL in the course of the bid process and subsequent negotiations. Furthermore, the representations were all statements of fact that related to matters peculiarly within the knowledge and expertise of EDS. As such, Sky contend that the only question is whether the existence or terms of the prime contract are effective to exclude or restrict these tortious duties of care.

**[512]** Sky submit that to the extent that representations were made to BSkyB and were relied on in selecting EDS and awarding them the letter of intent, the terms of any contract excluding or limiting a duty of care do not arise at that stage. The same, Sky submit applies so far as EDSC's liability to both BSkyB and SSSL is concerned.

**[513]** In relation to representations made prior to the selection of EDS and the award of the letter of intent, Sky submit that the representations were made to BSkyB and were relied on in selecting EDS and awarding them the letter of intent. At this stage, Sky say that their cause of action was complete and there can be no question of the existence of terms of any contract



excluding or limiting a duty of care that otherwise would arise. The same, Sky submit applies so far as EDSC's liability to both BSkyB and SSSL is concerned.

**[514]** In relation to representations relied on in the conclusion of the prime contract, Sky accept that the situation is less straightforward. Sky submit that as far as liability to BSkyB is concerned, nothing changed after the letter of intent so as to oust that duty when discussions and negotiations continued after the letter of intent and up to the conclusion of the prime contract. Sky submit that, in considering the question posed by Lord Goff in *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 532, [1995] 2 AC 145 at 194 of whether the 'tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded', there is no inconsistency from the prime contract itself, which is silent as to any liabilities owed to BSkyB.

**[515]** So far as the question of the liability of EDSC is concerned, Sky submit that the relevant question again is whether the terms or existence of the prime contract are sufficiently inconsistent with the duties which would arise so as to exclude or limit them. Sky say that the prime contract does not, on its own terms, purport to oust the liability of EDSC; it has nothing to say on the subject. Sky say that there is nothing unusual or abhorrent in EDSC being liable for the consequences of any negligent misrepresentations on which BSkyB and SSSL relied, notwithstanding the limitation of liability in the prime contract between EDSL and SSSL. Sky say that no attempts were made to limit EDSC's liability and that EDSC should be liable for its negligent misstatements in the usual way.

**[516]** In relation to pre-letter of agreement misrepresentations, Sky contend that representations were made to and duties of care were owed by EDSL to both SSSL and BSkyB in the course of the negotiations leading

to the letter of agreement. Sky say that these duties are not ousted or limited by the prime contract and it is not alleged that the duties were ousted by the terms of existence of the letter of agreement.

***Analysis***

**[517]** I first deal with the question of whether EDSL owed SSSL a duty of care or whether such a duty was excluded or limited by the terms of the prime contract. As Lord Goff said in *Henderson v Merrett* [1994] 3 All ER 506 at 529, [1995] 2 AC 145 at 191 where the parties are in contract, a concurrent or alternative liability in tort will not permit a party to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. However, subject to that qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

**[518]** In principle, subject to the limitation set out above, I can see no reason why a common law duty of care should not be owed by EDSL to SSSL in relation to any pre-contract representations. There is evidently a sufficient relationship between the parties in the period leading up to the prime contract and, in circumstances where SSSL might suffer damage as a result of such representations, I consider that it is sensible and just for a duty of care to be found to exist.



**[519]** What then is the effect of the terms of the prime contract on that duty of care. Sky submit that the terms of the prime contract only came into effect at a later stage and therefore cannot affect the existence of a duty of care at the time when EDS was selected and entered into the letter of intent. That submission has some attraction but I consider that it ignores the fact that the question for consideration is whether it is sensible or just for a duty of care to exist in the light of all the circumstances. Those circumstances include the fact that the representations were made in the context of the ITT and the response which were part of the process by which EDS was seeking to be awarded a contract to carry out the Sky CRM project. The contract which was entered into therefore cannot be ignored. If that were not so then because pre-contract representations are, of necessity, made before the contract, parties could never effectively regulate their obligations in respect of such representations. The terms of the prime contract cannot therefore be ignored where they are relevant.

**[520]** There are three terms of the prime contract which are relevant: the entire agreement clause in cl 1.3, the warranties given in cl 7.2 and the limitation of liability clause in cl 20. Those clauses have to be considered to see whether they affect the duty of care which I have held would otherwise exist. In particular, the duty of care will have to take account of any exclusion or limitation clauses in the prime contract so as not to permit SSSL to circumvent or escape the consequences of those terms. In the light of my findings as to the scope and effect of cll 1.3.1, 7.2 and 20 of the prime contract, it is necessary to consider whether there are duties of care owed by EDSC or owed to BSkyB so as to give rise to claims for negligent misrepresentation at common law by BSkyB and SSSL against EDSC and by BSkyB against EDSL and EDSC which would avoid the effect of the limitations in the prime contract.

**[521]** First, though, it is necessary to consider something of the background to the way in which the parties arranged their relationship.

***The contractual framework***

**[522]** The first stage of the process was the preparation of the ITT which was sent to the potential bidders. It

was sent to other bidders on 17 March 2000 and then later it was sent to Joe Galloway at the request of Mike Hughes.

**[523]** The ITT was produced by Scott Mackay. That document had the Sky logo and was an Invitation to Tender for the build and implementation of a World class contact centre for 'BSkyB'. The ITT refers to 'BSkyB' and to 'Sky Services'. Although the references are not entirely consistent, 'BSkyB' is evidently a reference to the First Claimant, BSkyB and 'Sky Services' is a reference to the division within which the second claimant, SSSL, sat. The ITT refers to BSkyB objectives and is generally phrased in terms of BSkyB's requirements. There is also reference to the involvement of BSkyB and BSkyB staff.

**[524]** At para 3.5.2 of the ITT there is particular reference to SSSL being licenced to provide conditional access services to broadcasters of which BSkyB is one. There is also reference to 'Sky Services' having the two call centres at Dunfermline and Livingston.

**[525]** In the response, the EDS logo is used and it is generally written as being the response of 'EDS' and refers to 'BSkyB'. Under the Statement of Confidentiality on p 2 of the response it is stated that 'This document is proprietary to Electronic Data Systems Ltd, its parent company Electronic Data Systems Corporation and any of the corporation's subsidiaries'. It is also



stated that 'EDS and the EDS logo are registered marks of Electronic Data Systems Corporation' and it is stated 'Copyright © 2004 Electronic Data Systems Corporation'. It is said to be a 'written response from EDS, to BSkyB's “Invitation to Tender” '.

**[526]** The letter of intent was written on SSSL notepaper but was signed for and on behalf of 'British Sky Broadcasting Ltd', that is BSkyB. It was addressed to Joe Galloway as Managing Director of Electronic Data Systems Ltd, that is EDSL, and was countersigned for and on behalf of EDSL. It referred to BSkyB and 'BSkyB's existing contact centres'. The letter referred to the parties as 'EDS' and 'BSkyB'.

**[527]** The first draft of the prime contract dated 19 September 2000 from Herbert Smith provided for the contracting parties to be SSSL and EDSC and recorded that the ITT had been issued by SSSL and that 'Contractor', in that draft EDSC, had issued the response. That draft contained a limit of liability of the higher of £10m or the total amount paid to EDSC and also excluded indirect or consequential loss.

**[528]** When, on 2 October 2000, Laurence Anderson of EDSL supplied to Keith Russell of Sky comments on the draft contract he noted, under the heading 'Parties', that 'the contract will be entered into by Electronic Data Systems Ltd, the EDS UK company not the EDS Corporation which is a US based company'.

**[529]** The drafts which were produced from 2 November 2000 and the prime contract itself recorded the parties as being SSSL and EDSL.

**[530]** Allen & Overy produced a draft on 6 November 2000 which proposed a cap limited to amounts paid less various sums. That and earlier drafts also contained an extended form of exclusion clause. There was then negotiation of the terms of the limitation of liability and exclusion clause culminating in the versions in the prime contract.

**[531]** The prime contract was dated 30 November 2000 and stated that SSSL issued the Invitation to

Tender and that it was for, among other things, 'the retrospective fitting of environment, culture, process and technology to SSSL's existing contact centres located at Dunfermline and Livingston'. The response was said to have been issued by the 'Contractor', EDSL. There is a reference to notices for SSSL being sent to BSkyB with a copy to the Managing Director of Sky Services.

**[532]** By cl 1.3.2 of the prime contract there was a term which effectively provided that the letter of intent would cease to have effect on or shortly after the execution of the prime contract.

**[533]** On 7 December 2000, EDSC entered into a deed of guarantee with SSSL which was expressed to be supplemental to the prime contract. By cl 1, EDSC guaranteed the performance by EDSL of its obligations under the prime contract.

**[534]** The question which has to be answered is whether duties were owed by the EDS parties to the Sky parties in relation to statements or representations which were made negligently by an EDS party to a Sky party.

**[535]** I have found that the entire agreement provision in cl 1.3.1 of the prime contract does not, on its terms, prevent EDSL being liable in negligence for misrepresentations made to SSSL in advance of the prime contract. However, the effect of cl 20.2 and cl 20.5 is to limit EDSL's liability for such negligent misrepresentation to £30 million and exclude certain heads of loss.

**[536]** The background to the prime contract shows that the EDS and Sky parties decided that the contracting parties would be EDSL and SSSL. On the



basis of the ITT and the response I consider the position was open and could have led to the contract being between EDSL and/or EDSC on the one part and BSkyB and/or SSSL on the other part. The letter of intent was between EDSL and BSkyB but on SSSL notepaper indicating that some but not a great deal of thought, had been given to the position for the interim arrangement. When the matter came to be considered in more detail the parties were chosen as EDSL and SSSL and not EDSC and BSkyB. The parties chose to use EDSC as a guarantor of EDSL's liability and to choose not BSkyB as in the letter of intent but SSSL as the contracting party. The parties also chose to limit liability and exclude heads of loss.

**[537]** If as alleged by Sky, representations were made negligently by EDSC to BSkyB or SSSL or by EDSL to BSkyB which caused loss arising out of the arrangements under which the Sky CRM system was provided under contractual arrangements between EDSL and SSSL and this loss was suffered by SSSL or BSkyB then for there to be a duty imposed between those other parties which enabled them to recover unlimited damages would circumvent the detailed provisions that the EDS parties and the Sky parties had put in place.

**[538]** As Sky point out the parties did not include any provision within the prime contract which expressly referred to liability of EDSC or to BSkyB when they could have done so. Evidently if they had done so that would have avoided the situation. However, as is made clear in the authorities, the tests imposed to determine whether there is a duty of care and the scope and extent of any duty do not depend on whether there is an exclusion clause. They are based on questions of fairness, justice and reasonableness taking account of all the relevant circumstances.

**[539]** I bear in mind that the position here is somewhat different from those situations which more often

arise. This is not a case where the duty being considered is a parallel duty of care to a duty in contract. Nor is it a case of a contractual chain where the duty is said to arise between two parties separated by one or more parties in the chain. Rather it is a case where parties in a group have chosen the parties between whom to have a contract and it is sought to rely on a duty of care so that another member of the group can pursue a claim which circumvents the contractual arrangements. This is more a case which has similarities to the *Pacific Associates* case and *JP Morgan Chase v Springwell*.

**[540]** To paraphrase the test approved by Lord Goff in *Henderson v Merrett* [1994] 3 All ER 506 at 529, [1995] 2 AC 145 at 191: An alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

**[541]** As Ralph Gibson LJ said in the *Pacific Associates* case even absent the express disclaimer in favour of the engineer, to impose a duty would cut across and be inconsistent with the structure of relationships created by the contract. Or, using the test of Purchas LJ, to determine whether a duty arises in tort it is necessary to consider the circumstances in which the parties came together to see what obligations, if any, were assumed by the one in favour of the other and what reliance was placed by the other on the first. Russell LJ put it differently but to the same effect: 'Given the contractual structure between the contractor and the employer, can it be fairly said that it was ever within the contemplation of the contractor that, outside the contract, it could pursue a remedy against the engineer?'



**[542]** Applying the test used by Gloster J in *JP Morgan Chase v Springwell* the contractual documentation, whether taken at a straightforward contractual level, or looked at more widely, as an indication as to whether any common law duties of care arose, showed that the parties specifically contracted upon the basis of a relationship which negated any possibility of a duty by or to other parties coming into existence.

**[543]** Applying those tests, I have come to the conclusion that a duty of care should not be imposed upon EDSC in favour of BSkyB or SSSL or upon EDSL in favour of BSkyB which would circumvent or escape the contractual exclusion or limitation of liability which the parties put in place. That contractual structure, in my judgment, negatives any possibility that such a duty of care should arise in these circumstances.

***Claims under the Misrepresentation Act 1967***

**[544]** Sky make claims under this Act in respect of representations which they contend induced the letter of intent, the prime contract and the letter of agreement.

**[545]** Section 2(1) of the Act provides as follows:

> 'Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.'

**[546]** On the pleadings the claims made by Sky may be summarised as follows:

(1) In relation to the letter of agreement, it is pleaded that 'The claimants (Richard Freudenstein, Andrew Carney and Tony Ball) relied on the representations set out above with the result that SSSL entered into the letter of agreement with EDS Ltd, as it was intended by EDS Ltd that it should'. Sky rely on s 2(1) of the Misrepresentation Act. The claims for damages in respect of pre-letter of agreement representations are advanced by both claimants against EDSL only.

(2) In relation to the letter of intent and the prime contract, it is pleaded that the claim for damages is advanced by both claimants against both defendants.

**[547]** EDS refer to the fact that a claim for damages under s 2(1) of the Misrepresentation Act 1967 is only available as between the contracting parties. EDS therefore submit, and I accept, that no claim can be made under the 1967 Act against EDSC and that:

(1) No claim under the Act in respect of representations leading to the letter of intent can be made by SSSL.

(2) No claim under the Act in respect of representations leading to the prime contract can be made by BSkyB.

(3) No claim under the Act in respect of representations leading to the letter of agreement can be made by BSkyB.

**[548]** EDS submit that while the burden is on EDSL to establish the necessary reasonable grounds of belief and belief in the representation, the



defence relates closely to the allegations of negligence made by the claimants against EDSL at common law and if the claimants fail to establish that the representations were made without due care, then the claim under s 2(1) of the Act should also fail.

**[549]** EDS also accept that on the basis of *Royscot Trust Ltd v Rogerson* [1991] 3 All ER 294, [1991] 2 QB 297, a decision binding on this court, the measure of damages under s 2(1) of the 1967 Act is the measure of damages for fraud. EDS reserve the right to argue in a higher court that the correct measure of damages is that ordinarily applicable to claims in negligence. The difference is that under the measure for fraud both foreseeable and unforeseeable damages are recoverable, whilst under the measure for negligence only reasonably foreseeable damage within the scope of the duty of care is recoverable.

## G: THE CASE ON MISREPRESENTATIONS

### *Introduction*

**[550]** Sky allege that EDS made a number of representations at different times. There are a number of representations which are alleged to have been made prior to EDS being selected, receiving the letter of

intent or entering into the prime contract, which I shall refer to as the 'Initial Representations'. There are then further representations which are alleged to have been made prior to the letter of agreement which I shall refer to as the 'Further Representations'.

**[551]** In the case of the Initial Representations, it is convenient to deal with the three representations as to resources, time and cost together because much of the evidence is common to all three. I shall then deal with the representations as to technology and methodology separately.

***Initial representations***

***Resources, time and cost***

**[552]** In cross-examination of the EDS witnesses and in their closing submissions Sky developed a theme which went to the underlying basis for the alleged representations on resources, time and cost.

**[553]** In a section of their closing submissions in which Sky dealt with 'What EDS needed to do in order to bid', Sky referred to the evidence of Gerard Whelan, Barrie Mockett, Peter Rudd, John Chan, Tony Dean, Steve Leonard and Joe Galloway in cross-examination as to the steps necessary to be able to submit a bid. At para 86 of their closing submissions Sky summarised the position as follows:

> 'It is obviously correct, as a matter of common sense, that in order to honestly and properly respond to an ITT, and in particular one which indicates certain desired timescales, it is 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 in the light of that resource plan the extent to which one possesses such resources and, if one does, 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
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> 
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> 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.'

**[554]** This submission formed the basis for Sky's contention that, on the basis of what they had in fact done, EDS had not carried out those necessary steps in relation to work/cost, time or resources.

**[555]** It is therefore convenient at this stage to consider this submission about the underlying basis of the bid because it is central to Sky's case on misrepresentation as to cost, time and resources.

**[556]** The documents before the court which demonstrated the basis for the work and cost considered by EDS in their bid were the Costings Spreadsheets. In addition there were two plans, referred to as the Vine Plans, prepared by Steve Vine who was involved in the bid.

**[557]** Joe Galloway gave detailed evidence of the way in which the work element in the Costings Spreadsheet was prepared and this was also dealt with by Gerard Whelan and Andy Sollis who were involved at the time. In summary, the evidence is that representatives of EDS and the consortium partners assessed the workscope and this led to estimates of effort in terms of days for particular teams. This information on effort, together with daily rates for the team members, was gathered by Joe Galloway and his spreadsheet was then handed over to Tim Webb who carried out the necessary calculations. Sky make a number of criticisms about the evidence and this process which led, in the end, to a spreadsheet which contained the figure which EDS set out in the EDS response of £54,195,013.

**[558]** In relation to time, the position is less clear. The Vine Plans were produced in April 2000 at an early stage of the preparation of the response and pre-date all the costing spreadsheets. Those plans did not form part of the EDS response and were based on a waterfall method of working where each stage is carried out before the next, rather than a RAD project where steps are carried out together and in parallel. If anything it seems that a waterfall programme would show a longer duration than a RAD programme. It seems that questions of time were left to Steve Vine and Mahmoud Khasawneh, neither of whom were witnesses. Joe Galloway said that he gave 'no credence' to the Vine Plans. Gerard Whelan referred to the Vine Plans as being the output of the estimating process. He also referred to discussions with Steve Vine but was not aware of any more detailed plan being produced by Steve Vine. Andy Sollis was involved for a short time in April 2000 in relation to data warehousing. His evidence was that he spoke to Steve Vine to understand when other activities would be carried out on which data warehousing depended and to consider the duration for his work. He left at about the end of April 2000 and therefore could not say anything further on this aspect.

**[559]** In his evidence Joe Galloway referred to discussions with members of the consortium, in particular Chordiant, on the question 'do we believe that we can deliver something in nine months … that would give Sky sufficient activity to represent a new contact centre environment live in one hall'. Gerard Whelan also referred to the fact that the 'result of our estimating was a belief that we could complete the work requested in Sky's ITT and its Appendices within the nine months specified'. He appears to have gained confidence from the fact that other Chordiant projects had been completed in nine months.

**[560]** In relation to resources, Joe Galloway made it clear that there had been no detailed resource planning. He said that detailed resource planning, in terms



of precise numbers or specific individuals, is not carried out at the stage of a bid. He said that he had discussions about resourcing at a very general or 'macro level' and did not descend to specific numbers or skills or broad timeframes. The one exception was that five people had been agreed and secured from Chordiant as set out in Joe Galloway's e-mail of 15 June 2000. That there were discussions within EDS based on broad requirements was confirmed by Barrie Mockett and Peter Rudd. Gerard Whelan's evidence was broadly consistent with that of Joe Galloway. He said that there was a degree of comfort that the CRM Practice either had sufficient resources or would be able to obtain sufficient resources to deliver the project.

**[561]** On that basis I now turn to consider the particular alleged representations.

***Resources***

**[562]** Sky have made a number of amendments to their case on the resources misrepresentation. The original pleading in para 29 of the particulars of claim set out the following overall representation:

> 'EDS Ltd and EDS Corp represented that the personnel required for the project with the necessary skills and experience in the technology and methodologies to be used, were available and had been reserved for the project. The representation implied and was to the effect that such resources would be available when required in order to conclude the project in the timescale that had been promised.'

**[563]** Sky say that these representations arise out of individual statements and representations made at EDS's bid presentation on 1 June 2000, in passages from the response, in 29 June 2000 joint delivery teaming document, in Joe Galloway's letter of 5 July 2000 to Richard Freudenstein, at EDS's presentation to Sky on 7 July 2000 and in Joe Galloway's e-mail to Mike Hughes and others on 11 July 2000. Sky also say that representations were made by Steve Leonard to Richard Freudenstein on 13 October 2000 and by cl 7.2 of the prime contract.

**[564]** By an amendment, Sky added two further representations which, they alleged, arose out of the letter of 5 July and the e-mail of 11 July 2000 which, as set out above, are also relied on for the overall representation. Those two representations are pleaded as follows at paras 29A and 29B of the particulars of claim:

> (1) EDS Ltd and EDS Corp expressly represented, by way of a letter from Joe Galloway to Richard Freudenstein dated 5 July 2000 that: 'We have the resources and ability to deliver the systems and services you require and to meet the financial and budgetary targets that you have set.'
>
> (2) EDS Ltd and EDS Corp expressly represented by way of an e-mail dated 11 July 2000 from Joe Galloway to Mike Hughes and Keith Russell (copied to Richard Freudenstein, Martin Stewart, Jonathan Malin, Steve Leonard and John Chan), that they were:
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> 'ready to start this project as of Monday, 17 July. We have the resources reserved for this project; in fact, we have picked up some additional high level resources that you have worked with previously. These folks come with great experience of these types and size of project.'

**[565]** In relation to the overall representations pleaded in para 29 of the particulars of claim, EDS admitted in paras 20(1) and 20(2) of their defence that



EDSL had represented in the response, 'that personnel with experience gained from comparable projects identified in the response could be made available to be used on the project, as and when they and their particular skills might be required' and 'that it was ready to start work on the project as of July 2000, utilising such personnel as might be required for that initial stage'. EDS also admitted in para 20(3) of the defence that, as at the date of the prime contract, 30 November 2000, EDSL 'warranted that it had the knowledge, ability and expertise to carry out and perform all the obligations, duties and responsibilities of the Contractor set out in the agreement'.

**[566]** In relation to the two further representations alleged by Sky to arise out of the letter of 5 July 2000 and the e-mail of 11 July 2000, EDS deny that the letter of 5 July 2000 was or was intended or understood to be anything more than a repetition of the representation admitted in para 20(1) of the defence. They also deny that the e-mail of 11 July 2000 represented or was intended or understood to represent that all the resources required for the project had been reserved. EDS say that it meant, was intended and understood to mean

that EDS was ready to start immediately and that it had reserved the resources required for such a start.

**[567]** In closing Sky has accepted that, leaving aside the letter of 5 July 2000 and the e-mail of 11 July 2000, the representations made by EDS would have amounted to the two representations which are admitted by EDS. They contend that the overall representation pleaded in para 29 of the particulars of claim only arises from the letter of 5 July and the e-mail of 11 July 2000 when those documents are read against and understood in the light of the response and the other formal bid documents. Sky have referred to the overall representation as the 'Greater Resources Representation' in their closing submissions. They have referred to the representations admitted by EDS as the 'Lesser Resources Representation' and the 'Ready to Start Representation'. I shall adopt those definitions.

**[568]** Sky also submit in closing that the Greater Resources Representation was intended to be understood and was in fact understood in terms that EDS—

> 'had actually worked out what work needed to be done; had planned the performance of that work in the timescale indicated; had worked out what resources would be required in order to deliver that work in that timescale (with what skills, in what numbers, at what times and for what periods); and had in light of that resource plan reviewed the sources of resources which were open to them and satisfied themselves that they actually had the resources required, and that those resources were available and were reserved for when they were required in order to complete that work in that timescale.'

EDS say that this is unpleaded and no attention should be paid to it.

**[569]** In summary, therefore, the position is this:

> (1) Sky contend that EDS made the Greater Resources Representation by which they represented that the personnel required for the project with the necessary skills and experience in the technology and methodologies to be used, were available and had been reserved for the project;
>
> (2) EDS accept that they made the Lesser Resources Representation by which they represented that personnel with experience gained from comparable projects identified in the response could be made available to be used on the project, as and when they and their particular skills might be required;



> (3) EDS also accept that they made the Ready to Start Representation by which they represented that they were ready to start work on the project as of July 2000, utilising such personnel as might be required for that initial stage.

**[570]** Whilst Sky rely upon the Greater Resources Representation in closing they also contend that, in any event, both the Lesser Resources Representation and the Ready to Start Representation were false and known to be false. As a result Sky submit that EDS made a fraudulent misrepresentation as to resources in the terms of the Greater Resources Representation but, in any event, in the terms of the Lesser Resources Representation and Ready to Start Representation.

**[571]** EDS say that Sky's closing submissions and their reliance on the representations admitted by EDS is wholly inconsistent with the case pleaded by Sky based squarely on the Greater Resources Representation. EDS contend that it is not sufficient, least of all in a case of fraud, to conjure out of the air in closing submissions an alternative and lesser charge but that any alternative case should have been pleaded properly. However EDS say that they do not object to this yet further change of case but to the manner of the change.

**[572]** EDS also deny that, as alleged by Sky, it is inherent in the Lesser Resources Representation that EDS had actually worked out what resources were required and when, in order to be able to express the belief that they could be made available as and when they were required.

**[573]** With that introduction it is convenient to consider first whether EDS made the Greater Resources Representation.

***The Greater Resources Representation***

**[574]** In the light of the position adopted by Sky, it is evident that the letter of 5 July and the e-mail of 11 July 2000 are central to this representation. It is necessary to concentrate on the terms of those documents but considering them against the background of the other documents.

**[575]** By the beginning of July 2000, it had been about a month since EDS's bid presentation and there had been commercial discussions following on from that. There was also the letter of 18 June 2000 which Joe Galloway wrote directly to Richard Freudenstein to 'clarify the EDS position'.

**[576]** Joe Galloway sent the letter of 5 July 2000 to Richard Freudenstein from his personal Yahoo e-mail account. He said this:

> 'I know that you are drawing to the close of a very trying experience with the bid on the new and replacement systems for your organisations' customer care facilities. I wanted to write to you today to re-emphasise EDS's commitment to making your team extremely successful in this endeavor. EDS has worked with over 10,000 organisations in its nearly 45 years of service to insure that every business can achieve its goal and surpass their wildest expectations for success.
>
> As you have probably noticed, EDS has not tried to dabble too much in the political games that have been played by the some of the other organisations that have been involved in this process. We stand by our professional reputation and by the consistency of our solution, both from a financial standpoint and the technical requirements. *We have the resources and ability to deliver the systems and services you require and to meet the financial and budgetary targets that you have set.* In addition, we recognised that our 'non-IT' solution did not meet your specification; so we have teamed very



> successfully over the last couple of weeks to bring a new consortium member to our bid, that being Arthur Andersen. Together, our groups have proven that a joining of our forces makes sense and gives you the assurance of a highly motivated team that can solve any business problem and deliver the desired solution. If there are any concerns over our joint proposition, perhaps there might be an opportunity for our combined teams to come back together with you to present our consolidated proposal. Our team is excited and enthusiastic about the prospect

> of working with BSkyB to move your organisation into a new league of customer care. I do not understand why any consulting or software-providing organisation would attempt to alienate any member of your team to win the business. Surely they must realise that even if they win the business in this manner, working together begins to be a nearly impossible position for your team.
>
> In closing, let me reiterate, that EDS and its consortium parties want to win the business at BSkyB. We committed to developing with your team a world-beating customer care environment, while, enabling your organisation to change and grow knowing that your IT systems and solutions will not be an inhibiting factor. Steve Leonard and I are both personally committed to making this project successful. If you find that there is anything further that I can do, please do not hesitate to contact me directly.'

**[577]** On 10 July 2000 Joe Galloway wrote again to Richard Freudenstein giving further pricing information to support the selection of EDS.

**[578]** The e-mail of 11 July 2000 said this:

> 'I wanted to forward some additional to you. We have reviewed the commercials and are prepared to reduce our mark-up percentage from 37.5% to 32.5%. Additionally, we are willing to put 77% of our overall mark-up at risk using the previously agreed milestone schedule … This new model replaces that which is included in the documents enclosed.
>
> Mike, *EDS is ready to start this project as of Monday, 17 July. We have the resources reserved for this project;* in fact, we have picked up some additional high level resources that you have worked with previously. These folks come with great experience of these types and size of projects. Please let me know if you need anything further.'

**[579]** The issue is what was meant and understood by the phrases which I have emphasised in those documents.

**[580]** Joe Galloway was the author of both documents and, in relation to the letter of 5 July 2000 he alone at EDS saw that letter. The e-mail of 11 July 2000 was copied to, amongst others, Steve Leonard and John Chan at EDS. Richard Freudenstein received the letter of 5 July 2000 and he, together with Martin Stewart, was copied with the e-mail of 11 July 2000 addressed to Mike Hughes and Keith Russell.

***Letter of 5 July 2000***

**[581]** It was only in his fourth witness statement that Joe Galloway referred to the letter of 5 July 2000. He says at para 15 that he did not specifically refer to this letter in his earlier witness statements because he did not have anything



to say in relation to it that he had not already said in the context of the other correspondence which he had addressed in his first witness statement. He then adds:

> 'I now recall that Mike Hughes requested that I contact Sky in order to urge the decision process along in the light of the letters being written to Sky by Siebel and the internal politics within Sky. It was in those circumstances that I sent my letter to Richard Freudenstein on 5 July 2000.'

**[582]** He did not in his witness statement say what he meant by that letter. He was asked questions about it on Days 40 and 44.

**[583]** In cross-examination on Day 40 he said that the letter was intended to 'portray EDS as an organisation that has the resources and the ability as an organisation to deliver what is required by Sky'. He also said that he intended to inform Sky—

> 'we had the resources to begin the project, we had the resources that were sitting waiting to be deployed on the Sky project, that all we were waiting for was the announcement that we had won and we put those people in place. That core team that would have started the project would have been the core team that would have gone in and understood the requirements over some period of time, and would have put out the more detailed plan which would allow us to go and capture those resources as appropriate in the numbers we needed at the time.'

He accepted in cross-examination that the letter did not say anything about having the resources to start the project.

**[584]** He said that he meant that 'we', that is EDS and the consortium partners, had the resources and the ability to deliver the systems that Sky needed. He elaborated by saying that EDS was a company of 110,000 to 120,000 people; that Lucent Technologies was at least, as far as he knew a company of 50,000-odd people; Chordiant had a few hundred and that Sun was a mammoth organisation. On this basis he said that 'if one looks at it from the perspective of the overarching capability to deliver systems, one would have to conclude that those entities are capable of delivering the systems that were required for Sky'.

**[585]** On Day 44 he accepted that the letter was intended to persuade Richard Freudenstein, to whom he addressed the letter at the request of Mike Hughes. He said that this was a continuation of the sales process, it was an important letter to a key decision-maker, who was second only to Tony Ball in the Sky decision process. He said that he wanted him to understand that EDS was prepared to start immediately and would put people on the ground to begin that process, although he again accepted that the letter did not say that. He said that the 'we' referred to EDS, the Corporation, the company-wide EDS and its consortium partners and also included Salmon and Henley who were outside agencies or organisations who supply staff. He said that he wanted Richard Freudenstein to understand that 'we, the group, EDS and its partners, had the resources within our groups to deliver this particular endeavour'.

**[586]** It was put to him that the obvious meaning of the letter and what he intended was 'that you actually had available the staff required to deliver the project, and that you had actually worked out what staff you needed, and you had taken steps to ensure that they were available'. He said that was not his understanding but that the letter was communicating the fact that the organisation, '[t]he grouping that had undertaken and endeavoured to respond



to the ITT believe they have the resources and capability to deliver the systems that they desire'. He accepted that the letter did not refer to resources to begin and that in referring to 'the resources to deliver the

systems and services that you require' it was referring to the 'whole thing'.

**[587]** Richard Freudenstein dealt with the letter at para 52 of his first witness statement where he said:

> 'Joe Galloway referred to EDS' previous experience of working with over 10,000 organisations. He reiterated that they had the resources and the ability to deliver the system and services we required and to meet the financial and budgetary targets that we had set. I understood this to mean that EDS had confidence in their revised budget and that they had undertaken a proper exercise to identify the resources required and costs involved in carrying out the project (which were reflected in their Response).'

**[588]** In cross-examination it was put to him that the letter of 5 July 2000 said nothing about identifying resources to which he responded that it said 'we have the resources'. He accepted that he did not understand from that letter that EDS had put a name to a particular resource. He said that understanding came from the letter of 11 July 2000.

**[589]** It was put to him that he had not understood Joe Galloway to have identified all the names that would be required on the project. He replied that he was 'clearly given the impression … across this period when the tender was going on—that there was a process going on within EDS to identify resources'. He said he assumed they had some system there to say, 'We need these resources, these are the resources, here are the projects they are on, as soon as they roll off it we grab them'. He said that he was led to believe this by EDS throughout this period and that he thought that it was from a combination of the information he was being given. He said he was 'under the impression that they were—they had a plan for the ones that were going to start, and as the project—as they needed more people, they were identifying them and earmarking them as they rolled off other projects'. He thought this was derived from a combination of all the things EDS were saying to him in the letters of 18 June, 5 July, 11 July 2000.

**[590]** Mike Hughes at para 51 of his first witness statement says he cannot recall precisely but he believes that Richard Freudenstein would have shown the letter of 5 July 2000 to him when they discussed the bids. Otherwise, no other Sky witness refers to this letter.

***E-mail of 11 July 2000***

**[591]** Joe Galloway in his first witness statement only dealt with the e-mail of 11 July 2000. His evidence at para 402 was that, when he said 'we have the resources reserved for this project', he meant that EDS had staff standing by who would be required for an immediate start and could immediately deploy people who were appropriately qualified to begin the project. He added that Mike Hughes, with his understanding of projects of this nature, would not have understood him to have claimed that every resource for the whole project was reserved at that point.

**[592]** He gave evidence about the e-mail on Day 44. He confirmed that it was a continuation of the selling process. He said that the references to 'EDS is ready to start this project' and 'We have the resources reserved for this project' were one continuous thought and not separate and distinct matters. He said he



intended this to mean the resources reserved were those to start the project. He did not accept that he intended Richard Freudenstein to understand that EDS had actually reserved the resources for the project. He said that this would be a ridiculous statement.

**[593]** He said that his 'mindset' was that EDS were prepared to put the people on the ground to start the project and that EDS had those individuals to start the project. He added that EDS's expectation was that during the initial six to eight week period for detailed analysis which EDS had asked for prior to the ITT, EDS would have expected to put 'programme managers, project managers, technical people, some technical people at the architecture level and administrators' on the project. He said that those people would have worked alongside the business analysis team to determine the scope of the project and then determine a more detailed plan of 'who needed to be on the programme, when they needed to be there, how many people we needed'. He accepted that the phrase 'we have the resources reserved for the project' was capable of meaning resources for the whole project but said that he did not realise this at the time.

**[594]** Mike Hughes to whom the e-mail was addressed dealt with it in his witness statements. At para 55 of his first witness statement he deals with the presentation on 7 July and says:

> 'I recall that Joe Galloway stressed in that presentation the immediate availability of resources to start working on the project. I believe that this would have strengthened my view that EDS had the capability to successfully implement the project.'

**[595]** He then continues at para 56 by saying that Joe Galloway reinforced this message when he sent an e-mail to him and Keith Russell on 11 July 2000, 'in which he stated that EDS were ready to start the project immediately and that they had the resources reserved for that purpose'. He concludes: 'My clear understanding from him was that EDS had the people ready to start immediately.'

**[596]** At para 21 and 22 of his second witness statement Mike Hughes says something different. He says that when Joe Galloway said in the e-mail that EDS were ready to start the project as of Monday, 17 July and had the resources reserved for the project, he took that at face value. He says that as EDS had said that they could deliver what was required within the timescales that Sky wanted he understood the e-mail in that context:

> '… that EDS had the resources reserved to deliver the project in the timescales that they had represented to us. I did not expect the whole team for the entire project to turn up on the first day. That would be absurd and I did not read the e-mail in that way.'

He says that he was aware that the project team would need to ramp up and that particular resources would be deployed over the life of the project at various times for the activities needed to deliver the new system. On the basis that EDS had informed Sky that they would be using a RAD approach, he says that the team needed to be in place quickly in order to develop the solution.

**[597]** He says that he understood from what he was being told that EDS had worked out what resources they needed over the lifetime of the project and that they had reserved those resources for when they were needed. He adds



that the development timescales were short and that this was why it was important that EDS had a team that was available immediately and could hit the ground running.

**[598]** He was asked questions about this on Day 13. He said that as a result of the presentation of 7 July he

would have understood that Joe Galloway had people ready to go who would be required for an immediate start but that, as this 'was a RAD project, so he would have needed to have identified all of the key resources to start the RAD process, systems architects and various other people that would be required'.

**[599]** In relation to the e-mail of 11 July he said that he understood it to mean more than having resources to start. He said that:

> 'This was the height of the dotcom technology boom. It was critical that he had resources available for a project that had a very sort of tight RAD based timeline to … to cover development, cover systems architecture, to cover testing various other elements program management, to cover various other elements of the piece, and some of those would be named resources and others would be reserved from EDS's resource pool and their partners in the consortium and various other sources.'

**[600]** He said that his support of the EDS consortium's bid was based on his confidence that Joe Galloway, other key resources, the EDS organisation and the Consortium to whom they were subcontracting would be able to deliver a working solution. In relation to the e-mail he said that 'I was being lobbied very, very hard by him and by others and I suggested he made those commitments to Richard as well which he did'.

**[601]** Richard Freudenstein deals with the letter of 11 July 2000 at para 61 of his first witness statement where he says that Joe Galloway—

> 'stated in terms that EDS were ready to start and had resources reserved for the project. He even stated that additional high level resources had become available. All of this contributed to my increasing confidence in EDS' ability to carry out the project.'

**[602]** He was asked questions about it on Days 10 and 11. He said that his understanding on resources was that—

> 'there were some that were ready to start immediately, and they had a very, a comprehensive process internally to EDS to identify resources as they rolled off other projects, and he marked their card to say the ones that were coming to this project.'

He also said that his impression 'was that they were identifying resources as they rolled off other projects, to be put on this project' and that—

> 'they not only had resources ready to start, but they were identifying resources. I assumed they had some complicated process internally that – they knew how many, for example, Chordiant resources they had and they knew where they were working, and they were identifying them and reserving them as they rolled off the other projects.'

**[603]** He said that he was—

> 'not saying that they had identified every single person that would be on this project. I am saying that I clearly had the impression that they had

> resources that were ready to go immediately and that they had identified a number of resources to be rolled on this project at the appropriate time.'

**[604]** In re-examination he said that he understood it to communicate that 'they worked out what resources they needed for the project as a whole, and they had reserved them'.

**[605]** Martin Stewart refers to the fact that this e-mail was copied to him at para 29 of his witness statement. He evidently has little recollection because he says that these statements 'would have' given him additional confidence that EDS had sufficient resources available to undertake the project.

***Analysis***

**[606]** In terms of the representation, there are essentially two issues:

> (1) Was it represented that personnel 'were available' or was it only that they 'could be made available'?
>
> (2) Was the representation that personnel had 'been reserved' a reference to all the personnel for the project or only those required for the start or initial stage?

**[607]** In approaching these issues, I must consider what was intended by Joe Galloway and what was understood by the relevant people at Sky by the letter of 5 July 2000 and the e-mail of 11 July 2000. The test is objective as to the meaning of the representation: what would the reasonable person in the position of the representee understand by the words used. Subjective matters are relevant to knowledge and reliance.

**[608]** It is clear that, as Sky submit, the letter and e-mail have to be read in the context of what was happening at the time. The passages of the response relied on by Sky show that EDS were saying that they had the ability to 'leverage' or use global resources. At the presentation on 1 June 2000 EDS repeated its statements about global resources and proven experience and expertise and stated that it was ready to start the project. At the presentation on 7 July 2000 EDS stated that they were ready to start with the 'right skills'.

**[609]** When read in context, what would a person in Sky's position understand by the phrase in the letter of 5 July 2000 'We have the resources and ability to deliver the systems and services you require and to meet the financial and budgetary targets that you have set' and the phrase in the e-mail of 1 July 2000 'EDS is ready to start this project as of Monday, July 17. We have the resources reserved for this project'?

**[610]** In my judgment, the phrase that EDS 'have the resources' can only mean that EDS had the resources in the sense that it had global resources available from EDS, the consortium members and other organisations which it could use to deliver the Sky CRM project. First, that is consistent with what had been said in the response and at the presentations. It was a general statement similar to the phrase in s 1.3 where they stated that that they had the 'ability to leverage the global resources'. That availability of global resources was evidently referred to by EDS to give Sky the confidence that EDS could and would have the necessary resources available when they were required to carry out the project.

**[611]** Secondly it is consistent with what is said in the letter of 5 July. The reference to 'resources and ability' is clearly a general statement and the letter contains a number of references to the general capabilities of EDS and the consortium partners and others. The reference in that letter to EDS working with 10,000 organisations, clearly a reference to EDSC and to the



consortium, now including AA, emphasises that EDS was making a general representation about the organisations having resources which could be made available for the project.

**[612]** To suggest that it would mean, as Sky submit, that EDS had worked out what resources were required, with what skills, in what numbers and at what time and actually possessed those resources so that they were satisfied that they were or would be available at the relevant time, for the whole project is to give the phrase an unreasonable meaning and one which is not consistent with the context at the time. Given the uncertainty as to the scope of the project until the requirements had been fully defined, a fact known to Sky at the time, it would have been unreasonable for Sky to have concluded that EDS had done the sort of calculation which they now refer to and therefore that EDS had those resources available for the whole of the project.

**[613]** In relation to the phrase that EDS 'have the resources reserved for this project' when read literally and out of context that could be a reference to all the resources being reserved for the whole project. I do not consider that this would be a reasonable interpretation of what was being said in the response to the ITT on a complex IT project where what EDS had set out in the response showed that there was a need to add definition to the requirements by the SWAT, Design and Design Validate stages illustrated on p 38 of the EDS response and dealt with in the previous pages. It is evident that Sky understood that all the resources could not be reserved at the stage of the response.

**[614]** I did not find the evidence of Richard Freudenstein or Mike Hughes consistent as to what they understood EDS to have done in terms of whether the resources were those to start, with a system to obtain further resources or whether EDS had worked out what resources they needed for the project as a whole, and they had reserved them.

**[615]** The e-mail of 11 July 2000 stated that 'EDS is ready to start this project as of Monday, July 17. We have the resources reserved for this project'. The issue is whether Joe Galloway was saying that EDS had reserved the resources for the start or the initial stages of the project or whether he was saying that it had reserved the resources to perform and complete the project.

**[616]** The nature of estimating for IT projects was dealt with in expert evidence. That evidence showed that the task is to convert a set of wishes expressed by the client into a software solution which will perform the client's requirements. The definition of the work and therefore the effort is something that develops throughout the course of the project. This has been expressed by McConnell in his book Software Estimation in terms of a cone of uncertainty, with the effort or cost becoming more certain as the project progresses through Initial Concept, Approved Product Definition, Requirements Complete, User Interface Design Complete, Detailed Design Complete to the final stage of Software Complete. This necessarily means that on large and complex IT projects there is no ability to have resources available or reserved for the whole of that project.

**[617]** When read in context, I do not consider that any reasonable person in Sky would understand that EDS had reserved all the resources to perform and complete the project. In my judgment, when read with the first sentence the phrase must mean that Sky had reserved 'resources' for the project so that they could make a

start on 17 July rather than 'all the resources' for the project.

**[618]** Obviously there had to be some process to reserve resources needed to start. However, for a project that was at tender stage and where EDS had not



been selected, where further work was needed to define the scope of the work and where the project was to last some 18 months, it would not be reasonable to take EDS as stating that they had reserved all the resources for the whole project.

**[619]** Accordingly I do not find that the letter of 5 July 2000 and the e-mail of 11 July 2000 when read in context gave rise to a representation by EDS that the personnel required for the project with the necessary skills and experience in the technology and methodologies to be used, were available and had been reserved for the project.

**[620]** I therefore find that the Greater Resources Representation was not made by EDS. I now turn to consider the Lesser Resources Representation.

*The Lesser Resources Representation*

**[621]** Sky say in relation to the Lesser Resources Representation:

> (1) That it is inherent within the representation 'that appropriate resources could be made available to be used on the project as and when they and their particular skills might be required' that EDS had actually worked out what resources were required and when, in order to be able to express the belief that they could be made available as and when they were required.
>
> (2) That it is a lesser version of the representation for which Sky contend, in the sense that it is contained wholly within that which Sky submit EDS represented. Sky say that they accept that EDS made the representation for which EDS contend, but Sky say EDS in fact went further than that: they did not only say that resources could be available, they said that they in fact had them, they were in fact available and were in fact reserved.

**[622]** This admitted representation was in terms that personnel with experience gained from comparable projects identified in the response, which have been referred to as 'appropriate resources', could be made available to be used on the project as and when they and their particular skills might be required.

**[623]** As set out above, Sky say that it was inherent within this representation that EDS had actually worked out what resources were required and when, in order to be able to express the belief that they could be made available as and when they were required. EDS deny this.

**[624]** However in para 304 of their closing submissions EDS accepted that the Lesser Resources Representation would carry with it an implied representation that there were reasonable grounds for such an opinion. EDS contend that the representation was not false but that there were resources available from within EDS itself, consortium partners and outside agencies. They say that Sky's reliance on expert evidence

that compared EDS's plans with the number of personnel supplied fails to take into account the fact that EDS's plans were not achieved because of the delay in producing functional requirements. EDS submit that resources are always a risk on IT projects and that no serious problems were anticipated before the bid and there were no serious problems afterwards.

**[625]** Sky submit that the Lesser Resources Representation was false as appropriate resources could not be made available as required as EDS did not know how many of what resources were needed and when and, in addition, knew that they did not have available resources. They say that Joe Galloway, Gerard Whelan and John Chan knew that they could not honestly make that representation because they knew that steps had not been taken to assess the



resource requirement and resource availability. They also say that it was EDS's intention to recruit to staff the project and they had very few personnel with experience gained from comparable projects.

**[626]** Essentially, the question is what EDS needed to do to have reasonable grounds for representing that appropriate resources could be made available to be used on the project as and when they and their particular skills might be required. EDS submit that what was done by EDS amounted to what was necessary for EDS to have reasonable grounds. Sky submit that EDS did not carry out what was necessary because EDS did not undertake a proper exercise to establish what resources they required, at what times, for what periods, in what numbers and with what skills.

**[627]** The experts considered the appropriate way of assessing resources so as to make the alleged representations. EDS refer to Ian Murray's evidence of the appropriate approach in relation to resources. In relation to resource availability at the bid stage Ian Murray says at para B116 of PA's first report that a reasonable systems integrator would ensure that the envisaged resource requirements can be met prior to submitting a bid and that, in a large project, this would typically involve contacting the relevant resource managers to ensure that appropriate levels of skilled resources can be made available.

**[628]** Ian Murray then deals with the position at the project execution stage and refers to 'mission critical' resources. He says this at para B118 of PA's first report:

> 'Given the level of detail in the eCRM ITT a reasonable systems integrator would have:
>
> i. Reserved (or had specific plans for making available at the time of the LoI) key leadership resources and technical and business subject matter experts before the letter of intent was signed—the 'mission critical' resources to which I earlier refer. At this time EDS knew the technologies that would be involved, knew the business context of the programme (CRM), and should have anticipated the programme management demands of the programme and therefore should have been able to anticipate how many resources were required for the first few months of the project.
>
> ii. At the LoI, had a detailed resource plan for at least the first month of the project and had identified and secured the resources required for that period, and for the following three months identified the resource types required (skills and experience) together with an understanding of where those resources would be found.'

**[629]** In s 11 of his first report, Robert Worden refers to the evidence given by Barrie Mockett and Peter

Rudd as to EDS's resourcing approach which was essentially that there had been informal discussions between them and members of the bid team. This had identified sources of systems integration skills within EDS, the consortium partners and elsewhere. It had identified the need for Chordiant skills which would be met both from those in the CRM Practice from the former SHL who had those skills and also from the particular resources that were to be obtained from Chordiant. In addition, seven key members of the team had been identified in s 7 of the EDS response. Robert Worden says that the approach described by Barrie Mockett and Peter Rudd was adequate in relation to general systems integration skills, that the most important specific skill of Chordiant experience was dealt with and the proposed delivery team in s 7 of the EDS response was appropriate.

*[2010] IP & T 597 at 713*

**[630]** That evidence shows that neither expert expected EDS at the stage of the EDS response to have actually worked out what resources were required and when for the project in terms set out by Sky in closing, that is:

> '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 in the light of that resource plan the extent to which one possesses such resources and, if one does, 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.'

**[631]** It is evident that the process of resource planning at bid stage relied on by Sky is one which goes far beyond what is needed to satisfy the test of having reasonable grounds to support the representation that appropriate resources could be made available to be used on the project as and when they and their particular skills might be required.

**[632]** It is necessary to consider what steps EDS had in fact taken to resource the CRM project at the time of the EDS response.

**[633]** As EDS fairly accept, the evidence of what precisely Joe Galloway and others in the bid team did in relation to resources is not entirely clear. Joe Galloway said that he thought that it was not possible to produce a meaningful resource profile and that any attempt to produce one, even in August 2000, was futile because of the lack of sufficient requirements. He said that his confidence in the availability of sufficient resources was based on the combined experience of EDS and its consortium partners. He said that his assumption all along was that EDS—

> 'would be able to draw on EDS personnel and our consortium partner, ie Chordiant, for this particular element, and that we would be able to go to the contractor market. I did not believe at any time there would be a restraint on the resources that we would have to get.'

**[634]** Joe Galloway stated in cross-examination on Day 40 that it was his belief that EDS would use the majority of resources from EDS and that he could call on other resources from consortium partners or contractors to fill any provision that was needed. He pointed out that—

> 'EDS was a company of 110,000 to 120,000 people. Lucent Technologies was at least as far as I knew a company of 50,000-odd people. Chordiant had a few hundred, Sun, obviously a mammoth organisation. So if one looks at it from the perspective of the overarching capability

> to deliver systems, one would have to conclude that those entities are capable of delivering the systems that were required for Sky.'

**[635]** Joe Galloway confirmed that as far as he was concerned, other than the nine personnel on the Costing Spreadsheet who were to be obtained from sub-contractors, he intended to provide everybody else from EDS. EDS made arrangements for the five Chordiant resources. Otherwise Joe Galloway referred to conversations about resources 'absolutely at a macro-level' and that



apart from EDS resources, he intended to 'seek out those areas where I knew I would need particular assistance and to ascertain whether they had sufficient numbers to draw upon'.

**[636]** Gerard Whelan's evidence as to what had actually been done in relation to resourcing was broadly consistent with Joe Galloway's evidence. He referred to the commitment of the consortium partners. He said that he and the team were confident that they could obtain the balance of the resources from either EDS or the consortium partners or the wider public. He said that:

> 'The buzz around at the time whilst I wasn't sitting in on technical workstream meetings or whatever, I was frequently hearing the outcome or people discussions particular points or people discussing resources with the like of Barrie Mockett and Peter Rudd.'

The evidence of Barrie Mockett and Peter Rudd shows that they did not have any detailed involvement in resourcing the project or specific discussions about resourcing the project, during the bid stage. Rather there appear to have been only informal discussions.

**[637]** Apart from the five Chordiant resources in respect of whom a specific agreement had been reached, there was no commitment but there was informal discussion about the provision of Forte developers and other resources from Telford, Arbor resources by Lucent, specialist resources from EDS's global resource pool, resources by Forte Software, resources from other EDS projects where people were coming free and resources from external agencies. However, none of the potential sources of resources were told anything about the likely numbers or timing.

**[638]** There were also the seven personnel listed in s 7 of the EDS response. Sky say that, in the event only two of them worked on the project, the relevant people being John Chan, named as Programme Director and Steve Vine, named as the Transition Workstream Manager. Mahmoud Khasawneh had been named as Technology Workstream Manager but shortly after the EDS response was put in he left EDS to work in Jordan and was replaced by Dan Barton who became free from the GM Onstar project in June 2000. Because of changes after submission of the EDS response, the other four named personnel were no longer relevant. Three were AT Kearney personnel but AA replaced AT Kearney and one related to the Location Workstream which was taken out of EDS's workscope.

**[639]** In considering whether EDS had reasonable grounds for making the representation, it is necessary to consider whether there were any particular problems envisaged. The period in 2000 was during the 'dot-com boom' and therefore there was a risk of resource shortages.

**[640]** Much was made by Sky of a memorandum from David Courtley of 14 January 2000 ('the Courtley memo') relating to a recruitment freeze; a recruitment campaign in EDS from July 2000 and views expressed

as to the likely shortages if EDS were to be awarded the Sky project.

**[641]** The Courtley memo was, it appears, based principally on concerns that people outside EDS should not be recruited if there were appropriate resources within EDS. Not surprisingly when the Essential Hire Justification forms were submitted in March and April 2000 to obtain outside resources for the CRM practice, they were couched in terms of there being a 'dire need' for programmers and developers on particular projects. As Robert Worden observes, the premise for a recruitment freeze would be that there were already sufficient resources.



**[642]** The recruitment campaign may have initially started out as a general recruitment campaign for the EDS CRM practice in the UK but it was with a view to that practice being able to undertake more work and the Sky CRM project was obviously seen from about March 2000 as a key project for EDS to be awarded. The recruitment campaign then was seen as being able to provide resources related to the Sky project, either by providing people to undertake that work or by 'backfilling' positions within the CRM practice where the previous holders of those positions had moved to the Sky CRM project. I do not accept Joe Galloway's evidence that the campaign was not related to or seen within EDS as being related to the Sky CRM project.

**[643]** There was also the view expressed by Barry Yard on 18 July 2000 that 'Related to BSkyB, we have a serious resourcing shortage if the project is won'. That comment was supported by Barrie Mockett who considered that if EDS were awarded the Sky CRM project 'You would need to open up all the taps to bring resources in'. The Sky project was a large endeavour and it is evident that EDS could not supply the personnel to resource it from the CRM Practice. There would be a serious shortage within the CRM Practice but the taps would have to be opened to bring in other EDS resources, together with resources from the consortium partners and outside agencies.

**[644]** There will always be risks in resourcing IT projects but I do not consider that these matters would affect what EDS should have done to have reasonable grounds for making the representation about resources.

**[645]** I broadly accept Joe Galloway's evidence of what was done in relation to resourcing prior to the EDS response. This is a case where Joe Galloway's evidence is supported by Gerard Whelan and there is some support from Barrie Mockett and Peter Rudd. There is also the evidence of the five Chordiant resources and of the named personnel in s 7 of the EDS response.

**[646]** As Ian Murray says, a reasonable systems integrator would ensure that the envisaged resource requirements can be met prior to submitting a bid and that, in a large project, this would typically involve contacting the relevant resource managers to ensure that appropriate levels of skilled resources can be made available. In relation to general integration resources, I consider that EDS had reasonable grounds for considering that these resources could be made available from the CRM Practice, from elsewhere in EDS, from consortium partners or outside contractors. For the key Chordiant resources, EDS did make arrangements with Chordiant and the evidence from Chordiant's communications with Sky was that they were clearly willing to provide assistance. This supports EDS's confidence that they could obtain the necessary Chordiant resources. There were also general discussions with the other consortium members such as the one which I accept took place with Scott Yarnell of Forte, as referred to by Gerard Whelan. EDS had also named seven individuals who were intended to perform key roles on the Sky CRM project, as envisaged at the time.

**[647]** In my judgment, what EDS did was sufficient for them to have reasonable grounds for the

representation that personnel with experience gained from comparable projects could be made available to be used on the project as and when they and their particular skills might be required.

**[648]** As a result, there was no misrepresentation in terms of the Lesser Resources Representation.

*[2010] IP & T 597 at 716*

***The ready to start representation***

**[649]** Sky also say, in relation to the Ready to Start Representation, that for EDS to make the representations that EDS 'were ready to start work on the project as of July 2000, utilising such personnel as might be required for that initial stage' it is inherent that EDS in fact had such resources, they were in fact available and they were in fact reserved.

**[650]** This admitted representation was in terms that EDS were ready to start work on the project as of July 2000, utilising such personnel as might be required for that initial stage.

**[651]** Sky say that, as the actual resource situation in the first six to eight weeks of the project demonstrated, EDS did not in fact have suitable and appropriate resources in the numbers and with the skills required to start work on the project at the end of July 2000.

**[652]** However, I consider that what happened after 20 July 2000 has to be viewed in the context of discussions which were happening at that time which affected what was going to happen and when. In the EDS response, EDS proposed that a business process workstream led by AT Kearney was to proceed by two parallel paths: one a 'SWAT' team was to identify current customer service failures and 'quick wins' over a period of eight weeks; the other team was to define the vision for Sky's world-class customer service in four weeks and then over eight to ten weeks to validate the design, defining the use cases for certain processes and producing a use case catalogue together with a functional and technical specification for those processes. However by the end of June AA had replaced AT Kearney with a revised approach to both the process workstream and change management, as set out in the Joint Delivery document of 20 June 2000. Part of that revised approach was a six to eight week 'Define' phase to set 'the scope of the work and identify priorities within it'.

**[653]** The evidence shows that EDS, supported by the consortium partners, did start work immediately. There was a kick-off meeting in Dunfermline on 27 July 2000 attended by representatives from EDS, AA and Sky. A presentation had been produced by EDS which referred to 'month one deliverables'. It set out the detail of what work would be carried out in the initial start-up phase of each workstream. As Scott Mackay observed in his witness statement he believed that from this document EDS were ready to 'hit the ground running' and that work began in earnest on Monday 31 July 2000.

**[654]** EDS deployed a team of some 32 people who billed about 100 man-days in the first week after project kick-off, as shown on the resource list produced by Sky. When asked in cross-examination to give an approximate number of people Joe Galloway says that he intended to start with business analysts, some architects, project managers and administrators. The general approach of starting the project with a few high-level resources is supported by Robert Worden as a project initiation strategy.

**[655]** During the initial period there are two particular documents where EDS dealt with resources. First there was the August Risk List which shows that on 1 August 2000 John Chan raised risks about inadequate

resources. One risk he identified was an 'inability to provide project managers required within technology & implementation workstream' which had an impact from 24 July 2000 and was to be dealt with by active recruitment by Tom Lamb. He raised a second risk that an inexperienced development team would have an impact on the project from 1 September 2000 and this was to be dealt with by using contracting staff and training EDS staff.



**[656]** The second document, the Red Team Report of 21 August 2000 also identified the availability of staff both in terms of quantity and skills as the 'no 2 concern'. What was needed was to 'Develop detailed resource profiles as soon as possible' and 'commence internal/external recruitment'.

**[657]** I consider that the reference to resources for the development team and the need for detailed resource profiles related to concerns not about the initial work which was to be carried out by EDS but about the resources necessary for the further stage of the work after the initial stage. The reference to managers for the technology and implementation workstream seems, though, to be a more immediate need. As part of EDS's presentation for the kick-off meeting on 27 July 2000 there was a chart which showed Peter Chleboun as the leader of the technology workstream and Martin Wood as the leader of the implementation workstream. John Chan's reference to managers for the technology and implementation workstreams may have related either to other people required for the teams or to the fact that, as it seems, neither Peter Chleboun nor Martin Wood remained on the project for long.

**[658]** PA criticise the resources provided by EDS during the initial period. They identify a number of resources who they say were unsuitable. However, the documents show that EDS did provide a substantial number of resources in July and August 2000 and whilst some of them may have lacked experience or had weaknesses in particular areas, I cannot conclude that there was any material breach in a representation that EDS were ready to start work on the project as of July 2000, utilising such personnel as might be required for that initial stage.

**[659]** On that basis, Sky has not established that EDS made a misrepresentation in relation to the Ready to Start Representation.

***Misrepresentation as to time***

**[660]** Sky allege at para 41 of the particulars of claim that EDS represented—

> 'that they had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go live of the contact centre and that they held the opinion that, and had reasonable grounds for holding the opinion that, they could and would deliver the project within the timescales referred to in the Response, and, subsequently, the Contract.'

**[661]** Sky contends, first, that the initial representation in relation to the EDS response was made in writing in two documents prior to Sky's selection of EDS: the EDS response and Joe Galloway's letter to Richard Freudenstein of 5 July 2000.

**[662]** In addition to the statements in early 2000, Sky also rely on statements made later in 2000 in relation to the timescales in the prime contract. They rely on statements made in a high level project plan produced on 11 October 2000, made orally by Steve Leonard at the meeting with Richard Freudenstein on 13 October 2000, made in 24 October 2000 project plan, made in the effort estimates produced by EDS in October 2000

and made in the milestones set out in the preliminary specification dated 22 November 2000.

**[663]** In dealing with the matters in late 2000, Sky state that their primary case is that the cause of action was complete once they relied on the representations made in the response and in the letter of 5 July 2000 in



selecting EDS and awarding EDS the letter of intent. Sky also say that the representations continued and that the further statements made in late 2000 became part of the representations as to time.

**[664]** EDS deny that it made the alleged representation. At para 113(1) of the defence they say that the reliance by Sky on the response fails to take into account the qualifications in the response such as that the 'high level plan will be refined after further analysis of the current situation and business requirements' and that 'Milestone plans showing key commitment, decision dates and detail within each key project phase will be developed before work begins'. EDS admit at para 113(4) of the defence that by the EDS response EDSL did represent that it believed that, based on the information contained in the ITT, completion of phase 2 was achievable within nine months of project commencement.

**[665]** In relation to the representations alleged in later 2000, EDS deny that the project plan constituted a representation; they deny the representations alleged to have been made at the meeting on 13 October 2000; they deny that they made any representation in the project plan which they say was 'one step in an on-going process of project planning'; they state that the baseline budget was EDS's best estimate of effort based on information at the time and do not admit that EDS represented that 'it had carried out a proper estimate of the amount of effort required'. They also deny that, in producing the milestone schedule which was to form part of the prime contract, they made any representation to Sky.

**[666]** In closing Sky submit that the oral evidence established that EDS had made the representation in respect of delivering the project. EDS maintain that the representations were not made.

**[667]** EDS say that all the plans in the EDS response were only indicative and could not give rise to the alleged representations. In any event, EDS say that any representations as to time were overtaken by events before the prime contract. EDS say that the events of October 2000 rendered the previous estimates immaterial well before the prime contract. They rely on the joint planning as showing that all parties were well aware that the proper analysis carried out by the joint teams in October 2000, and again in November 2000, had led to a much later date than July 2001. Instead, EDS state that they had committed to the earlier July 2001 date in the expectation that it would be possible to produce a proper plan to fit it, but before any such plan had been produced. In doing so, EDS say that they took considerable commercial risk but made no representations.

**[668]** It is convenient also to consider the similar representation which Sky allege was made in relation to cost.

***Misrepresentation as to cost***

**[669]** Sky allege at para 45 of the particulars of claim that EDS represented 'that they had carried out a proper estimate of the cost of completing the project and that they held the opinion that, and had reasonable grounds for holding the opinion that, they could and would deliver the project within that budget'.

**[670]** Sky say that the representation comprises or arises out of the following statements and responses:

> (1) The EDS response at s 1.3, where EDS stated that if they were selected EDS would provide Sky with a unique World Class Customer Contact Centre 'on time and on budget';
>
> *[2010] IP & T 597 at 719*
>
> (2) Joe Galloway's letter to Richard Freudenstein of 5 July 2000, where Joe Galloway stated that EDS had the resources and ability to deliver the system and services required 'to meet the financial and budgetary targets that you have set'; and
>
> (3) The cost estimates at s 7.2.1 of the EDS response.

**[671]** Sky also say that the representation comprises or arises out of the further cost estimates that led up to and came to form the Baseline Budget at Sch 5 to the prime contract. At para 46 of the particulars of claim Sky allege that EDS represented that the £19,751,000 in the Baseline Budget for consultancy was a proper estimate.

**[672]** EDS admit in para 142 of the defence that they made the representation at s 1.3 of the EDS response. At para 143 of the defence they also admit the content of Joe Galloway's letter of 5 July 2000 but deny that he thereby represented that EDS had reasonable grounds for believing that Sky's financial and budgetary targets could be met.

**[673]** At para 144 of the defence EDS admit that the costs included at s 7.2.1 of the EDS response gave details of anticipated costs for the project and that Sch 5 to the prime contract included a Baseline Budget for EDS's costs. EDS say, though, that the Baseline Budget was a proper estimate on the basis of their knowledge at the time.

**[674]** In closing submissions, Sky adopt a similar position on cost as they do on time: that the representation in relation to delivering the project within budget is made out on the oral evidence. In dealing with the representation in Sch 5 of the prime contract, Sky state that their primary case is that the cause of action was complete once they relied on the representations made in the EDS response and in the letter of 5 July 2000 in selecting EDS and awarding EDS the letter of intent. Sky also say that the representation continued and that the further representation in Sch 5 of the prime contract became part of the representations as to cost.

**[675]** EDS in their closing submissions state that, like time, any estimates of costs could only be indicative. In any event, again like time, EDS state that the position changed in the light of events before the prime contract. They say that Sky's attempt to elide the costs estimate in the response and the costs in the Baseline Budget at Sch 5 to the prime contract ignore the fact that the estimate had in the intervening period risen to some £94m and the programme had been wholly reorganised. EDS say that, by the time of the prime contract, the estimates in the response were wholly irrelevant.

**[676]** It can be seen that both the representation as to time and that as to cost are conveniently dealt with together and in two stages: first, the position in July 2000, then the later period in 2000.

***Time and cost: representations in the response and letter of 5 July 2000***

**[677]** Sky rely on the evidence of EDS witnesses. It is therefore necessary to see what they said about the pleaded representations.

**[678]** First, there was the evidence from Joe Galloway. In cross-examination on Days 38, 39, 40 and 44 he was asked questions, on a number of occasions, about what he intended Sky to understand from the EDS response. In summary he accepted that he had intended Sky to understand that EDS had made 'a reasonable assessment' and undertaken a 'professional approach' in estimating and planning the project as set out in the EDS response, based on the information in the ITT. He also said that he wanted Sky to understand that on that basis EDS was reasonably confident and believed that they could



achieve go-live in nine months with overall transition in 18 months and could carry out the work for some £54 million and that EDS had reasonable grounds for that belief.

**[679]** Secondly there was the evidence of Gerard Whelan on Days 35 and 48 which was to similar effect referring to the pleaded parts of the EDS response. There was also similar evidence from John Chan on Days 59 and 60 and from Tony Dean but those individuals were not involved in producing the EDS response at the time.

**[680]** This evidence confirms what Joe Galloway and Gerard Whelan intended to communicate. I consider that, as set out below, this is consistent with what was said in certain passages of the EDS response.

**[681]** In relation to time, Sky rely on the following passages of the EDS response:

> (1) Section 5.2.1 where, in response to s 4.2.3 of the ITT, EDS referred to milestone plans showing key commitment and decision dates at the end of each Workstream and Change Management section and for the Technology Workstream EDS showed the three phases of development which included completion of the build and prototype of the CRM system within nine months.
>
> (2) Section 5.1 where, under the heading 'Programme Management and Governance', EDS showed the go-live date for the new contact centre as 1st Quarter of 2001, which Sky say was approximately nine months from a notional contract date of June 2000.
>
> (3) Section 1.3 where, under the heading 'Why EDS', EDS stated that: 'BSkyB will provide a unique World Class Customer Contact centre on time and on budget.' It is to be noted that para 4.1.1 of the ITT stated that 'BSkyB have an organisational desire to conclude the initial delivery of the contact centre within nine Months of project commencement.'
>
> (4) Section 3.5 where, under the heading 'Getting to the “Customer Journey of the Future” ', EDS referred to their 'unsurpassed delivery capability and expertise in systems integration' and then stated that they had: 'proven expertise in Systems Integration and capability to deliver the solution within the required timescales'.
>
> (5) Section 7.2 where, under the heading 'Costs' and dealing with resource requirements,

Sky say that EDS stated that the Business Process and Technology workstreams would last for nine months.

(6) Section 5.4.2 where, under the heading 'Estimating', it was stated that:

'For the purpose of this ITT response EDS have concentrated on estimating the size of the software development. Whilst further analysis of the requirement is needed, with BSkyB and EDS working closely together, we have used an approach which provides a high level of comfort.

Our approach has been adopted on many previous developments undertaken by EDS, including major travel reservations systems. Based on these projects it is reasonable to expect an estimating accuracy of between plus and minus 5% following detailed evaluation of requirements.

Resource estimation is conducted from a “top down” and “bottom up” approach. Top down estimation involves function point counting together with a high level view of the project development methodology, and



application of historical size and productivity data from similar projects, suitably tailored to the new environment and toolset, to generate an estimate of resource.

Bottom up resource estimation involves assessment of low-level activities to be undertaken during the development lifecycle. Using in-depth knowledge of team capabilities and team sizes help to validate the top down approach.

Essential to both these approaches is a formal size measure of the system to be developed. Our estimating process makes use of Function Points and has been independently assessed by the Guild of Function Point Analysts, who approved of our approach …

Schedule estimation then makes use of the function point count and productivity rate estimates to derive manday estimates.'

(7) Section 5.4.3 where, under the heading 'Planning Approach and Progress Monitoring', EDS stated that: 'Based on the estimates derived from the function point count a set of schedules defining key activities and elapsed times illustrating how the solution is to be delivered will be developed. Typically three sets of schedules are produced.' The three typical schedules were then described.

(8) Section 5.4.3 where in the final paragraph, EDS stated: 'Our Solution Centre already has the infrastructure and tool-sets in place to support this approach and they will be applied to the BSkyB CRM project.'

**[682]** Those references in the EDS response to EDS providing the contact centre 'on time' and 'within the required timescales', confirm the nine month timescale for go-live. This is consistent with the diagrams at pp

43, 52 and 63 of the EDS response and the evidence of Joe Galloway and Gerard Whelan who prepared the EDS response.

**[683]** Indeed, EDS accept that in the EDS response they represented that they believed that, based on the information contained in the ITT, completion of phase 2 was achievable within nine months of project commencement. That is a reference to the diagram at p 52 of the EDS response. When read in the context of the ITT and the other parts of the EDS response, I have no doubt that EDS represented that they held the opinion that they could and would deliver the project within the timescales referred to in the EDS response, which included go-live in nine months.

**[684]** In relation to cost, Sky rely on the passage in the EDS response at s 1.3 where EDS said they would provide Sky with a unique World Class Customer Contact Centre 'on time and on budget' and Joe Galloway's letter of 5 July 2000 where he said that EDS had the resources and ability to deliver the system and services required 'to meet the financial and budgetary targets that you have set', together with the estimate at para 7.2.2 of the EDS response which gave the sum of £54,195,013.

**[685]** Again, I consider that on the basis of those statements, as confirmed by the evidence of Joe Galloway and Gerard Whelan who prepared the EDS response, EDS represented that they held the opinion that they could and would deliver the project within that budget of £54,195,013.

**[686]** Did EDS represent that they had carried out a proper estimate of the amount of elapsed time needed to complete the initial delivery and go-live of the contact centre and of the cost of completing the project and that they had reasonable grounds for holding the opinion on time and cost? Whether such representations were made depends on the particular statements in the



particular context in which they were made. As was pointed out in *Society of Lloyds v Jaffray* [2002] EWCA Civ 1101 the test is what the reasonable person in the position of the representee would understand by the words used.

**[687]** This is a case where Sky made it clear in the ITT at para 4.1 that they had the nine month requirement and at para 6.3 that BSkyB would evaluate the tender submissions on the basis of cost. EDS were therefore providing an estimate of price or time so that Sky could consider whether or not to select EDS as the party to carry out the Sky CRM project. In making that selection the time and cost of the project were evidently important matters and EDS were aware of that in providing those estimates. Looking at the position objectively, in those circumstances, I consider that it was implicit in the estimates of time and cost that EDS had carried out proper estimates and had reasonable grounds for their opinions on time and cost. This was also accepted to be the position by Joe Galloway and Gerard Whelan in their evidence.

**[688]** In my judgment, for the reasons set out above, Sky is correct in their submission that prior to the letter of intent EDS represented:

> (1) that they had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go-live of the contact centre and that they held the opinion that, and had reasonable grounds for holding the opinion that they could and would deliver the project within the timescales referred to in the response.

(2) that they had carried out a proper estimate of the cost of completing the project and that they held the opinion that, and had reasonable grounds for holding the opinion that, they could and would deliver the project within that budget in the response.

**[689]** I now turn to consider whether those representations were false.

***Falsity of the representations prior to the letter of intent***

**[690]** Sky submit that the fact that the representations were false emerges from the summary of what EDS had and had not done.

**[691]** In relation to the representation as to cost prior to the letter of intent, Sky say that it was false because:

(1) EDS had not carried out a proper estimate of the cost of completing the project. Since Joe Galloway, Gerard Whelan and John Chan knew EDS did not know what their actual resource requirement was, whether they would in fact be able to secure such resources, and if so how much it would cost to secure the resources necessary to complete the project in the timescales indicated, Joe Galloway, Gerard Whelan and John Chan knew that they had not properly estimated the cost of the project. Indeed, since the staffing of the project was, as they knew, critically dependent on successful recruitment in the open market, and given the inherent vagaries of that process, they knew that they did not know what the project would in fact cost.

(2) In addition to this, Joe Galloway knew that he had artificially manipulated the Costings Spreadsheets which underlay the bid price, reducing the DTW (days to work or man-days) and the numbers and chopping the Interdec price in a wholly illegitimate manner. Gerard Whelan and John Chan were aware or came to be aware that he had done this.

(3) As such, Sky submit that not only did Joe Galloway, Gerard Whelan and John Chan know that they had not done a proper estimate, but they



knew that they did not have reasonable grounds for holding the opinion (to the extent that they actually did) that EDS could and would deliver the project for about £54 million.

(4) Sky submit that Joe Galloway simply and cynically told Sky what he knew they wanted to hear, well aware that that was not true and/or not caring whether it was true or not. It is again likely that Gerard Whelan and John Chan also did not hold, or came not to hold, this opinion either.

**[692]** Sky submit that the Costing Spreadsheets failed to provide any information about when and in what numbers resources would be required. Sky say that the Costing Spreadsheets do not assist in working out what work is required to arrive at go-live after nine months with full transition and completion within eighteen; they do not assist with planning of the requisite work and they do not amount to a resource plan identifying what resources with what skills will be required at what time, for what periods and in what numbers.

**[693]** In relation to cost, EDS say that prior to and in preparation for the EDS response, EDS had carried out an analysis of the effort that might be required to deliver the CRM system. EDS say that they carried out a reasonable exercise of estimating costs for the EDS response and that the criticisms by Sky are not valid.

**[694]** In relation to the representation as to time prior to the letter of intent, Sky submit that:

> (1) EDS had not carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go-live of the contact centre. EDS had not taken the necessary steps in the analysis in that EDS had not properly worked out what work was required; how that work was to be delivered in accordance with their proposed approach; and the resource requirements of that work and the implications of such resource requirements. EDS therefore did not carry out a proper analysis of how long the work would take.
>
> (2) Even if Joe Galloway, Gerard Whelan and John Chan did hold the opinion that EDS could and would deliver go-live within nine months and completion within 18 months, they had no reasonable basis for holding such an opinion.
>
> (3) Furthermore, Sky say that since Joe Galloway, Gerard Whelan and John Chan knew that EDS did not actually have the resources required and that no steps had been taken to ascertain whether they would in fact be able to secure anything more than a small number of resources from elsewhere, they did not have any reasonable grounds for such an opinion.
>
> (4) In any event, Sky say that it is unlikely, at least in the case of Joe Galloway, that he did ever genuinely hold such an opinion. He simply told Sky what they wanted to hear because he knew that that was what they wanted to hear, either knowing it not to be true or, at the very least, without caring whether it was true or not. In the case of Gerard Whelan and John Chan, if they ever did hold such an opinion, it is likely that they no longer held it by the time the letter of intent was agreed.

**[695]** Sky refer to the Vine Plans as being the only planning documents produced by EDS at the time of preparing the bid. They say that EDS did not undertake a proper exercise to assess what work was required in order to deliver go-live in nine months and the whole project in eighteen months; they did not undertake a proper exercise of planning and sequencing to establish



that go-live could be delivered in nine months and the project as a whole in eighteen and if so how; and they did not undertake a proper exercise to establish what resources they required, at what times, for what periods, in what numbers and with what skills.

**[696]** In relation to time, EDS accept in their closing submissions that, on the basis of Robert Worden's evidence, any representation of 'proper analysis' or 'reasonable grounds' would be false.

***The process of estimating for the response***

**[697]** The way in which EDS carried out its estimate for the purpose of the response forms the underlying basis for the complaint by Sky. It is therefore necessary to review what was done by EDS to prepare their estimate of effort, cost and time for the purpose of the response.

**[698]** Sky emphasised in evidence the need for there to be a number of stages in the process of estimating cost and time for an IT project. I accept that there are essentially four stages. First, it is necessary to estimate what work has to be done. Secondly, there has to be a calculation of the resources which are needed to perform that work. Thirdly, it is necessary to work out what number of resources are required to carry out the work within the period. Fourthly, it is necessary to work out whether those resources are available.

**[699]** In a case with much documentation, there is surprisingly little documentation relating to the process by which EDS prepared its response. What documents there are, combined with the witness evidence of Joe Galloway, Gerard Whelan and Andrew Sollis, forms the basis on which I have to proceed. The main documents which survive and which form the basis for the cost and time analysis are essentially the costing spreadsheets and two programmes produced by Steve Vine.

**[700]** I deal first with the estimate of cost.

***The cost estimate***

**[701]** In his first witness statement, Joe Galloway explains the process by which the cost estimate was produced. He says that estimating was carried out in meetings of the bid team and that he recalls at least two half-day sessions which he attended 'in order to consider and capture the team's conclusions in a useable form'. He says that people would spend time outside the group sessions looking at the ITT and forming their own views, but when the bid team came together they tried to reach 'consensual judgements'.

**[702]** Joe Galloway says that at the same time as the bid team were looking at this 'bottom up' estimate from expected functionality, they were also looking at a 'top down' estimate to provide a measure of verification. This 'top down' estimate involved an analysis of broad areas of project activity and an estimate of how long would be required for that activity based upon past experience. He says that the bid team were constantly measuring their estimate against the top down predictions and that the estimates brought to the group discussions had been verified in this way.

**[703]** He identifies the following people as being involved in the process and attending the sessions in which he was involved: Mahmoud Khasawneh (the bid architect), John Mitchell (the Chordiant Software consultant), Gerard Whelan, Simon Cayless and Zubair Ahmed. He says that Gerard Whelan, Simon Cayless and Zubair Ahmed were all on the business process side and that this bias was appropriate because the main imponderable was the scope and complexity of the business requirement.

*[2010] IP & T 597 at 725*

**[704]** The analysis process he explains as follows. The team considered the processes in the ITT 'at the level at which we anticipated use cases would be produced in the exercise of requirements definition'. For example, he says that the team were looking at functionality in terms of 'identify customer' or 'capture customer profile' and considered the effort that would be involved both in analysing the business requirements in each area and then implementing the requirements which they expected to be produced.

**[705]** In terms of business analysis, he says that the team considered how far each process was likely to be new and how far they would be relying on an existing and familiar process. Based on the ITT and their contact with Sky, he says that the bid team tried to predict the amount of customisation which would be

necessary in respect of existing processes. Where processes appeared to be wholly new it was a question of applying their experience.

**[706]** In terms of development effort he says that the team tried to form a view as to how far the functionality required by the ITT corresponded with the 'out of the box' functionality in Chordiant and the functionality they had to implement on other projects. From this and from their general development experience, the bid team then made a judgement as to potential reuse and also the effort required for the development of novel functionality. He says that 'consistent metrics' were applied across all the notional use cases attributing to each a low, medium or high complexity and a corresponding estimate of effort adjusted where considered necessary. These estimates, he says, were not directly based on any standard metrics from Chordiant but were developed by the team and that John Mitchell was involved in the process. He says that the team came to the conclusion that a very large percentage of what Sky wanted from the CRM package was closely analogous to what the team had done before or could be taken 'out of the box' from Chordiant.

**[707]** He says that this analysis of development effort was carried out for all of the functionality at use case level and this level of detail was applied to many small components. He adds that the team had also to include broad provision for functionality which could not be thought of in terms of use cases, including architectural design, interfaces (that is, the system requirements of the middleware component) and project management. He says that the amount of effort required for an architectural design connecting a given number of legacy systems had to be estimated on the basis of past experience. He refers to the outcome of this exercise being an estimate of effort in terms of numbers of people, divided by broad skill-sets and the time periods for which these numbers would be required.

**[708]** Joe Galloway says that these conclusions were then recorded by him at meetings using a spreadsheet on his laptop. He says that the spreadsheet was based on an SHL standard estimating template consisting of a number of tabs used in estimating and producing a cost. He says that during the estimating meetings he recorded conclusions in a separate tab which he created as a 'scratch-pad'. He says he transferred the conclusions into the formal tabs of the spreadsheet and then deleted the 'scratch-pad' tab. Initially, he says, only he had access to the estimating sheet and he updated it with the numbers of people in the different skill areas and the number of days' effort that had been estimated. He says that he kept the spreadsheet entirely to himself as he did not want members of the team to see the rates at which they would be charged to the client. Only when the estimating spreadsheet was complete did he then pass it on to Tim Webb for the purpose of costing.



**[709]** He refers to an example of the estimating spreadsheet dated 24 May 2000. This was created on 4 May 2000 but the version is one produced after it had been handed to Tim Webb. In the 'EDS' tab are the various categories of resources expected to be required from EDS, showing the overall numbers and the man-days of work expected of them. He says that it can be seen that a team of about 100 people (deployed at various times over the lifespan of the project) was predicted. He says that the spreadsheet contained a classification of rates in the 'Staff Model' sheet, with contract staff being in a separate column. He says that the practice during the estimating exercise was to identify a role as being filled by a contractor only where it was particularly desirable to do so, or it was inevitable that a contractor (which included a resource from another consortium member) would have to be used. He says that it was expected that some of the roles in the EDS column would eventually be filled by a contractor, notwithstanding the contrary indication in the spreadsheet.

**[710]** Joe Galloway says that the role descriptions in the spreadsheet were appropriate and captured all of the roles that would be expected at some point during any project, although the roles might vary in terms of number and duration depending on the nature of the particular project. The roles provided a generic description. For example, under the heading 'GUI', the spreadsheet referred to one technical lead, two

system engineers and nine programmers. This would cover both Chordiant Forte and Chordiant Java development on the Sky project, as well as Forte middleware.

**[711]** In terms of the 'cost to complete', he says that this is a function of time to complete individual tasks, multiplied by the number of people associated with the task, multiplied by appropriate hourly rates. He says that the professional judgement lies in the identification of the tasks themselves, the amount of time required for each task and the number of people required to complete it within a notional timescale. These, he says, were all outputs of the estimating exercise; the cost is then an arithmetical process.

**[712]** He says that Tim Webb managed the costing exercise. He says that the 'EDS' tab in the spreadsheet was derived from the estimating exercise and spreadsheet. The other tabs contained things like hardware costs and software licences. There is also a specific tab contributed by Interdec in respect of the location component and one from AT Kearney which set out their consultancy charges for the business process activity. He says that apart from the copy of the spreadsheet distributed to Tim Webb, the estimating spreadsheet existed only on the 'C: drive' of his laptop. And he left this on his desk at Canary Wharf on the day of his departure.

**[713]** He says that Tim Webb was responsible for collating, organising and presenting the information, but he drew upon the other members of the bid team, including the consortium partners in order to do so. He says that Gerard Whelan supervised the process, as with all aspects of the bid team's work, and he reviewed the information, although not in much detail.

**[714]** Gerard Whelan also provided a description of the process in his first witness statement. He says that the starting point in preparing the estimates for the response was an estimate of development effort, in terms of numbers of people working particular numbers of man-days in particular skill areas. From this estimate of effort, he says that EDS's professional consultancy costs were calculated by multiplying numbers of man-days by the appropriate day-rates and there was also a 'planning process of satisfying ourselves that the estimated effort could be organised so as to fit within the overall timescale'.

*[2010] IP & T 597 at 727*

**[715]** In broad terms, Gerard Whelan confirms Joe Galloway's description of the type of process used to estimate effort, being a group exercise, spread across a number of meetings. He says that for some parts, for example A T Kearney's analysis of 'quick wins' in business process redesign it was only possible to provide a 'top-down' estimate of X consultants for Y length of time on the basis of professional experience. For other parts, such as Chordiant contact centre development, it was possible to divide into many small tasks and estimate these individually by a 'bottom-up' process. He confirms that this part of the exercise was assisted very substantially by John Mitchell and the other Chordiant Software consultants who worked on the bid.

**[716]** He says that the leaders in particular areas took primary responsibility for developing those areas and that the work was done through discussions around a whiteboard and brought into larger meetings. He identifies the following people being involved, to the best of his recollection: Business Process Re-Engineering (AT Kearney): PJ DiGiammarino; Telephony and infrastructure: Pat Coster and Parashuram Kaneri; Chordiant: Mahmoud Khasawneh and John Mitchell; Middleware and interfacing: Mahmoud Khasawneh; Data warehouse: Andy Sollis; Data migration and data architecture: Mahmoud Khasawneh and John Mitchell; Transition: Steve Vine. He says that he was involved in Business Analysis and, together with Interdec, in Location.

**[717]** He confirms that Joe Galloway attended a number of the group meetings when the team aimed to

reach conclusions in terms of man-days in particular skill areas, which Joe Galloway would record on a pro-forma spreadsheet from his time at SHL. He says that he had a look at this spreadsheet a few times during the bid process of estimating, before and after it went off for costing. He says that the spreadsheet was not the only document used, but it was the only one which was retained as people tended to bring handwritten notes and calculations to meetings which were discarded once a decision had been reached and the conclusion incorporated into the spreadsheet.

**[718]** He also confirms that the spreadsheet was handed over to Tim Webb to provide an overall cost model, incorporating the EDS consultancy effort with other costs such as the cost of hardware and software licences. He says that Tim Webb worked full-time on costings during April and May 2000.

**[719]** Gerard Whelan says that he, himself, was responsible for coordinating the estimates received from these various sources and that he checked that the costs included were reasonably comprehensive and accurate by canvassing the views of others with relevant experience. He says that the fit-out of the Sky locations was in the event one of the largest constituent parts of the estimate and these costings were provided to EDS by Interdec.

**[720]** The only other witness called by EDS who was able to describe the bid process was Andy Sollis. Although he left the Sky Project around April 2000, he was able to confirm that the bid team met informally to discuss any issues or questions in relation to the response. He said that there were no agendas for these meetings and any discussions were recorded on whiteboards rather than on paper or on computer. He says that estimating information was fed to Joe Galloway in the course of informal meetings and then the spreadsheet in which he maintained this information was passed on to Tim Webb, who managed the costing. He says that his own estimations of effort and rough workings were recorded in his day book, which he has not kept but he says he passed on the information, to the extent that it was required, to Joe Galloway and Steve Vine.



He says that the estimating work was undertaken fairly early on in the bid process and completed by late April 2000 and that he played a fairly extensive role in researching and contributing the information about hardware and software costs which appears in this spreadsheet.

**[721]** From the evidence set out above, it is evident that a substantial number of people were involved in the process of preparing the cost estimate. Apart from the description of the process by Joe Galloway, Gerard Whelan and Andy Sollis there is nothing that survives to show the detail of the process except for the Costing Spreadsheets.

**[722]** There is however supporting documentation for the general process which EDS followed. There is the agenda for the Kick-off Meeting on 7 April 2000, the five Week Plan involving EDS, Chordiant, Forte and Lucent and a number of documents produced before and after the visit to Sky on 10 April 2000, the notes of the Internal Workshop of 12 April 2000, the Discover VRB on 13 April 2000, Gerard Whelan's e-mail to Scott Mackay of 21 April 2000 concerning further information, the EDS/Sky workshop on 27 April 2000, the de-briefing meeting on 28 April 2000, the draft response dated 12 May 2000, the meeting or red team review with Youd Andrews on 12 May 2000 and the schedule produced as output, comments on the draft response by Chris Rogers and Chris Moyer on 12 May 2000, the Technical Review on 18 May 2000 and the final Define VRB completed on 25 May 2000. These documents also demonstrate that some degree of the process was carried out but I accept Robert Worden's comments on the limited scope and extent of those reviews.

**[723]** Generally Joe Galloway's evidence on the process by which the costing spreadsheets were produced is supported both by the evidence of Gerard Whelan and Andy Sollis and by the costing spreadsheets and other documentation. I am satisfied that there were meetings within EDS and between EDS, Chordiant, Forte and Lucent at which the scope of the necessary work was defined in the light of the information contained in the ITT and the further information obtained from Sky. I accept the evidence of Andy Sollis and Gerard Whelan that these were informal sessions and that they resulted in matters being recorded on whiteboards and by other temporary means which evidently would not survive or did not survive.

**[724]** I am also satisfied that the Costing Spreadsheets had resource numbers which were originally produced by Joe Galloway on the basis of information obtained at those informal meetings and that they recorded the views of people at these meetings on the scope of the work and the necessary resources.

**[725]** In his witness statement Joe Galloway referred to the use of a 'scratch-pad'. Sky accept that some form of estimation of development effort must have been used to arrive at the contents of the Costing Spreadsheets, but say that the way in which Joe Galloway explained that an analysis had been carried out for all of the functionality at use case level was embellishment. In particular, Joe Galloway in his evidence said that a spreadsheet similar to that later produced by Steve Fleming, setting out use cases and functionality had been used. No such document exists and neither Gerard Whelan nor Andy Sollis refer to one. Whilst I accept that a form of 'scratch-pad' was most likely used, I consider that Sky are justified in their criticism of Joe Galloway. He changed and gave inconsistent evidence on the relationship between the analysis spreadsheet which he said he had used and the one produced later by Steve Fleming. In the informal meetings I consider that a much broader brush approach was taken to estimating development effort by using a 'scratch-pad'



or rough working tab on the spreadsheet which was later deleted. Doubtless some information was produced by considering certain use cases but other information on development effort was likely to have been derived from the experience of EDS and the consortium members. All of these estimates were evidently entered onto a scratchpad and transferred to the costing spreadsheet.

**[726]** The Costing Spreadsheets were produced by Tim Webb, starting on about 4 May 2000. The first version was produced on 16 May 2000 in US dollars. It indicated an EDS price, before adding any margin or profit, of some $54.6 million, including about $11.8 million of EDS consultancy. The EDS 'Sell Price' was some $82.5 million.

**[727]** The next version of the Costing Spreadsheet was dated 24 May 2000. It had a total EDS Price of £48.25 million, including £8.3 million of Consultancy cost. The EDS Sell Price was £66.7 million. There then followed a version dated 25 May 2000 in which the total EDS Price was £51.0 million with £9.2 million of consultancy and the EDS Sell Price was £70 million. On a 26 May 2000 version the EDS Price was £42.9 million with £8.9 million of consultancy, giving an EDS Sell Price of £59.2 million. That remained the figure on the version produced on 29 May 2000 and the two versions, 'ITT Costings IV' and 'BSkyB ITT Costings v6', both produced on 30 May 2000.

**[728]** On 30 May 2000 a further version of the EDS consultancy costs was produced as 'MP Chord Third Pass'. In that document, the 19,422 DTW for EDS consultancy was reduced to 15,212.3 DTW. The Staff costs which were previously £7.4 million came down to £7.25 million.

**[729]** On 31 May 2000 'ITT Costings V' was produced which had an EDS Price of £39.4 million including consultancy of £8.7 million (which incorporated the EDS consultancy of £7.25 million). The total EDS 'Sell

Price' was £54,195,013 which represented an overall margin of 27% over the EDS Price of £39.4 million. The figure of £54,195,013 was the same as that incorporated into the response. Although the metadata indicates that this may have had changes made in August 2000, I consider it likely that, as Sky suggest and Joe Galloway and Gerard Whelan accepted, this was only accessed in August 2000 and that it was the final version produced on 31 May 2000.

**[730]** I now turn to consider the contentions in relation to cost and time.

***Sky's case on cost prior to the letter of intent***

**[731]** Sky say that what happened was not a proper process and they make two further criticisms of the way in which EDS put together that cost. First, there was criticism of the way in which there was a last minute change in the EDS consultancy Days to Work ('DTW') and the rates applied in arriving at the cost. Secondly there was a criticism of the change in the sum included for Interdec between 24 May 2000 Costing Spreadsheet 'ITT Costings v2' and 31 May 2000 version, 'ITT Costings V'. The figure changed from an EDS Price of £18,843,335 to £5,491,316.

**[732]** It has to be remembered that the ITT contained a 'high level' or broad specification of Sky's requirements. That was expanded by the information provided by Sky during the bid process, particularly at the workshops or meetings held for that purpose. EDS's role was to produce an estimate of the work, effort and time to convert those requirements to an integrated software package which would provide the functionality to satisfy those requirements. Like any estimating process it had to be a combination of experience and calculation. There had to be a proper process so that EDS would have reasonable grounds for the estimate which they provided to Sky.



**[733]** So far as the general method of estimating effort and cost which was followed by EDS, and which I have found was carried out as described above, I do not consider that Sky have established that it was not a proper process.

**[734]** Robert Worden identifies one aspect in which he says the process was inadequate in terms of cost. He says that the profile of staff numbers over time, with a build-up to 96 staff for a nine month duration was not realistic and this causes him to have reservations about the realism of the staff costs. Otherwise, he considers that the approach used by EDS was adequate. I consider that Robert Worden's criticism does not detract from there being a proper process but is a criticism of the approach taken within that process on a particular element.

**[735]** Ian Murray concludes that the estimates of costs and resources were not conducted using any recognised process or industry standard method. However, he explains that Top-Down and Bottom-Up estimating processes are accepted methods of estimating and that without a list of functions or use cases from functional specifications, it would be impossible to carry out a proper function point count method of estimating. Robert Worden does not consider that function point counting was appropriate for the stage of the EDS response because the requirements were not at that time expressed in the detailed form that would support function point counting. I accept that view.

**[736]** Given the overall status of the requirements at the stage of the ITT and the EDS response, I do not consider that the type of information necessary for a function point counting technique could reasonably have been used. Absent the use of that technique the Top-Down and Bottom-Up estimating processes described

in the evidence were, in my judgment, proper processes to be used. I now turn to consider the two particular criticisms that are made by Sky.

***The Interdec price***

**[737]** EDS chose Interdec as subcontractors for the location work. Interdec provided a quotation for the work in two parts: £5,349,723.60 in respect of the proposed new site and £13,493,611.25 in respect of the work to be done upgrading the existing sites in Livingstone and Dunfermline.

**[738]** Joe Galloway confirmed that this part of the work was dealt with by Gerard Whelan. Both he and Gerard Whelan essentially said that Interdec provided the quotation on the basis of what they, Interdec, thought was required and EDS adopted that price.

**[739]** The Interdec price changed as follows:

> (1) On the Costings Spreadsheet of 25 May 2000 it was shown as an EDS Price of £18,843,335 and an EDS Sell Price of £22,168,229.
>
> (2) On 26 May 2000, the price changed to an EDS Price of £8,492,189 and an EDS Sell Price of £9,990,810. From the tabs on the two spreadsheets it can be seen that the price changed because large elements of the work had been removed entirely. In respect of both the new site and the existing sites, the following work was removed: stripping out & demolitions; builders & enabling works; alterations of external claddings, windows and doors, raised access floor, ceiling works, mechanical/HVAC alterations & installations; provisional costs for high-level walkways; IT cabling & communications; and AV systems.
>
> (3) In 'ITT Costings V' Costing Spreadsheet on 31 May 2000 the Interdec element changed resulting in an EDS Price of £5,491,316 and an EDS Sell Price of £6,460,372.

*[2010] IP & T 597 at 731*

A number of lines had £0 inserted for both the new site and the existing sites. This applied to: partitioning; doors, frames & ironmongery; joinery items; flooring; signage; and decorative features/banners.

**[740]** Sky submit that there was no objective or rational justification for these two changes. Joe Galloway said in evidence that Mike Hughes was fully informed about the situation and instructed EDS to remove the elements that were removed from the Interdec quotation. In cross-examination on Day 40 Joe Galloway said:

> 'Through our conversations with Mr Hughes, we had indicated that the build-out and construction components that Interdec was composing was a high proportion of the bid that we had in place, some £22m, and Mr Hughes said, 'We should remove those from our area because he would be taking those forward himself.' Now, the reason that they are left complete in the Interdec tab is because we believe this is the appropriate work that needed to be done, and Mr Hughes was going to find, according to Mr Hughes, quote unquote, “another bucket of money”, that this was going to come from and that we should only consider items we felt absolutely vital to keep in the systems that were appropriate to getting the existing contact centre up and running. Now, this is phase 1 of that discussion with Mr Hughes. Through another phase of discussion with Mr Hughes, this number comes down again, and I don't remember the exact figure, but it is somewhere around £6.7m or £6.8m, as the point that we

believe absolutely necessary for us, EDS, to manage through our process.'

**[741]** Gerard Whelan said that he could not explain the reductions. He suggested that there might have been documents which would explain the situation which have not survived or that there might have been a revised bid of some sort from Interdec and that EDS were simply reflecting that. He did not mention instructions from Mike Hughes. He recalled that in the last few weeks prior to submission of the EDS response, the bid prices changed on a frequent basis, with costs being added and taken away.

**[742]** Sky say that the explanations of both Joe Galloway and Gerard Whelan are false. First, they say that the EDS response contains no suggestion that EDS were going to do anything other than 'design, build and implement a new contact centre for Sky and … refit the existing contact centres' which was consistent with the 'fly-thru' shown as part of the EDS multi-media presentation on 1 June 2000. Secondly, as to Joe Galloway's suggestion that Mike Hughes had specifically instructed EDS to act as they did, Sky say that this was not mentioned in any of his witness statements. It would have represented a significant change to the price and been significant. In addition Sky say that it would be expected that the same instruction would have been given to the other bidders but none of the others proceeded on this basis. Any such instruction was not recalled by Gerard Whelan.

**[743]** Thirdly, Sky say that the 'Youd Andrews checklist' as circulated on 24 May 2000 contained an entry 'Interdec price to be ratified' which was allotted to Gerard Whelan and was due to be completed by 17 May 2000. On 24 May 2000 that item was ticked to show that it had been completed. As such, it seems likely that the Interdec quotation that appeared properly for the first time in the Interdec tab of the Costings Spreadsheet on 24 May 2000 reflects precisely that 'ratified' price. Further, Sky say that if there had really been any change to the Interdec quotation after 24 May 2000 any such change



would have left some documentary reference. Sky say that the 'chopping' or 'slashing' of the Interdec price was done to ensure that the bid put forward by EDS was within a suitable touching distance of £50 million, and that Joe Galloway was responsible for this manipulation of the Costings Spreadsheets.

**[744]** EDS say that the suggestion made to Gerard Whelan and Joe Galloway that the Interdec element of the costs had been cut on no other basis than to reach the £54m figure was not a pleaded element of falsity and was not something that anyone had dealt with before those witnesses were asked questions. EDS refer to Sky's written opening where para 4.2 stated that 'Interdec do not play a significant role in this litigation and can be ignored'. EDS say that on the basis that no document had apparently been found to explain the reduction, Sky launched an unannounced accusation of fraud on this issue.

**[745]** EDS say that Gerard Whelan had no real recollection of how and in what circumstances the Interdec costs were reduced. He said on Day 35 that, so far as he was aware it was not the result of a decision on 31 May 2000 'to slash costs in some way'.

**[746]** EDS refer to the evidence of Joe Galloway that the reduction in Interdec costs was at Mike Hughes' request and to the suggestion that this was not in his witness statement and was made up. EDS rely on documents showing Sky's understanding of the position, including a costing comparison prepared by Sky on 8 June 2000. This showed that under the EDS bid there were location costs of £5.016m but 'possible upgrade of building' and 'additional location considerations' of £4m and £14.984m. The total potential location costs of £24m as understood by Sky were, therefore, as Joe Galloway noted in re-examination, closer to the original £22m figure.

**[747]** EDS also refer to the location costs sheet referred to in the cost comparison of 8 June 2000 under 'see location costs sheet'. This is a reference to a spreadsheet which indicates that the £5.016m cost element in EDS's bid was understood to relate to basic fit out of the contact centres, with a number of other items, such as dismantling and removal, attributable to the additional costs. Joe Galloway considered that this was consistent with Mike Hughes's instruction that the bid should include only the basics.

**[748]** EDS also refer to a further cost comparison prepared on 18 July 2000 in which Sky had included £20m for location costs in each bid and at Note 3 stated that 'Location Costs: A fixed charge of £20m has been included for this as an estimate to fit out and kit out all three sites.'

**[749]** EDS submit that Joe Galloway's response in cross-examination, without the benefit of documents, to the unpleaded and unannounced criticism of EDS in relation to the reduction of the Interdec costs is supported by Sky's own documents.

**[750]** The criticism of the change to Interdec's price as a foundation for the representation being false was, on any view, a matter which Sky only relied on in cross-examination of EDS's witnesses when all of Sky's factual witness evidence was complete. Sky's opening submissions clearly indicated that the hearing would not be concerned with Interdec.

**[751]** In those circumstances, where witnesses had been concentrating for a considerable period of time on the pleaded allegations, it is not surprising that the recollection of witnesses such as Gerard Whelan was not good. There was no documentary evidence for the change. The only explanation came from Joe



Galloway whose evidence, as I have said, I can only accept if there is credible supporting factual or documentary evidence or if a strong inference as to the correctness of his evidence can be drawn.

**[752]** His explanation was that he had had conversations with Mike Hughes in which he had said that location costs were a high proportion of the bid and Mike Hughes had said that EDS should remove those costs because he would be taking those forward himself. He said that there were two phases to his discussion and that in the second phase of discussion with Mike Hughes the number comes down again. There was no evidence from Mike Hughes on this aspect and no opportunity for this to be put to him because this aspect of the case only developed long after Sky's witnesses had concluded their evidence.

**[753]** The EDS response made it clear that they had only allowed for about £5 million for location costs for the existing and new spaces (para 7.2.1) and about £1.5 million for consultancy (para 7.2.2) giving a figure close to the £6,460,372 in the Costing Spreadsheet. The comments from Sky in the cost comparison sheets showed that Sky was aware that costs for such items as 'possible upgrade of building' and 'additional location considerations' of £4m and £14.984m would have to be added to EDS's total. The cost comparison sheets strongly suggest that Sky was treating location costs relating to possible upgrade of the building and other costs over the base case such as 'dismantling, removal and clearance' as additional costs. This led to the £20 million figure being placed in the figures for both PwC and AA/EDS in the cost comparison of 18 July 2000. This is consistent with Sky not being concerned with having the full costs of the location within the bid. Given that Mike Hughes was evidently in contact with Joe Galloway and wanted him to succeed in the bid, I believe it likely that Mike Hughes would have communicated Sky's approach to Joe Galloway.

**[754]** In the circumstances in which the Interdec allegation arose and in the absence of any evidence from Mike Hughes to rebut what was said, I accept Joe Galloway's evidence on this aspect as it is consistent with other evidence and with Mike Hughes' general approach towards EDS. Also EDS made it quite clear what sum they had included for the location work and Sky were evidently aware of the situation.

**[755]** I therefore do not consider that there is anything in the Interdec quotation to negative the representation on cost. There was originally a proper analysis of the sum for this work and I am satisfied that it was reduced in line with conversations with Mike Hughes and therefore was still a proper estimate on that basis.

***Changes in days to work (DTW) and number of staff***

**[756]** Sky say that, as is apparent and was dealt with in cross-examination, there were errors in the figures in the EDS tab of the Costings Spreadsheets, at least until ITT Costings V on 31 May 2000. Sky refer, in particular, to an error in failing to account properly for multiple staff. By way of an example, the Testing Team in the EDS tab of ITT Costings IV calls for three EDS staff for that team, each working for 180 days. The internal day rate for such a staff member is £399 but when working out the total cost of the EDS staff on the testing team, EDS multiplied 3 x £399 instead of 3 x 180 x £399.

**[757]** In ITT Costings V, somebody made corrections to remove these errors manually rather than using the formula facility on the spreadsheet. The correction, in itself, had the effect of significantly increasing EDS's consultancy



costs. However, the total EDS consultancy cost only rose, between ITT Costings IV and ITT Costings V by £533,209 as opposed to the increase of £5,966,205 that would have flowed from the correcting the errors.

**[758]** This, Sky submit, was in part because EDS had changed the external charging rates by reducing the EDS margin from 50% to 25%, whilst the internal rates remained much the same. Sky say that a significant element of this reduction was achieved by a reduction in the DTW for many of the categories and by the reduction in numbers of staff required. The changes included reducing DTW from 320 to 280 for such resources as the programme manager, project office admin, project management, mainframe technician and programme technical architects. Other similar changes were made. As a result of these changes, the total effort was reduced.

**[759]** Sky say that there was no objective or rational explanation for these reductions and they were made because Joe Galloway was determined to put in a bid in the region of £50 million.

**[760]** Sky refer to Joe Galloway's evidence. He provided the general explanation on Day 40 that—

> 'as one puts together a Response to ITT, over time one refines that effort, one takes words out, puts words in, takes—makes an assessment of where one has gotten to from an estimate standpoint, refines that estimate, based on information one expects to have, based on information one gets in … continuing in effort … all the way up to, I would say, 5 or 6pm on the day … the ITT was due, to further refine our Responses as they went out to the client.'

**[761]** He suggested that he had received advice from Mike Hughes to the effect: 'don't worry about the as-is

processes, we will get you those as soon as you are awarded the business', which allowed him and the team to—

> 'hone down … the amount of effort required … to cut down the man-days of effort required by the use case to prepare overall a figure for delivery, and in doing so, it would cut down the gross number, as I mentioned before, and the man-days of effort required for each one of these.'

**[762]** Sky submit that this evidence was false. First, this evidence was not included in Joe Galloway's witness statement and would have been an important explanation of how EDS prepared its estimate of cost. Secondly, his specific explanation would not explain the cuts that were in fact made at the eleventh hour to numbers and DTW. They say that any provision of as-is processes would result in a reduction of effort in the process workstream not in the other workstreams where changes were made.

**[763]** Joe Galloway also gave evidence that:

> 'I can say that there was a refinement process that was continuing as we moved closer to delivering the activities that people were thoughtfully processing the information that we had put forward, that on the day of the 30th, when we were preparing the final pieces, the team that put the estimate together was gathered again and asked if they had any revision, thought there was any appropriate changes. That team, on the 30th, said they thought there were appropriate changes to make, those changes were made, and we placed those into our final estimate.'



**[764]** Sky refer to Gerard Whelan's evidence and say that he accepted that he could offer no explanation for either the reduction in the DTW or the reduction in the number of programmers and others and could point to no documentation that recorded or explained these reductions. He said that he did not remember the errors or any correction and did not recall making changes or being aware of last-minute changes to the EDS consultancy costs. Notably, Sky say, he did not refer to any gathering together of the team to revise effort estimates or to this being on the basis of information provided by Mike Hughes.

**[765]** Sky rely on Joe Galloway's evidence of his involvement in these changes. In addition it points to the metadata of 'MP Chord Third Pass' which indicates that it was Joe Galloway who made the changes on 30 May 2000. Sky submit that the overall inference is that Joe Galloway manipulated the Costings Spreadsheets in order to reduce the EDS consultancy costs to enable EDS to put forward a bid in the region of £50 million, thereby knowingly putting forward a bid to Sky that did not reflect EDS's true opinion and was not based on any reasonable grounds.

**[766]** EDS accept that there were errors and that these were corrected and at the same time changes were made to other figures. In relation to the coincidence of timing of the corrections which increased the price and the reductions and the inference that the reductions were made to off-set the corrections, EDS say that it is a fair point to make but EDS rely on Joe Galloway's explanation in cross-examination on Day 40.

**[767]** It is evident that the Consultancy costs within the costing spreadsheet had a number of arithmetical errors. If corrected, the figures would have increased the consultancy figures. Sky say that the effect on the EDS Sell Price would have been nearly £6 million.

**[768]** There were two changes that occurred at the same time. First EDS reduced the margin on its staff

costs from 50% to 25%. The rates adjusted to reflect the 25% margin set out in the 'ITT Costings V' Costing Spreadsheet are consistent with the table at para 7.2.1 of the response. On that basis, EDS were reducing their rates and, as those rates were to be applied on the project, that did not affect the fact that the figure was a genuine estimate.

**[769]** The second change involved an adjustment in the DTW which were originally in the Costing Spreadsheet. The figure of 380 for the Project Manager and Project Office Admin for the Transition Team became 240. That was consistent with the hours for the Co-ordinator, Business Planning and Staff Scheduling resource which was already 240. Similarly Data Warehouse Resources of 363 and 396 were reduced to 240. A large number of resources with DTW of 320 were changed to 280. Was this, as Joe Galloway said, a late change to the figures or was it, as Sky state, Joe Galloway manipulating the DTW figures so as to correct the errors and retain a figure of near £50 million for the project?

**[770]** There is a strong and inescapable inference that the amendments to the DTW and the rates in the Costing Spreadsheet were made to overcome the errors which had been discovered and were dealt with at the same time. That, however, does not mean that the alterations made to the rates and DTW did not occur because of a proper estimating process. If an error is found then it necessarily leads to a review of other calculations to see whether they are accurate or not. Joe Galloway's evidence that the figures were changed as a result of a continuing process of review with some input from Mike Hughes may well be correct. Again this particular aspect was not dealt with in



evidence. If there had been an intention to put in false figures not supported by the underlying estimating process, why would it have been necessary to reduce the margin to 25% from 50%? That would only be done, in my judgment, if the DTW could not properly be adjusted to cover the whole of the correction necessary. In addition, there is some logic in reducing the figures for the Transition Team to 240 so as to be consistent. Nor do I consider that a 10% adjustment to an estimate of DTW can be said to be outside the type of adjustments that are made when estimates are reconsidered leading up to a bid.

**[771]** I am not satisfied that the reduction in the DTW figure and the rates leading up to the final figure in the EDS response can be said to make the estimate one which was not produced by a proper process.

**[772]** In all the circumstances I conclude that, in putting in an estimate of some £54m in the EDS response, EDS had carried out a proper estimate of the cost of completing the project. On that basis EDS had reasonable grounds for holding the opinion that, they could and would deliver the project within that budget in the response.

***The estimate of time***

**[773]** There are two plans which set out sequencing and time. They were prepared by Steve Vine and are referred to as the Vine Plans. The evidence of the Vine Plans and of their relevance to the EDS response is neither clear nor consistent. The basis on which EDS arrived at their estimate of time is dealt with in the witness evidence. There is also criticism of EDS's estimation of time both from Robert Worden and from Ian Murray.

**[774]** There is also some other evidence as to EDS's approach to the estimate of time which also needs to be reviewed in this context. There are references to professional judgment and to reliance on Chordiant and the other members of the consortium.

***The Vine Plans***

**[775]** These plans consist of two Microsoft Project plans which were prepared by Steve Vine in late April 2000. The first Vine Plan has a 'create date' of 13 April 2000 and a 'last modified' date of 24 April 2000 and has the title 'Sky Proposal'. It is the more detailed plan, running to 274 lines. The second Vine Plan has a 'create date' of 25 April 2000 and a 'last modified' date of 26 April 2000, and is entitled 'Sky Milestones'. This is a milestone plan, running to some 49 lines and is less detailed. Both Vine Plans show a development that takes nine months to get to go-live and a further nine months to be fully completed, following an initial period for contracting, due diligence, design and analysis.

**[776]** Sky contrast this with the plan in the EDS response which it says showed go-live in nine months and completion in eighteen months with contracting, due diligence and design and analysis included within the overall timescale. Further Sky say that, to achieve go-live in nine months, the more detailed plan sets a very compressed timetable which under 'Applications' at lines 124–145 allows just 80 days for the key development work.

**[777]** Sky summarise this evidence as showing that, at no time prior to their selection by Sky, did EDS ever know whether or not they would be able to deliver the Sky project in the timescales.

**[778]** EDS accept at para 779 of their closing submissions that, on the basis of Robert Worden's evidence, if there was a representation that EDS had carried out a 'proper analysis' in relation to time or had 'reasonable grounds'



for an opinion that they could and would deliver the project within the timescales referred to in the EDS response, that representation was false. I have found that there was such a representation and it follows that EDS accepts that there was no proper analysis or reasonable grounds for the timescales in the EDS response, in particular the nine month period for go-live.

**[779]** It is convenient at this stage to review the factual and expert evidence on the Vine Plans.

**[780]** Joe Galloway said in cross-examination on Day 39 that all that Steve Vine had done was to produce a sequenced version of the work required to fit into the nine and eighteen month periods. He said in relation to the Vine Plans that it had no resourcing in it and was not 'a resource levelling plan'. He accepted that he made no attempt to take the Vine Plans and the Costing Spreadsheet and to see what were the resourcing implications of the plan. He said that 'we, the team, depended on Mr Vine to take the view of whether his plans that he has created here would nominally fit the nine-month plan that we put together from the resourcing standpoint'. This might seem to suggest that some resourcing was done but he confirmed what he said at para 252 of his first witness statement that the planning by Steve Vine was not resourced. Joe Galloway confirmed at Day 40 that he had not sought to work out what work was to be done in the first nine months.

**[781]** He also confirmed, particularly by reference to the resources for the Graphical User Interface ('GUI'), that he did not take the Vine Plans and consider the resource implication of deploying the effort within the time periods. He said that EDS did not have enough detail to make a determination of when this would need to be deployed. He stated that the overriding information that EDS used was the Costing Spreadsheet. When

it was pointed out to him that the costing spreadsheet allowed for 18 people to work for 320 days on GUI work but that if this was going to be carried out in the 80 days allowed in the Vine Plan to achieve go-live in nine months, the work was going to be compressed, he said that 'I did not give credence to this plan … as it related to effort that was going to be required'.

**[782]** Joe Galloway's response on Day 39 to the question of how he could be assured that nine months was a realistic estimate was to say that 'what we did is our beginning premise was that we had 18 months to complete the entire task, nine months to deliver something in the go-live environment'. That again indicates that there was no analysis but only an assumption. He said that he had 'a very reasonable professional expectation' based on the consortium's collective professional experience. He also accepted that he could recall no specific discussions with the consortium members that considered how the overall effort estimate would be carried out in the nine month period.

**[783]** Joe Galloway also agreed that he had never assessed what numbers of resources were in fact likely to be required in any particular timescales or for any particular time periods other than in the Costing Spreadsheets. He confirmed that he did not and, as far as he was aware, nobody sought to determine at that stage what work was required to be done in the first nine months in order to achieve go-live within that period.

**[784]** Joe Galloway said that one of the reasons that he did not give credence to the Vine Plans was that he did not consider the timescales to be sufficient but he said that he did not seek to work out any alternative plan. However he said that EDS used the Vine Plans 'as a basis for putting in our response to ITT, the diagrammatic representations that are in place'.

*[2010] IP & T 597 at 738*

**[785]** On the basis of this evidence, 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 or sequencing to establish that go-live could be achieved in nine months and no effort was made to establish what number of resources would be required for that purpose.

**[786]** Gerard Whelan also gave evidence about the Vine Plans. He confirmed that as set out in his witness statements and as pleaded by EDS that—

> 'towards the end of the estimating process in late April 2000, Steve Vine set out our perception of how the tasks would fall together in a set of Microsoft Project Plans. Outline plans at a high level were also set out in the Response to Sky's ITT. These plans were an output of the estimating process to which I have referred above. They attempted to lay out, in the fairly broad way to which we were limited by the information then available, how the tasks we had identified and estimated would be sequenced into an overall timescale.'

**[787]** Gerard Whelan accepted that the more detailed Vine Plan was a classic Waterfall plan and not an iterative RAD plan but he said that there may have been other documents, extant at the time but no longer surviving. He accepted though that if there were other plans, then he was not aware of them. He was not aware of any RAD plans and was not aware of a reason why the plans were produced as Waterfall rather than RAD.

**[788]** He disagreed with Joe Galloway's statement that the Vine Plans were things to which no credence should be given or was given at the time. He said that they represented 'a genuine estimating exercise of

how one would go about implementing this project' and that he had not heard the view expressed that they were not credible at the time. He said that he himself gave credence to the Vine Plans, as did everyone else involved. He accepted that the Vine Plans were the basis upon which EDS was communicating to Sky that it believed it had the ability to do the project in the time and at the cost indicated. He said that had he been aware of Joe Galloway's view that no credence should have been given to the Vine Plans, then he would have not been able to put forward the EDS response until he had a plan to which credence could be given. Andy Sollis said that the Vine Plans were intended to show 'whether one could do this in nine months' and were 'an important part of the planning and estimating exercise'. Andy Sollis also said that the Vine Plans were intended 'to validate that one could do this in nine months'.

**[789]** Gerard Whelan suggested that Steve Vine had carried out a resourcing exercise either in a format that did not leave any documentary mark at all, or purely in his head. He accepted that he was not aware of any documentation which evidenced Steve Vine preparing any resource plan and he had not asked Steve Vine to produce any such plan and was not aware of anyone else doing so either.

**[790]** The evidence of what was done by Steve Vine and what the Vine Plans represented is neither clear nor consistent. Steve Vine was not called as a witness. If, as Joe Galloway says, he gave no credence to the Vine Plans and thought that the timescales were insufficient then, as Gerard Whelan said, EDS could not put forward the EDS response on the basis of the Vine Plans which is what Gerard Whelan and Andy Sollis say they did. If however the Vine Plans were the basis for the EDS response then Robert Worden makes criticisms that I consider to be valid.

*[2010] IP & T 597 at 739*

**[791]** Robert Worden points out that the Vine Plans were not resourced. He says that the plans do not give confidence that the growth of resources from a small design and requirements team, up to a full implementation and testing team, has been sensibly modelled, or that a sensible profile of resources over time could have emerged from the planning exercise. He also says that because the resources had not been fitted to the activities the planned durations would not be reliable and their sum would be unreliable.

**[792]** He concludes by stating at para 1420 of his first report:

> 'Therefore, in my opinion, the expected duration was not based on a proper planning process – in that unanticipated resourcing constraints might have made task durations longer than expected. To the extent that such tasks were on the critical path for the project, this would have impacted the overall timescale.'

**[793]** Robert Worden says that, in his opinion, the most serious problem with the duration estimate was that it is known empirically that if the team size had been as large as EDS planned, inevitably there would have been interactions between different workstreams which would cause delays. Robert Worden considers empirical data in the form of the Constructive Cost Model (CoCoMo) data which relates total effort to elapsed time. He says that for a project with a headcount of 96 EDS staff and an effort of 19,000 man-days, the CoCoMo nominal schedule for a project of this sort would be about 24 months rather that the nine months planned. This would have called for some justification for the short timescale and he has found no evidence of this.

**[794]** He concludes at paras 1464 and 1466 of his first report by stating that 'EDS' approach to the plans which formed the basis of their estimates of elapsed time in their ITT Response, was inadequate for making the representation as alleged by Sky' and that those inadequacies 'were more than minimal, so that in my opinion, the planning approach used by EDS was not adequate for the purposes of making the

representations alleged about elapsed time'.

***Other evidence of planning***

**[795]** In his first witness statement Joe Galloway said this at para 251:

> 'I was not directly involved in this final planning task. It was undertaken by the bid team using the results of the estimating exercise (as reflected in the estimating spreadsheet). The team reported that it was satisfied that the effort predicted could be sensibly scheduled into a nine month window of time. No one on the bid team was either significantly more or less optimistic about this timeframe. At the time of submitting the Response to Sky's ITT, our perception was that everything which the ITT appeared to require could be achieved within the nine months specified.'

**[796]** As referred to above, he said that EDS had started from the assumption that EDS had to deliver within a nine month timescale and that he had given no credence to the Vine Plans. He was asked on Day 39 how he could be assured that nine months was a realistic estimate. He replied:

> '… what we did is our beginning premise was that we had 18 months to complete the entire task, nine months to deliver something in the go-live environment. We had our previous experience of delivering applications and we had our previous experience of Thomas Cook and we had previous
>
> 
>
> work that we were carrying on at Cable & Wireless. We had Chordiant Software who had a number of implementations under development already. So we had professional experience telling us what we could and could not do in the timeframe. It was our opinion as we went through that process with our partners and professional expertise that we could deliver a solution in nine months that would represent a go-live in one hall.'

**[797]** In terms of planning, Gerard Whelan says that throughout the estimating process, thought was given to the way in which the tasks in question would fall into place within the overall timescale. He says that the 'result of our estimating was a belief that we could complete the work requested in Sky's ITT and its Appendices within the nine months specified'.

**[798]** In his first witness statement Gerard Whelan also refers to the involvement of Chordiant Software and their representatives, in particular, John Mitchell who assisted the bid team in preparing those aspects of the response that related to Chordiant. He says that Chordiant approved the content and plans contained in the bid, in particular, the relevant technical aspects of the solution. He also says that Chordiant and Forte attended a meeting on 18 May 2000 to review the bid document. He also refers to the fact that representatives from Chordiant, Forte and Lucent, including Chordiant Software's Chief Technical Officer, Joe Tumminaro, attended the presentation to Sky on 1 June 2000.

**[799]** He says at para 102 of his first witness statement that this confidence was shared by EDS's consortium partners who had participated in the estimating process. In particular, he says that the central Chordiant contact centre solution had been estimated with the assistance of Chordiant Software, who asserted in their own marketing and training materials that such projects could be achieved within eight to ten months. He also says at para 103 of his first witness statement that previous projects gave them

confidence that their estimates were realistic. He refers to having 'recently got a Chordiant system up-and-running using out of the box functionality for Cable & Wireless in approximately nine months' and to having 'implemented a Chordiant system for Bank One International/Halifax Bank within, to the best of my recollection, approximately nine months'. He says that 'comparing Sky's ITT with other projects, it looked like a project which could (as our more detailed estimating suggested) be completed within nine months (excluding the transition activities set out in the Response to Sky's ITT for months 10 to 18)'.

**[800]** Andy Sollis also gave evidence in relation to planning information. He said that individually and in concert with Steve Vine, EDS had satisfied themselves that the project, as they anticipated it, could be carried out in the nine month period (excluding data migration). In cross-examination on Day 41 he said that in relation to the period of nine months, you could 'refer to your experience of how long particular projects take and feel from experience what is achievable. You can then also do a more detailed planning exercise to confirm that'.

**[801]** It is evident both from Robert Worden's evidence based on the witness statements and documents and also from the evidence given by Joe Galloway, whether or not he gave credence to the Vine Plans, and from Gerard Whelan that EDS did not carry out a proper assessment of the time which the project would take and, in particular, whether go-live could be achieved in nine months. The Costing Spreadsheets produced by Joe Galloway provided the overall Days to Work but did not attempt to assess what work or effort was



needed over what period to achieve go-live in nine months. It is therefore unsurprising that there was no attempt by EDS to consider the resources necessary to carry out the work in the necessary period.

**[802]** Gerard Whelan tried valiantly to suggest that Steve Vine did carry out or might have carried out further planning or resourcing exercises but there was no substance in this and I reject it as being speculation. In my judgment Gerard Whelan's evidence amounted to an acceptance that, looking back at the matter now, he himself could not believe that EDS had put in a bid without a proper exercise to confirm that the necessary work could be carried out within the nine month period to go-live.

**[803]** Joe Galloway sought at first to explain how the Vine Plans fitted in with the estimating process. When he realised that they were inadequate he said that he gave no credence to them as to the resources needed or the time taken. Indeed he said that he thought the periods were too short. He then shifted his ground to rely on 'professional judgment' and the views of the consortium members. His evidence was inconsistent and exposed the inadequacy of the estimating process which had been followed in relation to time. I simply do not accept that he was telling the truth. Rather, I conclude that much of Joe Galloway's evidence in relation to planning at the bid stage was false and was created to cover up the inadequacies of this aspect of the bidding process in which he took the central role.

**[804]** EDS accept that the representation that I have found EDS made was false. This is inescapable on the evidence and I accept Sky's submission that EDS did not undertake a proper exercise to work out what work was required in order to deliver go-live in nine months and the whole project in 18 months; they did not undertake a proper exercise of planning, sequencing and resourcing to establish that go-live could be delivered in nine months and the project as a whole in 18.

***Knowledge and intent: misrepresentation as to time prior to letter of intent***

**[805]** Having found that the representation as to time made by EDS prior to the letter of intent was false, it is

now necessary to consider whether that misrepresentation was made fraudulently, negligently or innocently.

**[806]** Sky submit, in summary, that the representation as to time was known by Joe Galloway and Gerard Whelan, and by John Chan when he became involved, to be false. Sky say that EDS had not taken steps which Joe Galloway, Gerard Whelan and John Chan all accepted in evidence to be essential to estimate the time necessary to deliver the CRM project. Sky say that, even if they did hold the opinion that EDS could and would deliver go-live within nine months and completion within 18 months, Joe Galloway, Gerard Whelan and John Chan knew that they had no reasonable basis for holding such an opinion.

**[807]** Sky say that, at least in the case of Joe Galloway, that it is unlikely he did ever genuinely hold the opinion that EDS could and would deliver go-live within nine months and completion within 18 months. He simply told Sky what they wanted to hear, either knowing it not to be true or, at the very least, without caring whether it was true or not. In the case of Gerard Whelan and John Chan, Sky say that, if they ever did hold such an opinion, it is likely that they no longer held it by the time the letter of intent was agreed.

**[808]** EDS say that the estimate of time could only be a rough estimate in the response and reject the allegation that the time estimate was made deliberately, knowing that it was false or recklessly, not caring whether it was true or false.

*[2010] IP & T 597 at 742*

**[809]** EDS submit that there can be no doubt that the bid team did believe that the nine month target was achievable. EDS accept that doubts arose later, partly because of uncertainty as to scope, and these are reflected in August 2000 Red Team Report and other documents referred to by Sky. However, EDS say there is nothing to contradict the evidence of EDS witnesses that, at the time of the bid, the bid team as a whole, including consortium partners, genuinely believed that they could deliver a new contact centre in nine months.

**[810]** EDS point out that on the basis of the same information, PwC and AA provided similar estimates. PwC promised a Fast-Track Contact Centre within five months of the start of the project and a World-Class Contact Centre within nine months of the start of the project and AA promised a total solution within a year. EDS also refer to communications between Ian Anstey of Chordiant and people at Sky in late June 2000 in which he gave them confidence about being able to complete in the timescale.

**[811]** In relation to the criticisms made by Robert Worden as to the reality of the timescale, given estimated effort, EDS say that this does not imply knowledge or recklessness. Rather, EDS say, the same criticisms could be made of the plans proposed by PwC and AA, and the plans later made by Sky itself after it took over in March 2002. They also say that the comparison of the effort with the CoCoMo schedule was not something that Ian Murray considered when he reviewed matters.

***Analysis***

**[812]** It is necessary to consider the knowledge and intent of Joe Galloway, Gerard Whelan and John Chan. Were they dishonest, negligent or innocent in the parts they played?

**[813]** In assessing the honesty of these three people I obviously take account of the fact that I have seen them give evidence and have been able to assess them. I have made my views on Joe Galloway clear. He was a dishonest witness and his evidence lacked credibility. I must obviously be careful not to assume that

such dishonesty, in itself, establishes deceit. However, where, as I have found, he dishonestly covered up a fake degree, he forged an e-mail to cover up a mistake in key rates provided to Sky and lied to cover up the unsatisfactory process by which the timescales in the EDS response were assessed, I am obviously less reluctant to find that he was dishonest in his approach to EDS's response. By comparison, although there were elements of the evidence of both Gerard Whelan and John Chan which were not satisfactory, I do not doubt that they were generally honest in their evidence.

**[814]** I must also take account of the various matters referred to in submissions which might reflect on the position.

**[815]** I accept that EDS relied on the involvement of and information from the consortium partners. It is said by EDS that from that involvement in the bid process it is to be implied that they thought that the bid was a reasonable one and certainly honest. However, the overall programme for EDS had to take account of the work which EDS was to carry out. Although, the central framework software was Chordiant, the method of working and the interaction of the workstreams, including other contractors was a matter for EDS. Further, there is no evidence of direct detailed Chordiant involvement in making the time estimate and general involvement is not sufficient. Nor is there any evidence from any of the other consortium partners on their involvement at the bid stage. The overall time, it seems to me, was a matter for



EDS and, in the absence of relevant evidence from Chordiant or the consortium partners, EDS cannot draw support for their time estimate from the involvement of the consortium members in taking part in discussions or in reading and approving the draft Response.

**[816]** EDS also refer to the view expressed by Ian Anstey of Chordiant to Andy Waddell, Scott Mackay and Graeme Hardie on 22 June 2000, when the following was said:

> 'I believe that one of the key concerns of your team is the ability to deliver within the timeframes allotted, rather than the technology. I would point to 2 recent UK projects that Chordiant has successfully delivered on time and to budget. Our project at Bank One International (in conjunction with EDS) was implemented in 12 weeks and went live exactly on the day specified. Directline, with whom we are currently working on a project, awarded Chordiant the contract in March of this year and will go live in early July. This should give you confidence in our ability to deliver and should you wish to speak with Directline, as our most recent customer, about us I am sure we can arrange for someone to speak with their Group IT Director.'

**[817]** There is also a document of 26 June 2000 from Ian Anstey to Mike Hughes in which he said:

> 'There seems to be a view held that, because of the differences in approach, Siebel offers a lower risk solution in terms of implementation time.
>
> If BSkyB's implementation timescales were a few weeks and no customisation of the Siebel applications were required (not likely to be the case) then this view may have some validity. In the case of BSkyB however we are talking about the first phase implementation of six months. An implementation timeframe that EDS and Chordiant, as part of the delivery team, are more than comfortable with based on past experience:
>
> —Thomas Cook: four months

—Bank One International: three months

—Direct Line: four months—will go live early July.'

**[818]** EDS submit that this supports the honesty of Joe Galloway and Gerard Whelan in putting forward the timescale and in saying that it was also the view of Chordiant. The fact that on other projects Chordiant have been able to complete those projects in 12 weeks or four months (March to early July 2000) shows that they have been able to complete those projects in those periods. It is not said that Chordiant made any detailed assessment of the time in this case. Gerard Whelan's evidence is that it was from Chordiant publicity and other EDS projects that he derived support for the nine month period. Joe Galloway's evidence relies more on general involvement which I have dealt with above.

**[819]** EDS also refer to the other bids put in by PwC and AA. It says that they put in similar estimates of time. In PwC's Proposal they stated that they would: 'Deliver Fast-Track Contact Centre within five months of the start of the project; Deliver a World-Class Contact Centre within nine months of the start of the project; Migrate the existing call centres within fifteen months of the start of the project.' In AA's Proposal it was suggested that AA would deliver a go-live in one contact centre by the end of January 2001, with the whole project completed by end May 2001, giving a period of about 8 to 12 months.

*[2010] IP & T 597 at 744*

**[820]** I have looked in more detail at the PwC Proposal below. It was based on Siebel and not Chordiant and the timescales for a CRM system using a Chordiant framework would be longer than a Siebel package implementation. I understand that the AA Proposal was on a similar basis. I do not consider that the time estimates made by other people for the implementation of other packages provides assistance in determining the question of honesty in this case.

**[821]** EDS point out that Robert Worden has commented that Sky itself seem to have failed to take account of CoCoMo and, in the context of the expert evidence, PA did not refer to CoCoMo or apply CoCoMo correctly. The question of the use of CoCoMo would be relevant if, for instance, EDS had carried out a proper process but had made an error which might have been picked up by a cross-check against CoCoMo. That would be a case of negligence in which case Ian Murray's admitted error in failing to carry out a CoCoMo cross-check would have been relevant. Robert Worden relies on the period which can be derived from the CoCoMo schedule to demonstrate that the Days to Work estimate is not compatible with a nine month time period. Whether Sky's own estimates were correctly made does not, I consider, reflect on the question I have to consider.

**[822]** Sky refer to documents which were produced after 24 July 2000 and to matters of which EDS became aware after 24 July 2000 which they say bear on the question of knowledge. They are essentially a Risk List prepared by John Chan dated 14 August 2000 ('the August Risk List'), the review carried out internally by EDS in August 2000 ('the Red Team Review') and some views expressed internally by people in EDS in September 2000. I shall review those matters before setting out my conclusions as to knowledge.

***The August risk list***

**[823]** This was an Internal EDS Risk List produced by John Chan dated 14 August 2000 but which, as John Chan said, contained conclusions which he had reached well into June and certainly well before 24 July 2000.

**[824]** Such risk lists or risk registers are now a commonly used management tool. Their purpose is generally to identify risks on a project so that they can be avoided or reduced before they impact or can be dealt with more effectively or mitigated if and when the risk occurs. Risks may arise from known events or from predictions of future events from general experience. In this case, the matters germane to the issues which I have to consider generally concern known events and these are relied on by Sky to establish knowledge of those events. Much was made by John Chan of the fact that the list identified risks which it was said may or may not happen. That, as a general principle, will be true of risks which have not yet impacted. In this case some of the risks had already impacted. For others, a known event gave rise to the risk of an impact at a future date, demonstrating the importance of that known event.

**[825]** The August Risk List contained a number of relevant risks identified by John Chan concerned with timing: 'Unrealistic expectations being set with the client' with an impact date of 24 July 2000 and 'Proposed milestones not achievable' with an impact date of 3, 4, 7, 9 and 18 months. The action to be taken was to 'Agree milestone definition, [Critical Success Factors] and project scope by 18 August 2000' and 'Agree new set of milestones and assumptions for each.'

*[2010] IP & T 597 at 745*

**[826]** In my judgment, this risk list showed that John Chan thought that unrealistic expectations, as to what would be achieved when, had been set by EDS with Sky and that the proposed milestones were unachievable.

**[827]** I consider that these risks reflect the fact that EDS had not properly analysed the timing of the project. These risks had become apparent to John Chan and, as a competent project manager, he brought them to the attention of EDS management. The risk list provides support for the findings I have made as to the basis of the time estimate and as to the knowledge that Joe Galloway must have had at the time but does not suggest that John Chan was acting dishonestly in any way.

***The Red Team Review***

**[828]** The Red Team Review was conducted by Steve Dowle and Gary Hill of EDS on 21 August 2000. They were given a large amount of information relating to the project including the August Risk List, John Chan's resource plan dated 20 August 2000, a project plan dated 18 August 2000 and a draft milestones document, together with the EDS response.

**[829]** In addition, during the course of their day long review, they interviewed and had discussions with: John Chan, Dan Barton, Gerard Whelan and Steve Vine. Steve Dowle, who led the review, had been involved with the VRB process, the Youd Andrews session and commercial matters for the Sky project. He was a senior person within EDS and Elwyn Jones's superior. Although Joe Galloway criticised him as a 'naysayer', the evidence from Elwyn Jones was that he was competent and knowledgeable. In addition Gary Hill gave evidence before me and I found his oral evidence to be fair and balanced.

**[830]** John Chan accepted that the Red Team Report reflected the concerns of the team at the time. The report was distributed to Joe Galloway, as well as to Steve Leonard, Barry Yard, Elwyn Jones and Jonathan Malin. In addition, it was later provided to Laurence Anderson, who in turn provided it to Steve Mayhew. John Chan referred to the report at the meeting on 24 August 2000 and at para 73 of his first witness statement said that he had provided Scott Mackay with 'the Red Team action document' and believed he had handed the document out at the meeting on 24 August 2000. It seems very likely that Dr Chan made reference to the 'actions arising' sheet from the Red Team Review because the bulleted paragraphs in the 'Briefing on Red Team Review' section of the minutes of the meeting on 24 August 2000 follow those actions closely.

Certainly there is no reaction from the Sky personnel at the meeting and if a copy of the Red Team Review itself had been made available it is extremely unlikely that Sky would not have raised concerns at its contents.

**[831]** The Red Team Report dealt with a number of matters. The key issue was identified as control of scope. The 'no 2 concern' was 'availability of staff—quantity and skill sets'. The conclusion was that the Red Team was impressed with the progress made by John Chan and the project team. However, they said:

> '… overall the Project must be regarded as High Risk at this time. The major reasons for the assessment are:
>
> —Status of contract negotiations
>
> —Lack of precise definition of scope
>
> —Shortage of staff—quantity and skill sets
>
> —Imposed business critical time scale
>
> *[2010] IP & T 597 at 746*
>
> —Vulnerability due to over dependence on single individual within client organisation
>
> —Aspects of technical solution (new/untried software, legacy system interfaces, data migration)
>
> Given the relatively immature state of the overall programme plan and the significant risks that have been identified it is recommended that a further review be carried out prior to signing any contract for this work with BSkyB.'

**[832]** The Red Team Report also dealt with scope and timescale. Under the heading of 'Scope' within the 'Issues' section, it was noted:

> '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.
>
> Action: EDS must take a proactive approach to defining the scope, concentrating on making maximum use of “out of the box” functionality, phasing delivery to provide minimum business critical solution by 1 April 2000 and managing client expectations to achieve this. It is essential that EDS ensure that scope is something that we can confidently deliver in the timescale, and the longer it takes to arrive at this agreed scope the less we shall be able to achieve in the time remaining.'

**[833]** The conclusions of the Red Team show two things relevant to this aspect of the case. First, by 21 August 2000 EDS did not believe that they could deliver the scope to Sky in the timescales set out in the response. Secondly, there was a real and immediate concern as to the availability of resources in the quantity and with the skills required.

**[834]** The unachievability of dates in the Red Team Review was pursued further in e-mails in September:

(1) In an e-mail of 11 September 2000 sent to Joe Galloway, Gerard Whelan, John Chan, Barry Yard, Steve Mayhew, Jonathan Malin and Terry Daniels, Laurence Anderson recorded as follows:

'I believe the key issue is not budget but timescale. Mile [Mike] Hughes has stated that timescales are critical, but our team has stated that the programme timescales (April delivery) are unachievable—as acknowledged to the red team three weeks ago.

My suggested way forward is to identify with the customer a 'minimum business critical solution' which is affordable, achievable in the timescale, and can be reliably costed prior to contract signature. All the rest can be addressed as options. This was the red team recommendation. Does such a “minimal solution” exist? If you don't succeed in de-scoping the initial contract, the TCV will be such that we have to go to Finance Committee for sign-off, and on present form they would chuck us out.'

(2) In an e-mail of 16 September 2000 addressed to Joe Galloway, Steve Leonard, Steve Mayhew, Chris Jenkins, Laurence Anderson and Jonathan Malin, Barry Yard wrote:



'Joe—At the Red team review your team admitted that the April delivery date could not be met. Since the client does not want to move the deadline the challenge was to descope to a level where we are satisfied that delivery can be achieved.'

**[835]** Joe Galloway's evidence was that his view at the time was wholly different to that expressed by those working on the project. I do not think that is true. Rather, he did not wish to accept what was being said as it reflected the fact that the timescales in the EDS response had not been properly calculated, as he knew.

**[836]** Gerard Whelan, who participated in the Red Team Review, suggested that the conclusions of the Red Team did not accord with his recollection but said that, by this stage, he had moved from the delivery side of the project and was not in a position to contradict the views of the delivery team as recorded in the Red Team Report. He accepted, though, that the August Risk List and the Red Team Review, together with the Laurence Anderson e-mail referred to above, reflected a consistent message that the team considered that the programme timescales were unachievable. He said that it was his recollection that this appreciation came only in the beginning of August 2000. I consider that this is likely to be correct.

**[837]** John Chan evidently had become aware of the problems with an unachievable timescale prior to 24 July 2000. As a project manager he clearly raised the issue in the risk list and, as it was his role to manage the project, he looked for ways in which the problem could be overcome. That seems also to have been the approach of the Red Team Review and of Laurence Anderson and Barry Yard. It was a problem which had to be dealt with by finding a solution. That, I consider, is the usual reaction of those involved on a project. It seems that there was no review of what had been done at bid stage to reach the conclusion that the

timescale was achievable at the time of the EDS response. Without that and without finding out that there was no proper basis for the time estimate at that stage, I do not consider that the way in which others at EDS dealt with the situation can be criticised.

***Joe Galloway***

**[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 and was involved in and well aware of what was happening in relation to estimating the duration, including the work of Steve Vine.

**[839]** Having seen the way in which Joe Galloway gave his explanation, I am far from impressed by the assertion that he had discussions with the consortium partners and that this enabled him or the bid team to take a view that the nine month period was achievable. I am very doubtful that any relevant discussions took place and Joe Galloway's evidence seemed to develop as it became obvious that the Vine Plans would be a woefully inadequate basis for a bidder to represent that they can achieve go-live in nine months and complete delivery in 18 months.

**[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. His evidence as to what had been done in relation to the time estimate shows that he was aware that no proper attempt had been made to assess whether go-live could be achieved in nine months and complete delivery in 18 months. His approach was to ignore the need for analysis. I am driven to the conclusion that he proffered timescales which he thought were those which Sky desired, without having a reasonable basis for doing so and knowing that to be the position. 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. I consider that his reaction to the Red Team Report provides support for this finding. 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.

**[841]** Although it is not necessary to establish motive, motive provides support. 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. It was that motive which led him to say that he could achieve the Sky CRM project in the required timescale when he knew that

he had no proper basis for doing so. EDS say that there can be no motive in obtaining a project on the basis of times which cannot be met. I do not think he took that type of long term view. His wish was to be awarded the CRM project and use that for advancement.

***Gerard Whelan***

**[842]** I view Gerard Whelan's position differently. Whilst he was the bid manager and in that role was responsible for producing the EDS response, he was very much a second string to Joe Galloway. The role he performed was more that of an administrative bid manager, co-ordinating matters, but not himself being involved in deciding what had to be done by whom for the purpose of estimating and putting in the bid. He received information from other people who had carried out the work and incorporated it into the EDS response. He was also the conduit for communications between EDS and Sky. He appeared to be unable to believe that someone, probably Steve Vine, had not done the necessary analysis to establish that go-live could be achieved in nine months. He sought to look for support for a nine month period in Chordiant publicity and in other projects. I consider that he simply failed to spot that an essential part of the bidding process which he thought had been carried out had not in fact been done. He did not have the knowledge of Joe Galloway in relation to what was being done for the overall estimating process.

**[843]** He was not a person who showed dishonesty or who, I consider, would be likely to be dishonest. He says in his witness statement that it had been intended that he would move onto other things if the Sky CRM project was awarded to EDS and that he received no bonus or reward for achieving such an award. In my judgment, he did not know that a proper process had not been carried out. Given his role, I do not think he could be described as negligent in relation to the misrepresentation.

**[844]** Subsequent to the submission of the EDS response it is evident that Gerard Whelan became aware that the view was that the timescales were



unachievable. By then he had moved from the delivery side of the project and does not seem to have been involved in management decisions. That may explain why he did not seek to investigate what had happened in making the estimate of time for the EDS response. In any event, other people were then becoming involved in finding a solution. I do not consider that, what he came to learn in August 2000 provided knowledge which imposed liability for his actions when there was no liability prior to putting in the EDS response.

***John Chan***

**[845]** John Chan similarly is in a different position to Joe Galloway. He was introduced into the EDS response as the Project Manager and was approached for this role at the last minute. He had no involvement in putting together the EDS response and at the presentation on 1 June 2000 his evidence was that he sat outside and was not involved. He soon became involved and, like many project managers, had the difficult task of taking over the management of the project without having been involved in the bid stage.

**[846]** His knowledge of the project was gained over the next two months. He started to prepare the necessary documents to manage the project, particularly after EDS knew, on 20 July 2000, that they had been awarded the Sky CRM project and from August 2000 when the letter of intent was signed, with effect from 24 July 2000.

**[847]** He became aware that the nine month timescale was not achievable prior to the selection of EDS and the letter of intent. As I have said above he made his view of the position apparent and it can be seen that this is reflected in the Red Team Review and the communications from Laurence Anderson and Barry Yard. He cannot be criticised for that. Nor do I consider that he can be criticised for proposing a solution which was a similar approach to that of Steve Dowle and Gary Hill in the Red Team Review and Laurence Anderson and Barry Yard. There is no suggestion that he knew that there had not been any proper basis for the timescale in the EDS response and he did not seek to cover up the position when he found out. I do not consider that the way in which he dealt with the situation can be criticised.

**[848]** There is also a further aspect which is that he was not involved at the time the representation was made in the EDS response or in making any other representation to Sky. Liability can arise where a person has 'manifestly approved and adopted' a statement, with the necessary knowledge and intent. I have found that John Chan did not have the necessary knowledge or intent. But, in any event, I do not consider that any conduct on his part manifestly approved and adopted the false representation that a proper process had been followed to arrive at the time estimate. His conduct in acting as Project Manager did not demonstrate that he approved and adopted that representation. I therefore do not see any basis on which John Chan could have been made liable for the original representation.

**[849]** For the reasons set out above I consider that EDS did make a misrepresentation that a proper process had been followed in arriving at the timescales in the EDS response and that misrepresentation was known to be false by Joe Galloway.

***Inducement and reliance***

**[850]** It is evident that one of the aims of Sky was to achieve go-live within the nine month time period. It is clear from the evidence of Joe Galloway and Gerard Whelan that they wanted Sky to understand that they had made a



proper estimate of the time within which EDS could achieve go-live. As it formed part of the EDS response and was referred to in the e-mail of 5 July 2000, the timescale and the fact that EDS had assessed it on a proper basis was intended by EDS to be relied on by Sky in deciding whether or not to select EDS for the Sky CRM project. That is clear from the process and also the evidence of Joe Galloway and Gerard Whelan.

**[851]** In coming to the decision to select EDS one of the factors which Sky took into account was timescale and the fact that EDS had reached their estimate of time on a proper basis. That is evident from the underlying aims stated within the ITT, from the discussions which took place before Sky selected EDS and from the evidence of those in Sky who were involved.

**[852]** Accordingly, in making the misrepresentation EDS intended Sky to rely on it and to select EDS for the Sky CRM project and Sky did so.

***Time and cost: representations in late 2000***

**[853]** Although Sky submit that, in the case of deceit, the critical point at which the representations were made was the time of selection of EDS and entering into the letter of intent, they also rely on representations made later in 2000, prior to entering into the prime contract. It is therefore necessary to consider what

representations were made at that stage.

**[854]** In relation to time, as pleaded in paras 42.9 to 42.12 of the particulars of claim Sky rely on the following statements:

(1) The high level plan produced on 11 October 2000 after the planning exercise conducted by EDS where 'New technology live in 1 hall' was shown as 6 August 2001.

(2) The statement at a meeting on 13 October 2000 when Steve Leonard told Richard Freudenstein that EDS would deliver by the end of July 2001 and that EDS would use their global resources in the US to work around the clock in order to ensure that the system would go-live in one hall by the end of July 2001 or earlier.

Sky say that such statements implied that suitably skilled and experienced resources were available to work on the project and that Steve Leonard had reasonable grounds for making such statement and that EDS held the opinion that EDS would deliver by the end of July and had reasonable grounds for expressing such an opinion.

(3) The programme plan headed 'Overall Project Programme As at: 24 October 2000' produced by EDS as a result of the planning exercise in which 'eCRM ready for go-live' was represented by EDSL as 15 August 2001.

(4) An estimate of the number of man-days of effort required for the project produced by EDS in or about October 2000 which came to form part of the baseline budget at Sch 5 to the Contract. The estimate of effort for technology consultancy was 14,325 man-days and the estimate for programme management was 1,776 man-days.

Sky say that EDS thereby represented that it had carried out a proper analysis of the amount of effort required.

(5) Section 3 of the preliminary specification produced by EDS on 22 November 2000 which set out the following milestones by which work was to be completed:

(a) Milestone 2, 'New Business Design Complete', which comprised 'All Processes and Technology required to build SSSL eCRM have been defined and signed off', with a Date for Acceptance of 15 January 2001.

*[2010] IP & T 597 at 751*

(b) Milestone 3, 'Working Prototype Complete' which comprised 'ECRM has completed development and integration testing. Ready for System Test Phase', with a Date for Acceptance of 30 April 2001.

(c) Milestone 4, 'eCRM Live in One Hall' which comprised 'System supports new customers in one hall through the following components' with a Date for Acceptance of 31 July 2001.

> Sky say that EDS thereby represented that the milestone dates in section 3 of the preliminary specification were feasible and that they had reasonable grounds for believing that the milestones could be achieved.

**[855]** EDS say that any representations that may have been made in the period prior to the letter of intent were overtaken by events which occurred up to the signing of the prime contract on 30 November 2000. In particular, EDS rely on the fact that in October 2000 the project was changed in the following ways: the new contact centre in Manchester was abandoned; Sky decided that location and change management would not form part of EDS's scope but that Sky would contract directly with AA for those aspects; EDS's scope was limited to technology, process (which EDS sub-contracted to AA) and systems build (integration). Further EDS say that an overall budget of £65m was effectively imposed by Sky. EDS say that these events rendered the previous estimates of cost as well as time immaterial well before the prime contract.

**[856]** EDS deny that it made representations in the period up to the prime contract. They place reliance on the joint planning session in October 2000 to negative Sky's contention that there was any representation as to time in the period up to the prime contract. EDS say that as a result of the joint planning exercise, all parties were well aware that the 'proper analysis' carried out jointly by EDS and Sky in October and November 2000 had led to a much later date and that EDS had committed itself to the earlier date in the expectation that it would be possible to produce a proper plan to fit it, but before any such plan had been produced. EDS say that, in doing that, EDS took considerable commercial risk but made no representations at all.

**[857]** In order to deal with the alleged representations in late 2000, it is necessary to consider the background to the position in October 2000 leading to the joint planning session on 11 October 2000 and the dates put forward by EDS at that time.

***Background to the planning session on 11 October 2000***

**[858]** The letter of intent envisaged a contract being entered into by 31 August 2000. Following the letter of intent EDS carried out further work including work by AA in the Process Workstream. The main task was to carry our further work on the scope and cost of the project. By 12 September 2000 Barry Yard was reporting internally that the—

> 'size of the deal now that scoping is close to completion looks more like £100m for all activities … This also requires us to manage client expectation since the bid price was much less. We may also have to get the client to agree to a reduced scoping for timeline delivery purposes as well as budgetary constraints.'

**[859]** At about this time Sky became aware of this. On 13 September 2000 Richard Freudenstein in an e-mail to Steve Leonard referred to costs provided to him by Mike Hughes in draft form. He commented: 'The numbers are



stupid!!! If they do not become realistic, this project will not go ahead. I am at a loss to understand how EDS could quote a number around £50 million and then have numbers close to double that now appear.'

**[860]** There followed a meeting between Richard Freudenstein, Mike Hughes, Joe Galloway and Steve Leonard on 18 September 2000 at which the suggestion of producing a number of different options of scope and cost was discussed. Meetings then took place between Sky and EDS which led to Joe Galloway providing Scott Mackay with eight options on 21 September 2000 which were forwarded to Mike Hughes. Those options showed a cost ranging from £60.81m (Option 6) to £113.66m (Option 1).

**[861]** After further refinement of the options, the Sky Board decided on 4 October 2000 to choose one of those new options, Option 5, which meant that the new contact centre at Manchester would not go ahead and that the project would be limited to refurbishment of Livingston and Dunfermline. Mike Hughes was allocated a budget of £65m.

**[862]** Matters could then proceed to the signing of a contract and EDS were looking to the contract being signed by 13 October 2000. The perception of the situation as set out by Chris Jenkins of EDS on 4 October 2000 was 'Please make no mistake, this is a mess and we are fighting to come out with our shirts!' In preparation for the envisaged contract signing, Chris Jenkins said that he wanted to give Steve Leonard 'a fair degree of comfort about what he may sign' and asked to be provided with information. Barry Yard was to brief Steve Leonard on 11 October 2000 and on 9 October 2000 he e-mailed Joe Galloway to say 'I must have from you your personal assessment of our ability to deliver what we have on the table'.

**[863]** Once the option had been chosen and the budget had been set, there was a need to consider what the timescale would be for the new option. A re-planning exercise was planned which Tim Gardner of AA described in an e-mail of 28 September 2000. This exercise started with a Re-Planning Kick off Workshop on 6 October 2000 and led to a critical path workshop on Wednesday 11 October 2000.

**[864]** In an e-mail of 9 October 2000 Tim Gardner set out the purpose of the Critical Path Workshop which was going to take place from 1:00pm to 5:00pm on 11 October. The purpose was:

> '—to agree the critical path for all milestones
>
> —to compare this critical path with the Exec Committee expectations
>
> —to think out of the box to identify additional opportunities to reduce the expected timeline.'

**[865]** The Executive Committee expectations were, it seems, noted down by Andy Waddell and appeared to include the delivery of the CRM platform in nine months by 1 May 2001. This, it seems, means nine months from the end of July 2000.

***The planning session on 11 October 2000***

**[866]** The critical path workshop took place on Wednesday 11 October 2000, although some witnesses incorrectly referred to it as taking place on 10 October. The meeting was attended by representatives of Sky, EDS and AA and took place at Sky's offices in Dunfermline. It was referred to as a brown paper exercise as it appears that the participants drew out the programme on brown paper sheets and they used post-it notes to put information onto it. It is common ground that the outcome of the meeting was that the go-live date would now be November 2001.

**[867]** It seems that this came to the attention of Mike Hughes who had been keeping in touch with the planning process. He had a meeting on 11 October 2000 with Scott Mackay, Dan Barton and Tony Dean and posed some questions to, it seems, Dan Barton so that he could understand the difference between the Thomas Cook CRM project and the Sky CRM project. Tony Dean says that Mike Hughes had to defend himself with senior Sky management over promises he had made over dates. Tony Dean adds at para 51 of his first witness statement that Mike Hughes 'was fighting to stick to the August 2001 date to ensure the project was delivered prior to the pre-Christmas rush. At the meeting, Mike emphasised that this was an absolute requirement for Sky. He was not giving way on this'.

**[868]** Mike Hughes also had a conversation with Joe Galloway in which he said that he had been told that delivery was going to take 12 months, that is until November 2001 rather than the nine months. The November 2001 date was later than Mike Hughes wanted and this led to Joe Galloway going up to Dunfermline on 12 October 2000 to 'sort it out'.

***Joe Galloway's visit on 12 October 2000***

**[869]** There are a number of discrepancies in the evidence about the detail of what happened when Joe Galloway was in Dunfermline on Thursday 12 October 2000 and I have already dealt with the 'car park' conversation in relation to what was said to Scott Mackay when he met Joe Galloway later that day. There is no doubt as to the outcome of Joe Galloway's visit. A programme was produced which had a number of dates on it, including 'New Technology Live in 1 Hall' by 6 August 2001. There was therefore a reduction of some three months from the date derived at the critical path workshop on 11 October 2000. This programme forms the first statement relied on by Sky as giving rise to the representation.

**[870]** What was the process by which the dates, including 6 August 2001 go-live date, were produced on 12 October 2000?

**[871]** In his witness statement, Joe Galloway refers to a conversation with Mike Hughes on about 10 October 2000 in which Mike Hughes was concerned that delivery of go-live was going to take 12 months and 'said that this was not what we had agreed and that he needed something in the six to nine month range' and 'that I needed to “do something” to sort this out'. This led to Joe Galloway going up to Dunfermline on 12 October 2000 to sort the position out. This appears to be common ground with Mike Hughes's evidence.

**[872]** Joe Galloway said that what he was doing in producing [the] 12 October 2000 plan was as follows:

> '… what I was looking at is the scope of what they had put up in the programme and how much contingency is built into that and had a discussion with them about removing the significant amounts, and I do mean significant amounts of contingencies that I saw in the programme.'

**[873]** He said that he asked the team to plan for no more than 5% contingency instead of somewhere around 15–20% contingency which he thought was included. He said that the exercise he was doing was a perfectly proper one, in which he removed contingency and increased the degree of parallelism, and that he proceeded on the basis that resources and resourcing would not be an issue.

**[874]** His explanation of the events of 12 October 2000 was as follows:

> 'When I went to Sky on the 12th I looked at the plan that was in place; I talked to my people, told them that they needed to remove the contingency, that we needed to plan for parallel activity, that I was directed by Mr Hughes and his direction for Sky to deliver something in the late July/early August time frame. I've since, when I was putting my witness statement together, noted that Mr Hughes says almost identically the same thing, and that the team needed to act on that the rationale that we had a time boxed delivery of late July/early August to deliver something and that is very straightforward, that is the accurate view of whatever and it was done at the behest of my client, Mike Hughes.'

**[875]** Gerard Whelan had flown to Scotland with Joe Galloway that day, but said that he was not directly involved in the plan or any of the events surrounding it. He was aware of disquiet about the cutting back of the plan but was clearly taken aback when, in evidence, he realised what had been said by Melanie Haydon in the amendments to the risk register. John Chan addressed this episode in his first witness statement. He says that Joe Galloway was forthright and said that he had worked on similar projects before and from this experience he believed he knew how long such a project took to complete. John Chan also says that Joe Galloway explained that, based on his own experience and knowledge, it would be possible to work to a July 2001 date and EDS had now committed to a July 2001 date. John Chan's view was that November 2001 would have been a challenge. He adds 'However none of us were able to persuade Joe. I recall that Dan Barton did discuss the date with Joe but unsuccessfully. Joe was firm about the date and reiterated that he had done it before and he could do it on this project'.

**[876]** Richard Durling's evidence on the events of 12 October 2000 in his witness statement was that later in the morning he had a meeting with Joe Galloway in Mike Hughes's office with Dan Barton present. There was a short discussion about the plan, which Dan Barton had on his laptop. Joe Galloway told him that the November 2001 date was not acceptable and that Sky needed the system to be delivered by July 2001. He understood that the July 2001 date was the date Mike Hughes insisted on. He says that the meeting with Joe Galloway developed into a heated discussion, because he refused to sign up to a go-live date of anything less than November 2001. He says that Joe Galloway said that Mike Hughes had told his board that the project would be delivered in July and that he had told Mike that EDS would deliver to that date. Richard Durling said that EDS would not do so.

**[877]** In cross-examination Richard Durling explained that he was called in by Joe Galloway and 'was effectively told that I didn't know what I was talking about and that he knew better and the date was going to be July and I would do well to listen'. He said it was 'very much of a raised voices meeting'. He described it additionally as a 'heated exchange' and a 'fairly rancorous meeting'. He accepted that Joe Galloway was 'riding roughshod' over his views as leader of the technology team. He said that he had 'been yelled at, effectively by my boss' and had 'yelled back'. He was evidently shaken by the experience and said that he did not do anything much for the rest of the day. He said in relation to the plan produced on 11 October 2000 which gave a November 2001 date that: 'We knew that that plan for November had some risks, every plan does and there was a degree of parallelism within that plan already established to arbitrarily bring it back to July. We failed to



understand how that could be done.' When asked why Joe Galloway was doing this he said that 'He didn't want to tell Mike Hughes that it wasn't going to be July'.

**[878]** Melanie Haydon had amended a risk list which John Chan had circulated on 9 October 2000 asking for comments. The version made on 12 October 2000 containing Melanie Haydon's comments, ('the October Risk List') was explored in cross-examination with a number of EDS witnesses. She added to it: 'The Plan and resources will be artificially manipulated to commit to deliver within the budget' with immediate impact.

This obviously referred to what had happened when Joe Galloway arbitrarily chose the date of 6 August 2001.

**[879]** In her witness statement Melanie Haydon said: 'the response of the group to Tony Dean was that we had planned the project for November 2001 and a July 2001 go-live date was not achievable'. Her oral evidence in relation to the events of 12 October 2000 was unsatisfactory and, at first, she did not even accept what she had stated in her witness statement. Whilst, generally, she was a fair and honest witness, she was reluctant to accept in oral evidence the meaning and effect of what she had written at the time. I consider that having written what she did and realising the obvious impact of that evidence on EDS, she tried to characterise it in a different way and one which was patently unsupportable. She was evidently furious at the actions of Joe Galloway in October 2000. She was, after all, a very experienced programme and project manager who had worked for EDS on a number of major assignments. She was brought into the re-planning process in October 2000 reviewing the plan which gave a go-live date of November 2001.

**[880]** Her e-mail of 15 October 2000 to Blair Eldridge included this passage:

> 'I managed to speak to Tony Dean on Friday about the state of play and told him that I was singularly unimpressed with the way the plan had been chopped for presentation to the client. His line was that it was a marketing/sales ploy for the client, that's all very well but clients latch onto the timescales.
>
> I expressed the view that the plan was now high risk as there was no contingency time and that I was not comfortable with Joe's behaviour on Thursday. I told him that I had made you aware of events.'

**[881]** From these comments it was quite clear that she regarded the plan as unachievable. By the use of the phrase 'artificial manipulation' I consider that she was expressing both a feeling of what had happened and also a fear as to what would have to happen because of the conduct of Joe Galloway. In other words, she thought that the way in which the plan had been 'chopped for presentation to the client' was not based on any sound analysis and the phrase 'artificial manipulation' summed up her view.

**[882]** Steve Fleming accepted that 'chopping' the plan was going to and did make life impossible. Dan Barton in his witness statement stated that he disagreed with Joe Galloway's process, that he recognised that he was being ordered as to what to do. Karl Davies gave evidence to similar effect. Tony Dean was much more evasive in what he would accept about the events at the time.

**[883]** The programme was sent by Scott Mackay to Mike Hughes by e-mail on the afternoon of 12 October 2000 together with the response from Dan Barton to 'Mike's Questions'. Scott Mackay said:



> '1. milestone version of the plan. You will note that this is a revised version from that which we talked about yesterday evening in your office. I have not been involved in the discussion to drag the dates back in so I do not fully understand the rationale. Joe, however, is happy with this timeline.'

**[884]** Mike Hughes's evidence of the events of 12 October 2000 was that he received Joe Galloway's revised project plan by e-mail from Scott Mackay. He says that his recollection was that Joe Galloway was quite confident about it and that he had removed contingency and come up with a more realistic date.

**[885]** In putting forward that date to Sky in those circumstances, I consider that Joe Galloway was impliedly representing that EDS had carried out a proper analysis and held the opinion on reasonable grounds that they could deliver the CRM project in that timescale.

***Events subsequent to 12 October 2000 plan produced by Joe Galloway***

**[886]** The next major step was to be the meeting between Richard Freudenstein and Steve Leonard at Sky's offices in Osterley on Friday 13 October 2000. In preparation for that meeting Briefing Notes had been prepared by Steve Mayhew of EDS for Steve Leonard. They had been sent to Sky and were amended by Keith Russell of Sky on 12 October 2000. In addition there had been the meeting on 11 October 2000 for Barry Yard to brief Steve Leonard on the basis of Joe Galloway's personal assessment of EDS's ability to deliver.

**[887]** The evidence from Richard Freudenstein of what happened at the meeting on 13 October 2000 is contained in his witness statement where he says that he cannot directly recall the meeting but adds that he has seen the briefing note and 'this matches my own recollection of what he was telling me at that stage'. In cross-examination on Day 10 he said that Steve Leonard 'talked about the commitment of delivering the timeline' and that 'He was giving me a commitment to hit 31 July timetable'. He said that it was not a contractual commitment he wanted but a commitment from Steve Leonard to deliver by 31 July 2001 and the contract would then reflect that as much as it could. He was aware that there was some debate about scope and that this would affect the budget figure. He said he was working on the basis that there was a plan, an estimate and timeline based on that plan.

**[888]** Steve Leonard deals with the meeting of 13 October 2000 in his second and third witness statements. In his third witness statement he says that he does not have a recollection of the meeting but would not have said that he would use global resources to meet any date. On Day 64 he was cross-examined but evidently had no recollection about what was said at the meeting. He said that the briefing note consisted of points to consider. He said he did not recall the specifics when the statement about July 2001 was put to him. When he was shown the contract which stated under milestone 4 'eCRM live in 1 Hall' on 31 July 2001 and was asked to infer that he was talking about July 2001 in the meeting on 13 October 2000 he said he would not have 'been across the detail' but could see what the information was showing. He agreed that what he was communicating to Richard Freudenstein was what he was intending to be in the contract.

**[889]** Richard Freudenstein and Steve Leonard tried their best to recollect what was said at the meeting on 13 October 2000. Neither was able to recall precise details of the discussion. It was clear that Richard Freudenstein was



relying heavily on the EDS briefing note and Steve Leonard was not able to recall what was actually said. The note referred to 'We will deliver by July'. It is overwhelmingly likely that Steve Leonard gave Richard Freudenstein the July 2001 date at the meeting although the precise date of 31 July 2001 may be based not on Richard Freudenstein's recollection of what happened at that meeting but on subsequent events leading up to the prime contract. There is no doubt that the July 2001 date came from Joe Galloway and he accepted as much.

**[890]** Work on the preliminary specification had been started by EDS in September 2000 and had then been discussed with Sky. The first draft preliminary specification had the title 'Contractual Scope' and was

produced on about 1 November 2000. The authors were Richard Durling and Heather Winter of EDS. A further draft was produced on 6 November 2000. At that stage, whilst section 3 of the document had a description of milestones, there were no dates for the milestones, apart from Contract Complete, with a date of 8 November 2000.

**[891]** A further draft, referred to as a Release Draft, was produced on 14 November 2000. It added members of Sky as authors. It referred to an update being produced following a Sky/EDS review on 7 November 2000 and to the current version being a further update 'following incomplete review' on 8 November 2000. That document included the following milestones:

> 'Milestone 2 New Business Design Complete 15 January 2001
>
> Milestone 3 Working Prototype Complete 30 April 2001
>
> Milestone 4 eCRM Live in One Hall 31 July 2001
>
> Milestone 5 BSkyB eCRM Integrated Technology Solution 30 November 2001
>
> Milestone 6 Operational Handover 1 February 2002'

**[892]** On 14 November 2000, Scott Mackay distributed that Release Draft to a number of people at Sky, EDS and AA. He referred to it as being 'the contractual scope for the EDS elements of the Sky CRM programme'. He stated that there had been wide authorship and that a final review session had been held involving Sky and EDS that morning to tie up loose ends. He added that 'this is the currently agreed version' and that it was the master version for legal review.

**[893]** The next version of the preliminary specification was that incorporated into the prime contract which is relied on as being a further statement giving rise to the representation.

**[894]** In addition to the preliminary specification, a number of programming exercises were produced, including one of 24 October 2000 which is relied on as giving rise to the representation. That is described as 'CRM Project Overall Project Programme As At: 24 October 2000'. It shows at line 65 a milestone of eCRM ready for go-live of 15 August 2001. From the e-mails exchanged at the time it can be seen that this was a draft for comment. Indeed the copy of the document has manuscript comments on it some of which formed the basis for an e-mail from Sky's Nicola Simpson of 25 October 2000 in which she set out her initial thoughts on the plan.

**[895]** Equally, there were further plans produced. Another plan also dated 24 October 2000 provides 'New E-CRM live' on 1 August 2001. Other plans in November 2000 show later dates in November 2001. I do not consider that the programme of 24 October 2000 can properly be said to be a statement giving



rise to a representation. They were sent as drafts in the further planning process and not as documents which contained or could have been understood to contain representations.

**[896]** The way in which the planning process culminated was in a planning workshop on 29 November 2000. On 24 November 2000, Deb Chakravarty (the Sky Programme Director) sent an e-mail to the AA, EDS and Sky managers and workstream leaders in relation to an 'Integrated Programme Plan Review'. He referred to the fact that 'The Exec Steering Committee have certain expectations regarding the programme milestones dates'. In particular he referred to the following milestones:

| Milestone | Date |
|---|---|
| 1. Contract Complete | Now |
| 2. New Business Design Complete | 15 January 2001 |
| 3. Working Prototype (e-CRM Development and Integration Testing complete and ready For system test) | 30 April 2001 |
| 4. e-CRM operationally ready for one hall (New customer only) | 31 July 2001 |
| 5. e-CRM fully live in all halls with all customers (New & Old) | 30 November 2001 |
| 6. Operational Handover | 1 March [2002] |

**[897]** He then referred to the next stage of the process. He said that 'As a team we must work together to ensure that these expectations are reflected in the integrated programme plan'. The process was to be:

> (1) Refine Integrated Programme Plan Detail: Individual workstream leaders were to continue to work with Diane Cheyne of EDS to refine the existing integrated programme plan and on Monday 27 November 2000 she would forward a copy of the integrated plan to all workstream leaders/owners.
>
> (2) Integrated Programme Plan Analysis: During Tuesday 28 November 2000 individual workstream leaders were to analyse the integrated programme plan. They were to identify 'potential areas of conflict within the plan and possible solutions to resolve [them]' and 'key plan issues and risks'.
>
> (3) A workshop was organised for Wednesday 29 November 'with the objective of reviewing the integrated programme plan to understand what actions are required in order to align the plan to the Executive milestone dates'.

**[898]** This process was carried out and a planning workshop was held on 29 November 2000 at which Sky, EDS and AA were represented. Later that day Tim Gardner of AA, who had been at the workshop, circulated to Sky, EDS and AA a document setting out 'CRM Programme Milestones as identified in the Planning meeting today'. That document set out the following milestones:



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| | | |
|---|---|---|
| 1) Contract signed | | |
| 2) New business design complete | | 15 January 2001 |
| 3) Telephony<br>*available for implementation* | | 1 February 2001 |
| 4) Refit first hall<br>*new furniture*<br>*new hardware populated* | 1 April 2001 | 6 May 2001 |
| 5) Delivery of working prototype<br>*ready for system test*<br>*end to end customer solution* | | 30 April 2001 |
| 6) Refit second hall | 1 May 2001 | 18 June 2001 |

| | | |
|---|---|---|
| 7) System live in first hall<br>*new customers only*<br>*new technology*<br>*people trained*<br>*hall fitted* | | (tba) |
| 8) All halls refitted | | 15 November 2001 |
| 9) Operation hand-over<br>*all halls new system* | | (tba) |

**[899]** According to Scott Mackay the planning meeting took place over two days. It involved about 25 people in the boardroom from all workstreams and all organisations. On 1 December 2000 Tim Gardner of AA again circulated a similar document by e-mail to Sky, EDS and AA setting out proposed milestones as discussed in the planning meeting on 30 November 2000. That left the same dates as the previous one but changed 'System live in first hall' to 16 November 2001 and 'Operation hand-over' to '19 February 2002 (to be confirmed)', with 'All halls refitted' as '25 October 2001(to be confirmed)'. In the e-mail Tim Gardner said 'Deb [Chakravarty] has asked that these dates are not to be widely circulated'.

**[900]** On 30 November 2000 in the middle of the day the prime contract was signed. That included dates for the following relevant milestones set out in section 3 of the preliminary specification dated 22 November 2000:

| | | |
|---|---|---|
| Milestone 2 | New Business Design Complete | 15 January 2001 |
| Milestone 3 | Working Prototype Complete | 30 April 2001 |
| Milestone 4 | eCRM Live in One Hall | 31 July 2001 |



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| | | |
|---|---|---|
| Milestone 5 | SSSL eCRM Integrated Technology Solution | 30 November 2001 |
| Milestone 6 | Operational Handover | 1 March 2002 |

***Falsity of the representation as to time prior to the prime contract***

**[901]** Sky submit that the representation in relation to 31 July 2001 date in the prime contract was false.

**[902]** In closing submissions EDS accept that, given that the joint planning exercise had produced significantly later dates, and work was still underway to fit the plan to milestone dates, it follows that, if EDS made any representation that the milestone dates were the product of a proper analysis or were reasonably based, then such representation was false. However EDS say that it must have been clear to all concerned that Joe Galloway's new dates produced on 12 October 2000 were not the result of any coherent planning process.

**[903]** In the light of that EDS do not seriously challenge the falsity of the representation which I have found they made. Rather they say that Sky did not rely on that representation.

**[904]** On the evidence, I consider that Joe Galloway's exercise in bringing back the date for go-live to 6 August 2001 was not based on any proper analysis and there were no reasonable grounds for holding the

opinion that the project could be completed in accordance with the programme produced on 12 October 2000. It is also clear that this date led to Joe Galloway providing Steve Leonard with the July 2001 date which was set out in the briefing note for the meeting with Richard Freudenstein on 13 October 2000 and was communicated to him at that meeting.

**[905]** It was also on that basis that the milestone date for eCRM Live in One Hall of 31 July 2001 came to be in section 3 of the preliminary specification which was incorporated into the prime contract.

***Knowledge and intent***

**[906]** Sky submit that Joe Galloway 'chopped' the plan on 12 October 2000 in a manner which he knew to be wholly improper and with the result that he produced a plan which he knew, given the views expressed to him by those members of the project team to whom he spoke, was unachievable. Sky say that he did so dishonestly and with intent to deceive because he wanted to meet Sky's expressed desire to achieve such dates, even though he knew that the only honest course of action was to present a plan in which he and EDS had an honest and genuine belief.

**[907]** Sky submit that he did not have an honest and genuine belief in 12 October 2000 plan, and yet he put it forward to Sky on the basis that it was a plan that EDS believed, on reasonable grounds, was achievable. Sky also refer to the fact that Joe Galloway accepted that he was responsible for Steve Leonard saying 'we will deliver by July' to Richard Freudenstein and they say that he intended Steve Leonard to make this statement and he knew and intended for it to be understood to be a statement of EDS's opinion that carried with it an implied statement of possession of reasonable grounds for that opinion.

**[908]** Further, Sky submit that Tony Dean and John Chan knew that the plan was being put forward to Sky on a false basis, and they manifestly approved and



adopted this statement. As a result Sky say that Joe Galloway made a deceitful statement to Sky, which John Chan and Tony Dean adopted and approved.

**[909]** EDS say that Joe Galloway's instructions to Dan Barton and to Richard Durling were to produce such a plan that matched the dates but that is not to say that he did not believe these dates. EDS say that he believed that the July/August 2001 date was possible, and that the objections raised were misguided.

*Joe Galloway*

**[910]** I see no basis on which Joe Galloway can have genuinely believed that 6 August 2001 date obtained as a result of 12 October 2000 planning session was the subject of a proper process. Nor do I think that Joe Galloway had reasonable grounds for believing that the timescales, particularly for go-live and overall completion could be achieved. The evidence of those involved in the process confirms this. Whilst Richard Durling says in his witness statement that Joe Galloway 'believed that the July 2001 date was possible and was not going to be convinced otherwise', in his oral evidence he said that the basis on which the dates were changed was that Joe Galloway did not want to tell Mike Hughes that go-live was not going to be July 2001. Given the background to Joe Galloway's visit and the way in which the dates were changed, I do not accept that Joe Galloway can have had any genuine belief in the dates. He was merely arranging the dates so as to achieve the end date. Melanie Haydon's statement of 'artificial manipulation' provides confirmation that Joe

Galloway carried out no proper analysis and had no reasonable grounds for putting forward the date of 6 August 2001.

**[911]** Joe Galloway's instruction to Dan Barton and Richard Durling to produce a programme to match the dates is of no assistance to EDS's case. It confirms that he proceeded in a manner which he could have no genuine belief in by starting from the conclusion and making the programme fit, a process which the other people involved made it plain could and should not be done. Melanie Haydon was clearly right when she characterised what Joe Galloway had done in her e-mail to Blair Eldridge as follows: 'the plan had been chopped for presentation to the client'. She was also correct in reporting that Tony Dean had said it was and Joe Galloway knew that it was 'a marketing/sales ploy for the client'.

**[912]** He was prepared to act in this way, deliberately providing a date to Sky which he knew had not been the subject of any proper planning process merely to provide the date that the client wanted to hear. He was also prepared to act in this way despite the evident strong disagreement with his approach and even the clear distress which such an approach caused for those who worked for him.

**[913]** As a result, I conclude that Joe Galloway knew that the July/August 2001 was not based on any proper analysis and had no reasonable grounds for believing that go-live could be achieved by that date but despite that deliberately made the false representation. He had no genuine belief in what had been done and can have had no reasonable grounds for belief.

**[914]** Joe Galloway's approach on 12 October 2000 also reflects on his general attitude to estimating time. He did not proceed by way of a proper process but was prepared to give a date which the client was seeking to achieve without having any proper basis for doing so. That, in my judgment, also supports the findings I have made as to his approach and attitude in relation to the time estimate within the EDS response.

***[2010] IP & T 597 at 762***

***Gerard Whelan***

**[915]** Sky also say that Gerard Whelan was aware of the misrepresentations and manifestly approved and adopted them.

**[916]** By October 2000 Gerard Whelan's role on the Sky CRM project seems to have diminished. He did travel up to Dunfermline with Joe Galloway on 12 October 2000 but said, and I accept, that he was not directly involved in the relevant events that day. He was aware of disquiet within EDS at the cutting back of the plan but does not seem to have been aware of the way in which it was done. Certainly, by his reaction to Melanie Haydon's entries on the October Risk List, which I do not think he read or considered at the time, he is unlikely to have been aware of the position at the time.

**[917]** In any case, it is not clear that there is any possible conduct by which he could have manifestly approved and adopted any representation.

***Tony Dean***

**[918]** It is also alleged by Sky that Tony Dean knew that Joe Galloway's 12 October 2000 plan was being put forward to Sky on a false basis, and manifestly approved and adopted this statement.

**[919]** He was involved in the Sky CRM project as the Client Executive from mid-September 2000 but only seems to have become directly involved with Sky from 4 October 2000 when he went to Dunfermline and had a meeting with Scott Mackay. He was present at the meeting with Mike Hughes on 11 October 2000 when Mike Hughes raised concerns as to the time for go-live.

**[920]** His evidence was, as I have said, evasive and he obviously did not want to accept his evident involvement in or knowledge of the events of 12 October 2000. In her e-mail to Blair Eldridge, Melanie Haydon had referred to Tony Dean saying that 12 October 2000 plan was 'a marketing/sales ploy for the client'. I consider that she was accurate in this and this shows that Tony Dean was aware that 12 October 2000 plan was being put forward on a false basis. In a number of communications he showed that he was careful to guard EDS's interests and not disclose matters to Sky. I do not consider that this is evidence of dishonesty but was derived from a wish to protect the commercial interest of EDS. It is clear that he had further direct involvement in matters leading up to the prime contract but I do not consider that there is anything which changed his knowledge.

**[921]** The question is whether he 'manifestly approved and adopted' the representation by his conduct. Sky say that this derives not from any particular conduct but from Tony Dean's position as a senior EDS employee and the person with responsibility for their client relationship with Sky. They say at para 458 of their closing submissions that given his involvement with relevant matters and his position on the CRM project 'his conduct communicated to Sky an endorsement of the representations made'. I do not accept that general conduct not referable to the representation can be sufficient to convert Tony Dean's conduct into conduct which imposes liability for the false representation made by Joe Galloway.

***John Chan***

**[922]** John Chan was involved in the discussions with Joe Galloway on 12 October 2000 and was aware from this and from the changes that Melanie Haydon made that there was no proper basis for Joe Galloway to put forward the dates in July/August 2001.



**[923]** Again, though there is no conduct which, in my judgment amounts to a manifest approval and adoption of any representations.

***Inducement and reliance***

**[924]** An important aspect of the project was the time to achieve go-live in one hall and from the reaction of Mike Hughes to the November 2001 go-live date it can be seen that the date which Sky wanted was an earlier date, particularly for go-live in one hall. The whole purpose of Joe Galloway's visit to Dunfermline of 12 October 2000 was to see whether EDS could bring forward the dates which had been derived at the planning meeting on 11 October 2000, including bringing forward the date for go-live in one hall from November 2001.

**[925]** As I have set out above I have no doubt that by making the misrepresentation Joe Galloway was intending to provide Sky with a date which would allow discussions between Steve Leonard and Richard Freudenstein to proceed to the signing of the prime contract. He therefore intended to provide Mike Hughes with the date on 12 October 2000 and Steve Leonard with the date for his meeting on 13 October 2000 to induce Sky to enter into the prime contract.

**[926]** EDS say that Mike Hughes was aware that the amount of functionality at go-live was not defined but rather that July 2001 date was fixed or 'time-boxed' and that there were difficulties in matching the work to the 'time-box'. They refer to an e-mail from Mike Hughes to Richard Freudenstein on 14 December 2000 after the Executive Steering Committee Meeting. He said that: '… I know from your comments and body language that you are uncomfortable with elements of the plan and the timeline overall, as frankly am I …' He then made some comments and said on Timescales:

> 'The time box we are attempting to fit the entirety of the program into is up to the start of peak (Xmas sales) 2001. As yet we have not been able to find the right formula to do this, since we built the detailed 'integrated plan', some of the challenges we face are: …'

He then referred to the need for time for testing and migration, the complexity of the project and importance of better documentation in the form of Gantt Charts.

**[927]** EDS say that this comment makes it clear that Sky knew perfectly well that EDS had committed to the contractual dates before the joint teams had been able to find a way to fit those dates into a coherent plan. I do not agree. It seems to me that, first, it highlights that Richard Freudenstein was uncomfortable at hearing the new dates at the meeting, indicating that he was not aware that the date could not be met. Secondly, it mentions particular challenges in terms of testing and migration but not that EDS could not achieve functionality for go-live in one hall by the date Joe Galloway represented they could.

**[928]** EDS say that it must have been perfectly clear to all concerned at Sky that Joe Galloway's new dates were not the result of any coherent planning process.

**[929]** First EDS rely on what Graeme Hardie and Geoff Walters said. They rely on e-mails from Graeme Hardie on 12 and 16 October 2000 but these indicate that he was not aware of what had happened. He was aware that the joint planning session had arrived at the November 2001 date. He then said on 12 October 2000: 'I am concerned that you may now be given a plan from this



session which has not had full input from, nor review by, the original planners. Clearly if our staff have not seen this plan they will not be in a position to comment on its validity.' In his e-mail of 16 October 2000 he said:

> 'The dates you mentioned today are significantly changed from the last dates indicated to me by both my team and by Dan Barton. (Although, Dan indicated on Friday that dates had come in a little in a session to which neither Andy Waddell nor Scott Mackay were invited—I don't know why!) I'd like to understand what has changed to allow such a change in delivery dates.'

Both of these show that he wanted to understand the plan not that he understood that it had not been derived from any proper process. It is not evident that he later understood the plan.

**[930]** His superior was Geoff Walters. In his evidence Geoff Walters said that he was not party to the discussion about pulling it back from November 2001 to July 2001 and could not recall his reaction when he heard about the date of November 2001. He expressed the view that it is heading for a disaster if 'commercial people take an arbitrary approach to pulling the timing'. He accepted that this is what he understood had happened but it was not clear when he gained this understanding, at the time or more recently or how he had gained it. I do not derive support for Sky knowing prior to the prime contract that there

was no proper process.

**[931]** Mike Hughes said on Day 14 that his view of what Joe Galloway had done on 12 October 2000 was that he had looked again at the work plan, he had looked again at the resourcing and he had looked again at the approach. In para 75 of his first witness statement he mentioned there being a 'time box' with the time being fixed and the scope prioritised to meet that date. He also referred to his understanding that the RAD process was to be used. This indicates that Mike Hughes understood that Joe Galloway had followed a proper process in arriving at 6 August 2001 date on 12 October 2000.

**[932]** Secondly, EDS rely on the planning process which took place after 12 October 2000, leading up to the signing of the prime contract on 30 November. Plans which were produced on 24 October 2000 gave dates of 1 August 2001 and 14 August 2001. These were part of the planning process and subsequent plans produced in November 2000 gave dates in November 2001.

**[933]** Deb Chakravarty, Sky's programme manager e-mailed AA, EDS and Sky managers and workstream leaders on 24 November 2000 pointing out that the Executive Steering Committee wanted CRM operationally ready in one hall by 31 July 2001 and saying that a workshop was being organised for 29 November 2000 'with the objective of reviewing the integrated programme plan to understand what actions are required in order to align the plan to the Executive milestone dates'. On 30 November 2000 after that meeting the milestones circulated still showed that System live in one hall was 16 November 2001. Deb Chakravarty did not want those dates widely circulated. It is evident that the combined team of planners from EDS, AA and Sky had not been able to achieve a plan which gave a 31 July 2001 date.

**[934]** What effect does this knowledge by members of Sky have upon the position? They knew that they had not yet been able to produce a detailed programme which showed a go-live date of 31 July 2001. The planning process was obviously continuing to see what could be done to align the go-live date with that date and by 29 November 2000 they had not been able to do so.



**[935]** First, there is no evidence that the Sky representative carrying out the re-planning were aware of the fact that Joe Galloway had not carried out a proper process on 12 October 2000. They were aware that their process led to the initial plans of 24 October 2000 gave dates in August 2001 but that subsequent plans gave dates in November 2001. That did not mean that they were aware that no proper process had been followed by Joe Galloway to arrive at 31 July 2001. Indeed the planning effort which was still continuing was trying to meet that date but had not yet been able to do so. Equally there might be other possibilities for why the planning effort could not achieve the same date as Joe Galloway. Joe Galloway might have made an error or made different assumptions and these would have explained why they could not meet the date.

**[936]** Secondly, there is no evidence that Mike Hughes or Richard Freudenstein was aware that Joe Galloway had not carried out a proper process to arrive at the date of 6 August 2001. Nor do I accept that they were aware of the results of the planning effort, despite EDS's assertion to the contrary in para 775(3) of their closing submissions.

**[937]** Thirdly, EDS cannot escape liability on the ground of imputed knowledge. Whilst Sky would not be deceived if they actually knew the truth, it is no answer to an action in deceit that Sky might have discovered the falsity by the exercise of reasonable care: 'it does not lie in the mouth of a liar to argue that the Claimant was foolish to take him at his word': see *Clerk & Lindsell on Torts* (19th edn, 2006) at para 18–34. Equally, I accept Sky's submission that there was no duty on those people in Sky to whom the misrepresentation had been made to carry out investigations with Sky personnel to see whether they might have concerns as to the

basis on which Joe Galloway had made the representation.

**[938]** EDS also say that Sky did not rely on 31 July 2001 date as a representation but relied on it as a promise in the form of a contractual obligation under the prime contract. Whilst the date was a date included within the prime contract, it is clear both from the Executive Steering Group's requirements and from the approach of Mike Hughes that a central requirement was to have go-live in one hall in July/August 2001, if not earlier and certainly in advance of November 2001 and the busy Christmas period. The meeting on 13 October 2000 also reinforced this. Sky needed to know when go-live would take place not only as a matter of contractual commitment but also because that was a fundamental part of their business strategy. As a result, it was the representation made by Joe Galloway, reinforced by Steve Leonard and ultimately included in the contract which was relied on by the relevant Sky personnel.

**[939]** As a result, it is evident that EDS through Joe Galloway on 12 October 2000 and through Steve Leonard, based on information from Joe Galloway, on 13 October 2000 intended Sky to rely on the representation and enter into the prime contract. Sky did rely on the representation in entering into the prime contract and I reject the submissions of EDS to the contrary.

***Representation as to cost prior to the prime contract***

**[940]** In relation to cost, Sky rely at para 46.3 of the particulars of claim on the following in the period in late 2000:

> 'During the course of the discussions leading up to signature of the Contract, further cost estimates were made which eventually came to form
>
> 
>
> the baseline budget dated 21 November 2000 at Schedule 5 of the Contract. The representation made in the baseline budget was that a proper estimate of the costs to be incurred had been made and that such costs amounted to £19,751,000 for consultancy, before profit was added.'

**[941]** In relation to costs, Sch 5 to the prime contract contained an important statement by EDS as to their estimate of EDS's consultancy costs of the CRM project. As the document itself shows, EDS represented it to Sky as the budget which had been estimated by EDS for those consultancy costs as at 21 November 2000.

**[942]** At this time the preliminary specification was being negotiated to define scope for the purpose of being included in the prime contract. An estimate of the number of man-days of effort required for the project produced by EDS in or about October 2000 came to form part of the baseline budget at Sch 5 to the Contract. The estimate of effort for technology consultancy was 14,325 man-days and the estimate for programme management was 1,776 man-days. Sky say that EDS thereby represented that it had carried out a proper analysis of the amount of effort required.

**[943]** The way in which that document was produced was not clear from the evidence. In closing oral submissions, Sky stated that this figure came from EDS and I was referred to a Sky e-mail of 25 October 2000 from Penny Hicks to Laurence Anderson at Sky and Gerard Whelan and Steve Mayhew at EDS attaching a baseline budget of £63.872m. I was also referred to the project plan dated 24 October 2000. Sky submitted that the baseline budget could be traced back to Joe Galloway's resource sheets but did not

elaborate on this. In fact the document appears to be a comparison between a budget of 16 October 2000 of £60.418m and the 'latest budget' of 25 October 2000. I do not gain assistance from these documents in showing how the baseline budget was traced back to an estimate by EDS.

**[944]** EDS say that the Baseline Budget contained no express representation as to its effect and none can be implied. They submit that the budget simply provides the baseline for the operation of the risk sharing provisions of the contract which assume that the budget will vary. Whilst the underlying assumption for a reasonable person in the position of Sky would be that the Baseline Budget was a proper estimate of the consultancy cost of completing the project, I agree with EDS's submission that the way in which the Baseline Budget was incorporated into the prime contract on the terms set out, including cll 3 and 10, indicates strongly that they were not representing that they could and would deliver the project within that budget. Rather it was a budget which might be more or less than the actual cost of the CRM project.

**[945]** I therefore consider that, whilst it would be implied that the budget had been prepared on a proper basis, I do not consider that it would be implied that EDS held the opinion or had reasonable grounds for an opinion that they could and would deliver the project within that budget. For the reasons set out above I am not persuaded that Sky have established that the budget was not prepared on a proper basis.

***Summary as to representations on time and cost***

**[946]** It follows that in the time leading up to the selection of EDS and the letter of intent, EDS misrepresented that they had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and



go-live of the contact centre and that they held the opinion that, and had reasonable grounds for holding the opinion that they could and would deliver the project within the timescales referred to in the response.

**[947]** In relation to the time between the letter of intent and the prime contract, EDS misrepresented that they had carried out a proper analysis of the amount of elapsed time needed to complete the initial delivery and go-live of the contact centre and that they held the opinion that, and had reasonable grounds for holding the opinion that they could and would deliver the project within the timescales referred to in the contract.

**[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.

***Liability in respect of representations: liability of EDSC and liability to BSkyB***

**[949]** Whilst EDS accepts that EDSL would be liable to SSSL for any representations that it made, it does not accept either that EDSC would be liable or that there was any liability to BSkyB Ltd. I turn to those issues.

***Liability of EDSC***

**[950]** EDS contend that EDSC cannot be liable for deceit based on any misrepresentation which they say would have been made by EDSL.

**[951]** Sky contend that EDSC is liable in deceit because of EDSC's involvement in the following ways. Sky say that the question of the contracting party is not relevant and rely on *Langridge v Levy* (1837) 2 M & W 519, [1835–42] All ER Rep 586; *affd* (1838) 4 M & W 337, [1835–42] All ER Rep 586. They say that the relevant question is: were the representations made to Sky made by or on behalf of EDSC?

**[952]** Sky say that the response, together with the Appendix Document and the Technology Document, were produced and issued on behalf of both EDSC and EDSL. They rely on evidence produced by EDS which shows that EDSC organised itself, promoted itself, marketed itself and presented itself to third parties as a single global organisation, comprising, at the time, four Lines of Business. They say that the policy of EDSC, which all its subsidiaries, including EDSL, were required to follow was that the whole organisation was known as 'EDS' in order to persuade prospective customers that such global resources, experience and expertise would be made available to them should they contract with 'EDS'. Sky say that it was the intention and effect of this policy that third parties would understand that they were dealing with EDSC so that EDSC's subsidiaries and their employees were held out by EDSC as being authorised and were in fact authorised, to act as EDSC's agent, and to present themselves as acting on behalf of EDSC.

**[953]** As a result, Sky submit that the individuals responsible for the representations made both within the Response, Appendix and Technology Document acted on behalf of, and were authorised or held out as being



authorised to act on behalf of, both EDSC and EDSL in making representations so that both EDSC and EDSL are liable for their fraudulent misrepresentations.

**[954]** Sky also rely on the fact that specific representations were made by Steve Leonard to Richard Freudenstein in October 2000 and that Steve Leonard was acting on behalf of EDSC to finalise the terms of the agreement to be entered into between SSSL and EDSL. Steve Leonard met and spoke directly to Richard Freudenstein to provide him with assurances and comfort on the part of EDSC and they say that this makes EDSC liable for deceit in respect of those particular representations.

**[955]** EDS contend, in summary, that the response and accompanying documents were produced on behalf of EDSL only; that EDSL was the company tendering for the contract, and Sky was at all times aware of this; that those responsible for the production of the response were employees of EDSL so that EDSC is not responsible for their statements and cannot have their knowledge imputed to it and that EDSC did not make the representations alleged, which were made by EDSL in materials produced in pursuit of a contract for which EDSL was tendering and Sky could never have understood to the contrary.

**[956]** The response was produced by a team led by Joe Galloway and with Gerard Whelan as the bid manager and named as the point of contact.

**[957]** Whilst Gerard Whelan and the other EDS personnel were employed by EDSL, Joe Galloway had the title of 'Managing Director' of the CRM Practice for the EMEA region, within the e.solutions line of business.

He says that he was employed by EDSL. He reported to Barry Yard who was the head of e.solutions in the UK who, in turn, reported to Steve Leonard who was employed by EDSC.

**[958]** The question is whether Joe Galloway and Gerard Whelan in putting forward the EDS response and other documents were acting on behalf of EDSC as well as EDSL. Equally, when Steve Leonard became involved the question is whether he was acting on behalf of EDSC as well as EDSL. He signed the prime contract and letter of agreement for and on behalf of EDSL.

**[959]** As Sky point out the EDS response, in line with EDSC policy, was expressed in terms of EDS and not EDSL or EDSC or any other company. It is now quite common for multi-national companies to decide that from a branding point of view all companies within a group should use the same logo and refer to themselves by a name which is neutral as to the particular company but demonstrates an affiliation with a large group consisting of a group company and subsidiaries. I do not consider that this means that when an employee uses the EDS logo or refers to himself as acting on behalf of EDS, he is acting on behalf of not only the company which employs him but also on behalf of EDSC any more than the employee would be acting for all other companies in the group. I do not consider that the corporate policy on branding gives rise to authority for the employee of a company to act other than on behalf of that company. It may make for uncertainty but that does not create actual or apparent authority to act on behalf of any party who might be authorised to use the logo and the name EDS.

**[960]** Joe Galloway had a regional role in Europe, the Middle East and Africa which was wider than his role in respect of EDSL. He doubtless had authority to act on behalf of other EDS subsidiary companies in the region. His authority to act within the region would either come from those companies or from EDSC. The fact that such authority may have come from EDSC would



not mean that he was given authority to act generally on behalf of EDSC. EDSC may, for instance, authorise someone to act on behalf of EDSL but that does not mean that the person is then acting on behalf of EDSC. Equally, the fact there was a reporting line from EDSL to EDSC in one direction does not mean that there is authority passing down the other way from EDSC authorising EDSL to act on behalf of EDSC.

**[961]** In the EDS response, it is clear that reliance was placed on work carried out by the EDS group and resources of the EDS group to give confidence in the ability of EDS to carry out the Sky CRM project. This is most clear from section 6 of the EDS response. In doing that the employees of EDSL who produced the response were not putting in the EDS response on behalf of EDSC or any other company within the EDS group. They were relying on the ability of the EDS group to show that EDSL had the ability. They were not representing that they were acting on behalf of every company in the EDS group.

**[962]** Clearly, the fact that a party enters into a contract after a representation does not mean that that party is the only party who may have made a representation. In this case when the parties put their mind to who should be the contracting party as a result of the EDS response, both in the letter of intent and in the prime contract they decided that the contracting party should be EDSL. In addition in the recitals to the prime contract they referred to the EDS response being issued by the Contractor, that is EDSL. The absence of mention of EDSC in that context and the fact that there is no mention of EDSC being involved in the EDS response in the recitals to the Deed of Guarantee between EDSC and SSSL provides some support for EDS's submission that EDSC did not make representations in the response.

**[963]** The fact that Steve Leonard of EDSC was involved in the major stages of signing the prime contract and letter of agreement raises the question of whether he was acting on behalf of EDSC in that role. It is

clear that when he signed he was acting on behalf of EDSL. There is nothing to show that he was acting on behalf of EDSC as well. The fact that he had a role within EDSC does not mean that, without more, he was making representations on behalf of EDSC. I do not consider that what he said to Richard Freudenstein on 13 October 2000 was said by him on behalf of EDSC. It was said on behalf of the contracting party, EDSL.

**[964]** As a result, the representations which were made prior to the selection of EDS and the letter of intent and also prior to the prime contract were, in my judgment, only made on behalf of EDSL and not on behalf of EDSC.

***Liability to BSkyB***

**[965]** EDS accept that representations were made to SSSL but submit that no representations were made to BSkyB, so that BSkyB has no claim against EDS.

**[966]** Sky say that the ITT was, as is apparent from its face, issued by 'BSkyB' which is the First Claimant, BSkyB. Whilst Sky accept that the ITT also referred to 'Sky Services', the internal division within which SSSL sat, they say that the ITT described the requirements of BSkyB. Sky say that the EDS response was directed at BSkyB and refer to the letter of agreement where it was expressly stated in para 13 that the business benefits that were expected to flow from the CRM system would be enjoyed by 'SSSL and/or British Sky Broadcasting Ltd'. Sky also say that, throughout their dealings with Sky, it is



apparent that EDS understood they were dealing with BSkyB, which was generally referred to as 'Sky' or 'BSkyB', rather than considering that they were dealing with a subsidiary, SSSL, alone.

**[967]** Sky also rely on the fact that the letter of intent was entered into by EDS with BSkyB and not with SSSL and that it was at a comparatively late stage that SSSL was identified as the appropriate contracting party. It was therefore BSkyB who entered into the letter of intent with EDSL and the representations would found liability to BSkyB in deceit.

**[968]** EDS submit that whilst SSSL was a representee, the question is whether BSkyB was also a representee. They point out that the ITT was put together by Scott Mackay and employees of SSSL. They also say that whilst BSkyB was a party to the letter of intent, the more significant point is that when the parties came to consider who should be a party to the prime contract, it was SSSL who was chosen. They therefore submit that BSkyB was not a representee.

**[969]** The question of which party is a representee depends on whether EDS intended to make the fraudulent misrepresentation to BSkyB, whether individually or by reference to a class of person to whom BSkyB belongs. It is a question of fact whether EDS intended BSkyB to rely on the false statement and, in practice the test is often whether it was in EDS's interest that BSkyB should rely on the statement: see *Clerk & Lindsell on Torts* (19th edn, 2006) at paras 18–30 to 18–31.

**[970]** In the present case the ITT was generally written by reference to the requirements of 'BSkyB' without defining which party that was. There was reference to Sky Services which includes SSSL and Sky Home Services Ltd. The EDS response was phrased by reference to BSkyB. There was no definition of which companies within the Sky group which were defined as 'BSkyB'. Those involved in the ITT, in receiving the EDS response, in discussions with EDS and in dealing with the letter of intent were both employees of SSSL

and BSkyB, with a good deal of overlap between those two companies. The same is true of the lead up to the signing of the prime contract. In principle that would mean that parties with the Sky group were, as a class, intended to rely on the representations. I consider that the letter of intent signed on behalf of BSkyB indicates that EDS intended one of the companies to be BSkyB. Equally, by signing the prime contract with SSSL, I consider that EDS intended another of the companies to be SSSL. The aim of EDS was to be selected initially, then to have a letter of intent and then enter into the prime contract. In those steps the two parties who EDS intended to rely on anything they said, including the representations, were both BSkyB and SSSL.

**[971]** On that basis, EDS intended both BSkyB and SSSL to rely on the misrepresentations.

**[972]** Accordingly the misrepresentations which I have found were made, were made by EDSL alone but were made to both BSkyB and SSSL.

***Representations as to proven technology and risk***

**[973]** Sky allege at para 33 of the particulars of claim that EDS made representations as to the use of proven technology ('the Proven Technology Representation') in these terms:

> 'EDS Ltd and EDS Corp represented that the Chordiant, Arbor BP and Forte Fusion technology they intended to deploy as the solution to the requirements set out in the ITT was proven technology (in the sense that
>
> *[2010] IP & T 597 at 771*
>
> there was nothing novel or untried about it ie EDS Ltd/EDS Corp had used such products together before successfully on similar projects or alternatively that the three products had been successfully integrated together at least once by someone somewhere).'

**[974]** Originally Sky alleged that EDS 'also represented that Forte Fusion was the best product for the job and that they had reasonable grounds for so stating' but, as set out in para 172 of Sky's supplemental closing submissions, this contention is not pursued by Sky.

**[975]** Sky also allege at para 34A of the particulars of claim that EDS represented that:

> '(i) They had the technical experience, knowledge and expertise to integrate and implement the proposed technical solution that they had recommended and that such experience, knowledge and expertise would be available and applied to the project; and
>
> (ii) It was their opinion, for which they had reasonable grounds, that the implementation and integration of the proposed technical solution would not expose the claimants to significant risk in terms of cost or delay.'

**[976]** The representation in para 34A(i) is part of the resources representation. The representation in para 34(ii) which concerns risk is considered below as 'the Significant Risk Representation'.

***The proven technology representation***

**[977]** Sky allege that EDS represented that 'Chordiant, Arbor BP and Forte Fusion … was proven technology'. Sky define 'proven technology' as there being 'nothing novel or untried about it'. They further say that what this means is that EDS 'had used such products together before successfully on similar projects or alternatively that the three products had been successfully integrated together at least once by someone somewhere'.

**[978]** EDS contend that the particulars given by Sky of the representation do not give rise to the representation alleged. They say that when they were stating that 'Chordiant, Arbor and Forte Fusion technology were proven technology' they were merely expressing an opinion that each component was proven and that no representation was made as to any experience of combining all three products within a single solution. EDS also say that Sky understood that such an integration had not previously been carried out.

**[979]** So far as falsity is concerned, it is accepted by EDS in their closing submissions at para 674 that, if EDS represented that EDS had used Chordiant, Arbor BP and Forte Fusion together, that was false as EDS had not done so. It is also common ground that if EDS represented that they knew or had proof that Chordiant, Arbor BP and Forte Fusion had been integrated together before by someone somewhere, that is false as EDS had no such knowledge or proof.

**[980]** The main issue is therefore whether the Proven Technology Representation was made.

**[981]** Sky rely on statements derived from the EDS response, from the CD handed over and the presentation made by EDS on 1 June 2000 and from the letter of 18 June 2000 from Joe Galloway to Richard Freudenstein. Many of those statements include a reference to 'proven technology' being used in the solution which EDS were proposing in the EDS response. For instance at section 1.2 of the EDS response it is stated that EDS's approach was based on principles which included 'Use proven leading edge technology that will support full integration of process, people and information.'



**[982]** Sky rely on the reference to 'proven technology' as being a reference to a 'proven solution' and they say that this is supported in Gerard Whelan's witness statement at para 75.2 where he states that one of Sky's high-level business drivers was the 'desire for the solution to be “proven” '. However, in his witness statement Gerard Whelan then noted that there was a contradiction between Sky's desire for a 'leading edge' solution and its desire for a solution that had to be proven. He says that EDS interpreted 'proven solution' to mean that EDS needed to offer a solution which could be supported by reference to previous experience of this type of project. He refers to the fact that this led to the choice of Chordiant. This does not mean, though, that the whole solution had to be proven in the sense that Chordiant, Arbor BP and Forte Fusion had previously been used or integrated together. Rather it meant that the solution had to be based on proven technology.

**[983]** In cross-examination when Gerard Whelan was taken through the statements relied on by Sky to found the representation he was asked whether looking at those statements and what he had understood Sky wanted and what he said about Cable & Wireless, did he agree that the message being given was: 'that the solution itself is proven?' He said that it was not the intention to communicate that all these components had been put together in that form.

**[984]** I do not consider that the statements relied on by Sky as pleaded in paras 34.1 to 34.12 of the particulars of claim reasonably bear the meaning that there was to be a proven solution in the sense that all the components had to have been integrated by EDS or someone else before.

**[985]** This is supported by my reading of the ITT which, it must be recalled, was produced by Sky to set out its requirements. There is nothing in the ITT which suggests that a proven solution was required. At para 3.5.1 of the ITT Sky said that they had the following specific requirements:

(1) At 3.5.1.7:

'Critical to the response is a listing of all products considered to deliver the solution. Specifically, for each product (application or hardware) proposed a list of their proven functionality and details of reference sites where the proposed features are currently in use must be presented.'

(2) At 3.5.1.9:

'The complete solution will come from more than one supplier in all probability. The response must indicate the ability of the successful partner organisation to manage these disparate technologies into a single solution that creates a seamless customer experience. Clear demonstration that all proposed products within the architecture can and will coexist in the context of BSkyB is necessary as is commentary on how data will be reconciled and managed within the solution.'

**[986]** It must also be remembered that the 'solution' included not only Chordiant, Arbor BP and Forte Fusion but also the Sky legacy systems. Nobody suggests or could suggest that a proven overall solution which includes these legacy systems could possibly have been envisaged.

**[987]** In summary, I do not consider that what was being said in the statements can properly be read as meaning either that the overall solution, including the legacy systems, or even a solution limited to Chordiant, Arbor BP



and Forte Fusion, had previously been used or integrated together. There is certainly no suggestion that EDS said that they had done so or that they knew or had evidence that others had done so.

**[988]** If, however, I am wrong and the statements could be interpreted as meaning that Chordiant, Arbor BP and Forte Fusion had previously been used or integrated together, was that what EDS intended it to mean and what Sky understood it to mean? In the alternative, did EDS phrase it ambiguously so that it could reasonably be understood to mean what Sky understood it to mean?

**[989]** Gerard Whelan's evidence in para 79 of his witness statement and as confirmed in his oral evidence is clear. He says 'We did not however suggest that the combination of products contained in our proposal were together proven, but rather that the individual constituent products were proven and suitable for integration'. He made it clear that it had not been the intention to communicate that all the components had been put together in that form before. Joe Galloway's evidence was to similar effect.

**[990]** On that basis and from my own reading of the statements, I am satisfied that EDS did not intend those statements to mean that Chordiant, Arbor BP and Forte Fusion had previously been used or integrated together. Did EDS, though, phrase the response ambiguously so that it could reasonably be understood to mean that? For the reasons given above, I do not think so. Even if the phrase were to be ambiguous, I do not see that the references to proven technology or the other wording can be said to have been written so as to be ambiguous. Rather it seems to me that EDS were addressing the particular matters which were set out in the ITT and there is nothing in the ITT which required a proven solution in the way in which Sky interpret it.

**[991]** In any event, I am not persuaded that Sky understood the statements in the way in which they contend they did. Sky in its written closing submissions rely on the evidence of Andy Waddell and Richard Freudenstein to demonstrate that Sky understood the representation to mean that Chordiant, Arbor BP and Forte Fusion had previously been used or integrated.

**[992]** First, Andy Waddell in his first witness statement at para 23 explained that he wrote section 3.5 of the ITT and says that the issues in relation to proven software and proven interoperability were rehearsed in section 3.5.1, 'Specific Requirements', specifically at paras 7, 8 and 9. He says at para 22 of that witness statement that whilst Sky wanted the 'vision' he describes and that a leading technology solution would be required to achieve it, Sky were also concerned that what they were buying was proven and not 'bleeding edge'. He added that, by definition, a best of breed package would be proven software. However, he was also concerned that the interoperability of the software was proven.

**[993]** In cross-examination he explained that he was not a software developer or a middleware expert but by reference to the EDS response it was his understanding that in respect of Chordiant, Arbor BP and Forte Fusion, EDS was saying that they had done it before and it was proven. He said that he thought that the EDS response contained 'fairly positive statements of proven, integrated, best of breed products that are typically recommended. To me, that says we have done it before'.

**[994]** I consider that Andy Waddell's understanding that EDS 'had done it before' cannot be extended to an understanding that this meant that they or others had previously integrated Chordiant, Arbor BP and Forte Fusion together. He drafted section 3.5 of the ITT which, as I have said, did not make



a previously proven solution one of Sky's requirements. If he had intended that the solution or parts of it had to have been used and integrated together previously then the ITT should have stated that. It appeared that he was making a leap, as was suggested to him in cross-examination, in assuming that the only way a bidder could be confident that the components of the solution could be integrated would be if they had done it before.

**[995]** Secondly, Richard Freudenstein said in paras 23, 31 and 33 of his first witness statement that Sky wanted a solution 'based on proven technology'; that the presentation on 1 June 2000 referred to 'proven leading edge technology in relation to the technical architecture' and that in the EDS response EDS were 'proposing a solution based on proven technology'. He then added at para 39:

> 'On the basis of what EDS said at the presentation on 1 June 2000 and in the Response, it appeared to me that the solution which they proposed (ie Chordiant, Forte Fusion and Arbor) was based on proven technology, in the sense that it was not new or untried from their viewpoint either in terms of the individual products or the overall architecture.'

**[996]** In cross-examination, until it was pointed out to him that there were legacy systems as part of the solution, he said he thought that EDS had been asked whether the whole solution had been tried before. He then said that he did not recall anyone saying specifically to him that Chordiant, Arbor BP and Forte Fusion had all been integrated together before. He said that it was his 'understanding of the process that we went through, that they had given that assurance'. I did not find Richard Freudenstein's evidence on this aspect convincing. It was not clear whether he thought EDS had said that the components had been integrated before, which is not supported by other evidence, or whether he understood it from what had been said in the EDS response and at the presentation on 1 June 2000. As I have said, neither the ITT nor the EDS response would lead to an understanding that there was a 'proven solution' rather than individual '*proven technology*'. Nor would what was said at the presentation on 1 June 2000, as pleaded at para 34.10 of the particulars of claim lead to that conclusion.

**[997]** The matter was also dealt with by other Sky witnesses. Martin Stewart who was BSkyB's Chief Financial Officer put the matter more tentatively when he said at para 19 of his witness statement that:

> 'The Executive Summary in EDS' Response, which I believe that I would have read, refers to using proven leading edge technology, which I would have taken to mean that the technology proposed by EDS was proven both in the sense that EDS had used the technology before and that the overall solution was not previously untried.'

**[998]** In cross-examination, he said that he believed he 'would have read' the executive summary because that is what he generally did. He then said that his—

> 'clear understanding at the time is that EDS was proposing a technology solution that was proven in the round. They knew that all the different component parts worked together. That was the understanding I had quite clearly from the presentations and the executive summary and conversations and briefings I received from Sky staff at the time … And as a result of the EDS presentation, the second one which I did attend.'



**[999]** Martin Stewart then said that what Sky were looking for was a solution that worked in its entirety. He added:

> 'There was little point looking for individual components which may or may not work together irrespective of their own individual capabilities. So it was quite clear that what we were looking for was something which would function efficiently together and that was what we were asking EDS and that is what we believe that they told us they were proposing.'

**[1000]** He then went further and said that—

> 'they actually told us that they knew these different component parts of the system, of which I can only remember a fraction of the different bits, did work together … The briefing to me was that different parts of this project, the different technical parts did work together.'

When pressed as to whether he was told they would work together or had been tried before he said 'I can't recall precisely which one; if you're going to force me to pick one, I can't recall.'

**[1001]** Martin Stewart's evidence on this aspect I found to be unsatisfactory and it was clear that he did not understand the technical issues. I can only conclude that he had no clear understanding at the time in relation to the extent to which Chordiant, Arbor BP and Forte Fusion had been integrated or used together before.

**[1002]** Fourthly, Mike Hughes in his first witness statement says that he recalls telling Joe Galloway 'that any proposal would need to be proven, in the sense that the overall technology solution should not have been untried'. He also said at para 27 that he 'impressed on EDS the need to make sure that any solution that they proposed was proven'. He then says at para 32 of this witness statement that what he said to EDS reflected his 'concern at the time which was to achieve a solution which was leading edge but which was nevertheless proven in view of the risks involved in implementing a previously untried solution'.

**[1003]** In cross-examination, his evidence of what he had told Joe Galloway was less clear. Whilst no criticism can be made of Mike Hughes not remembering the time or place of any conversation which took place eight years previously, his evidence differed from what he had said in his statement. When asked if he recalled telling Joe Galloway he said variously, 'I believe I did', 'I think I must have done' and 'I firmly believe I did'. Evidently he did not have a clear recollection.

**[1004]** Also, in cross-examination on Day 13 he said this about the requirement for a proven solution:

> 'We wanted new technology but we didn't want to be the first corporation to be trialling an individual component or set of components that had not previously been looked at. This was a business project. It wasn't an R&D exercise.'

**[1005]** That does not amount to a proven solution. A proven component or set of components may both be examples of cases where the components have individually been proven. I am therefore left with the clear view that Mike Hughes was not correct in saying that he had said to Joe Galloway that he wanted a proven solution in the sense that Sky now allege. I note that this view also accords with Joe Galloway's evidence.



**[1006]** Fifthly, Scott Mackay said in para 55 of his first witness statement that he had understood from EDS's use of the word 'proven technology' that 'the solution EDS was proposing was not new or untried—in other words that Sky wouldn't be the guinea pig for a system where the components had never been developed before, with all the associated cost and time risks that that would bring'. He said that he had also read the reference to Forte in section 6.4.1 to be a reference to Forte Fusion which would indicate that Chordiant and Forte Fusion had been used together before.

**[1007]** In cross-examination, when he was asked about his witness statement he said this:

> 'No-one had ever took the time to say that these products have not been integrated before, so I left the bid process, and as I have said here, I did not go back to this in the same detail as I had in the main document as the technology workstream was not really my area of expertise. But my understanding was these guys had done this before.'

**[1008]** From his evidence, it is evident that Scott Mackay had no clear understanding of what 'proven technology' meant or what it was that EDS had done before in relation to the products.

**[1009]** Lastly, there was evidence that contradicted that understanding. Andy Waddell had produced or been involved in producing a series of questions and answers in Sky's Information Technology Services ('ITS') department's evaluation of the bids. This included this observation in respect of EDS: 'How will components (existing and new) integrate? Most interfaces will be bespoke.' Equally on the next page of the document it is stated under EDS that 'All interfaces are new bespoke development with the exception of PeopleSoft and Lucent. New interfaces include Chordiant to Kenan billing and Sky FMS.' These comments in relation to the EDS response indicate that the components had not been integrated before but would need bespoke interfaces, particularly when this is read with the comments made in relation to the other bidders.

**[1010]** In addition, when Ian Haddon produced a presentation document for Richard Freudenstein in July 2000 concerning the appropriate billing software, he set out at p 20 of the presentation that Kenan's Arbor 'has never been integrated with Chordiant' and that nor had Geneva been integrated with Chordiant before. Ian Haddon says in a witness statement at para 10 that, in a meeting in early May 2000 he had been told by Barry Yard and a person from EDS's German office that EDS were in the process of implementing a Chordiant/Arbor system in Germany. In relation to the presentation he says that the presentation reflected a conversation with Mr Rainger of Kenan on 14 June 2000 in which Mr Rainger indicated that he was not aware of any such integration. He says that at the time of writing the presentation document, he did not know whether EDS had completed the integration of Chordiant and Arbor at the site in Germany.

**[1011]** In cross-examination on Day 16 he accepted that if he had come away with a clear understanding that EDS had not just been in the process of integrating, but had successfully integrated Arbor and Chordiant then that should have been listed in the presentation as a strength of Arbor, rather than a weakness. Ian Haddon was unable to explain the contradiction. He said that his recollection was vague and that he suspected he was told at the second EDS meeting that there was not a completed integration. In the end he said that he could not definitively recall the position.

*[2010] IP & T 597 at 777*

**[1012]** Having reviewed the evidence from Sky witnesses and the documents in some detail, I am far from being satisfied that Sky understood EDS to be saying that Chordiant, Arbor BP and Forte Fusion had been used or integrated together before. The evidence in cross-examination exposed weaknesses in what had been said in the witness statements.

**[1013]** As a result, I do not consider that EDS represented that there was a proven solution in the sense that Chordiant, Arbor BP and Forte Fusion had been used or integrated together before. That was not a meaning that the statements could bear. It was not what EDS intended and was not what Sky understood by those statements. Accordingly, I find that Sky's case based on the Proven Technology Representation fails.

***The significant risk representation***

**[1014]** Sky allege at para 34A of the particulars of claim that EDS represented that 'It was their opinion, for which they had reasonable grounds, that the implementation and integration of the proposed technical solution would not expose the claimants to significant risk in terms of cost or delay'.

**[1015]** EDS deny in para 87A of the Defence that there is any basis for this implied representation as to risk.

**[1016]** This appears to be alleged to be an implied representation derived from the Proven Solution Representation to the effect that, as Sky put in para 507 of their written closing submissions, 'the solution was not an unusually or notably risky one'.

**[1017]** The statements relied on by Sky to establish this representation are, again, those which they relied on to establish the Proven Technology Representation. It is evident that, in those statements, EDS stated that they were proposing a technical solution which would use proven technology. Nothing is expressly said in those passages about risks in terms of cost or delay and from the passages which have been relied on by Sky I do not see that, without more, such a representation would arise either expressly or by implication from the pleaded case.

**[1018]** Sky say that, in relation to this representation, Gerard Whelan accepted that the representation had been made and that EDS had no reasonable basis for making it. They also say that Joe Galloway accepted that the representation had been made. This is not accepted to be the position by EDS. I now turn to consider the passages in the evidence of both Gerard Whelan and Joe Galloway relied on by Sky.

**[1019]** Gerard Whelan was asked on Day 49 first whether he was intending to represent to Sky that the implementation and integration of the proposed technical solution would not expose Sky to significant risk in terms of cost or delay. He did not answer that directly but said that there 'is always risk. There are the technical risks which can be controlled by testing. We believed the solution could be delivered in the time and for the budget'. It was then put to him that he would have wanted Sky to understand that EDS had reasonable grounds for believing that these products could be put together without putting at risk the nine months. He replied 'That's correct'. When his evidence is read together he was saying that there is always a technical risk but that he would have wanted Sky to understand that go-live could be achieved in nine months. It is not an acceptance of the 'Significant Risk Representation' and the questioning was not based on the premise that the representation was made or to be inferred from the pleaded statements.



**[1020]** It was then put to Gerard Whelan: 'As I have already said to you, I suggest that you did not in fact and you knew you did not in fact have any reasonable basis for making that representation, bearing in mind no proper evaluation had been done.' His answer was 'Yes, the only evaluation or the evaluation that I recall was within the technical work stream'. I do not consider that Gerard Whelan was agreeing to what had been put but was acknowledging that this was what had already and was again being put to him to which his former and current answer was that the only evaluation he could recall was within the technical workstream.

**[1021]** Just before this line of questioning he had been asked whether he could point to anything which showed a proper evaluation of whether the products could integrate. He said he could not point to a proper evaluation by way of proof of concept or documentation but could recall the fact that the solution was discussed by the technical workstream. It was then suggested to him that he was 'fully aware as was Mr Galloway that putting together these products created a risk which you were not in a position to measure and so you were not in a position, honestly to say, we can implement this solution in nine months?' He replied 'I certainly … did not feel we had a risk here. I was comfortable that the technical team were confident to make appropriate decisions and trust them accordingly'. This shows that he was not accepting the proposition being put to him and was not accepting that the technical team had not carried out a proper evaluation. When viewed in context I do not consider that Sky's reliance on Gerard Whelan's evidence is well-placed.

**[1022]** There is even less force in the submission that Joe Galloway made any concession. In cross-examination on Day 46 it was suggested to him that he 'must have wanted Sky to understand that you were satisfied that they could be integrated together'. His response was 'Absolutely we could'. The suggestion continued 'And that could be done without risk to the project?' He replied 'Yes that is absolutely the case and that was absolutely a fervent belief'.

**[1023]** Joe Galloway later said this:

> 'We wanted them to understand that the technology that they were asking for was used on a very regular basis, that we used it on a regular basis, that we had consortium partners in the programme that believed that there was no issue with either the technical ideas or the integration of those technologies, so we wanted them to understand that the technology we were putting forward would work and it would work together.'

**[1024]** Those extracts go no further than stating a belief that the solution would work and that EDS wanted Sky to understand that. That is not equivalent to making a representation in the terms of the Significant Risk Representation.

**[1025]** I do not consider that Sky can rely on this evidence to establish a representation. The statements relied upon say nothing about risk and whether there was no risk or no significant or other risk representation that time and cost would be exceeded. I am not satisfied that EDS made any representation in the form of the Significant Risk Representation. In any event, the pleaded basis for the representation being false is that the solution had not been proven in the sense that Chordiant, Arbor BP and Forte Fusion had been used or integrated together before. However, the expert evidence does not support that. Mark Britton at para A211 of PA's first report considered that the technologies were capable of integration but it was a matter of the amount of effort, the level of



support from the vendors and the particular requirements of Sky. Robert Worden is of the same view as he considers that the ability to integrate was not a significant risk at the time of the EDS response. I accept that.

**[1026]** So far as Sky's evidence is concerned, it is not clear that Sky understood that EDS were making the representation or, as EDS submit, that Sky relied on it.

**[1027]** For these reasons I am not persuaded that the Significant Risk Representation was made, based on the pleaded statements or that it would have been false. I have, of course, dealt above with two representations which relate to the question of cost and delay and do not consider that this adds anything to that.

**[1028]** Accordingly, I find that Sky's case based on the Significant Risk Representation fails.

***Representations as to methodologies***

**[1029]** The term 'methodology' is used to describe a method or set of procedures for carrying out the necessary tasks on IT projects. In the context of the CRM project, there were two relevant sets of procedures, one for project and programme management and one to help manage the 'lifecycle' of the IT project.

**[1030]** For project and programme management there need to be procedures for managing the various workstreams and ensuring that they produce the necessary outputs or 'deliverables' on time and to the requisite standards. This can be assisted by defining processes, having standard documents ('templates') for particular steps in the process and by planning or scheduling the necessary activities.

**[1031]** Procedures to manage the lifecycle of an IT project are referred to as lifecycle methodologies or Software (sometimes System) Development Life Cycle ('SDLC') methodologies. The first stage is the definition of the IT requirements for the business. This is typically done by business analysts working with the business staff to produce specifications of functional and non-functional requirements. This then leads to the second stage when IT design and development is carried out where the requirements are translated into the necessary IT architectural and detailed design. That IT design is then transferred into programme coding to implement the design within the software. When that is complete it is necessary to carry out testing prior to implementation. Testing relates both to the individual units or parts of the software and also to the individual parts in combination and together.

**[1032]** In principle, the lifecycle methodology can follow two paths. First, the lifecycle can follow a sequence in which each stage is completed before the next stage begins, often referred to as a 'waterfall' methodology. The second type of lifecycle is one where there is parallel working and where there is more interaction between the IT staff and the business staff so that development takes place in increments with feedback at each stage. One such methodology is called Rapid Application Development ('RAD'). RAD allows for the requirements to be produced jointly by the IT and business staff often using software tools that permit the rapid construction of prototypes of major parts of the system which can then be reviewed to ensure they meet the requirements of the business.



***Representation***

**[1033]** Sky contend in para 37 of the particulars of claim that EDS's bid team made a number of statements and representations concerning methodology and, in particular that EDS represented that they—

> 'had developed powerful project management and SDLC methodologies suitable for this type of systems integration project which they intended to use to ensure that the project was completed on time and on budget. They also represented that the personnel to be used on the project were experienced in using such methodologies.'

**[1034]** In paras 38.1 to 38.12 of the particulars of claim Sky set out the statements which they say give rise to the representation. These are derived from the EDS response, the CD used at the presentation on 1 June 2000, a letter dated 18 June 2000 from Joe Galloway to Richard Freudenstein, the presentation on 7 July 2000 and cl 7.2 of the prime contract. In the EDS response, EDS set out statements about the way in which they intended to perform the project if they were selected. This included reference to methodologies.

**[1035]** EDS accept in para 98 of the defence that representations were made in the documents set out in paras 38.1 to 38.12 of the particulars of claim but deny that it made the representations alleged by Sky. Rather EDS accept that EDSL represented that:

> '… it had powerful methodologies to support programme management, business transformation and change management. It also represented that such methodologies supported the "Customer Centric" approach to business transformation and provided a framework for delivering results. In relation to SDLC, EDS proposed an "iterative and incremental" approach … and its "initial thoughts" were that this would be "within a framework of EDS' formal Transform methodology" … From and after the partnership with AA, and as noted at paragraph 38.11, EDS expressed the intention to use AA methodologies as well. The representations made by EDS Ltd in respect of methodologies were limited to the matters expressed in the documents quoted in paragraphs 38.1 to 38.12.'

**[1036]** Sky in their closing submissions refer, in particular, to the EDS response at s 12 of the Technology Document, which contained a description of EDS '*Development Approach*'. This explained:

> 'Choosing the best development methodology is vital to the delivery of the project within allowed time and cost constraints. Whilst it is anticipated that this selection will take place following discussions with BSkyB's CRM project team, our initial thoughts lead us to recommend a rapid application software development process. This will operate through iterations within a framework of EDS' formal Transform methodology. A complementary project management approach, PM 2™ would also be utilised – see section 5.4 of the main document for details. Bringing these tried and trusted approaches to the project will ensure the enterprise can gather rapid momentum following project approval, ensuring timely delivery.'

**[1037]** Sky then refer to the description of 'Transform' which is set out over the following three pages of the Technology Document, identifying its six different phases, and then explaining how 'rapid application development



fundamentals' fitted 'Within the overall systems development life cycle'. Sky refer to a draft of the EDS response and say that this is a description of the SLC3 methodology which had been developed by EDS and that the methodology differed from the Transform methodology which was a methodology which had been developed by SHL. Sky also contend that Transform was a methodology which EDS had inherited from SHL and which, by 2000, was no longer supported by EDS.

**[1038]** Sky say in their closing submissions that the central representation communicated to Sky was that of an intention to use an SDLC methodology which they say was made deceitfully. They also originally relied on a representation as to project management methodologies which they say was made negligently. As confirmed in the oral closing submissions on Day 108, that allegation is no longer pursued.

**[1039]** EDS say in their written closing submissions that the only material representation that was made was that EDS had various suitable methodologies that could be deployed on this project. They accept that there was a representation of intent to use one or more of those methodologies, subject to discussion with Sky and/or adaptation for Sky, but say that this representation of intent was immaterial, save perhaps as regards RAD as to which there is no allegation of falsity.

**[1040]** Sky say that the representation involved the following elements:

(i) that EDS possessed methodologies;

(ii) that the methodologies had been developed by EDS;

(iii) that the methodologies were suitable for this type of project; and

(iv) EDS intended to use those methodologies.

**[1041]** EDS accept that they represented that they had SDLC methodologies that were suitable for this type of systems integration project so it accepts that it made representations equivalent to elements (i) and (iii). It is therefore necessary to consider the other two elements.

***Methodologies developed by EDS***

**[1042]** Sky did not develop this contention in its closing submissions although correspondence between solicitors in November 2007 indicated that Sky still relied on this aspect. To the extent that it is still relied on EDS submit, correctly in my view, that the statements relied on in para 38 of the particulars of claim are to the effect not that it had developed some methodologies but that it had various methodologies, not all necessarily developed in-house. The two particular methodologies which are referred to in the statements relied on by Sky are Transform and PM2. Whilst in relation to these two methodologies there are references to 'EDS' formal Transform methodology' (Technology Document section 12) and to PM2 as an EDS corporate methodology (response 4.3.4), it is only in the CD for the presentation on 1 June 2000 that it is stated that EDS has developed powerful delivery methodologies, apparently in the context of Transform. Otherwise references are to EDS having used or possessing those methodologies rather than EDS having developed them. In my judgment, the representation does not go as far as to say that EDS had developed all the methodologies which they possessed.



***Intention to use methodologies***

**[1043]** The allegation is not that EDS intended to use a particular methodology in the form of PM2 for project management or Transform as a SDLC methodology. That is perhaps not surprising in the light of what EDS said in section 12 of the EDS Technology Document:

> 'Whilst it is anticipated that this selection will take place following discussions with BSkyB's CRM project team, our initial thoughts lead us to recommend a rapid application software development process. This will operate through iterations within a framework of EDS' formal Transform methodology. A complementary project management approach, PM 2$^{TM}$ would also be utilised.'

This passage makes it clear that there was no firm intention to use particular methodologies but that it was anticipated that the selection would take place after discussions with Sky. It was therefore only EDS's 'initial thoughts' that Transform and PM2 would be used.

**[1044]** In written closing submissions at para 174.5 Sky put the matter, as follows:

> 'Joe Galloway and Gerard Whelan represented (and John Chan approved and adopted such a representation) that EDS intended to use an SDLC methodology (which was identified as Transform), when in truth, as at the date of selection/Letter of Intent, they did not in fact have such an intention.'

**[1045]** The statements relied on in para 38 of the particulars of claim show that EDS intended to use both project management and SDLC methodologies but that EDS had not by that stage finally selected those methodologies. I do not read anything as saying that a single methodology would have to be used either for project management or for SDLC. Rather there is an indication, in particular in para 4.3.4 of the EDS response that several methodologies might be used and that these would be tailored to the needs of Sky.

Further, it is clear from the statements relied on in paras 38.10 and 38.11 of the particulars of claim that methodologies used by Chordiant and Arthur Andersen would be used.

**[1046]** I therefore consider that EDS made a representation that they had SDLC methodologies that were suitable for this type of systems integration project. Whilst there was a representation that they intended to use methodologies, there was no intention to use particular methodologies.

***Falsity***

**[1047]** Sky set out its case on falsity in para 39 of the particulars of claim. In its written closing submissions at para 553.6 they have narrowed the scope of their contentions and concentrated on a lack of intention to use methodologies. It is said that prior to the letter of intent 'EDS did not in fact intend to use Transform as the SDLC for the project, and it did not in fact have an intention to use an SDLC to govern and control the technical work to be undertaken on the project.'

**[1048]** In the light of the fact that there was no relevant representation that EDS intended to use Transform, Sky's case is limited to a lack of intention to use an SDLC methodology.

**[1049]** EDS set out in detail in paras 715 to 721 of their written closing submissions their contention that they possessed methodologies which were



suitable for the CRM project. Sky's case on this is to a large extent based on the fact that EDS did not use a SDLC methodology and therefore it is to be inferred that they did not possess suitable methodologies.

**[1050]** There are therefore three relevant questions related to falsity: did EDS have SDLC methodologies; did EDS have methodologies that were suitable for this type of integration project; and did EDS intend to use methodologies?

***Availability of methodologies***

**[1051]** The factual evidence, particularly that of Chris Moyer, shows that EDS had internal methodologies including PM2 for project management and SLC2 and SLC3 for lifecycle development. Transform, which was a methodology originating from SHL which covered both programme/project management and lifecycle development, was being evaluated and whilst no longer supported, it was still available for use. I am satisfied that, at the relevant time in 2000, EDS possessed methodologies.

***Suitability of methodologies***

**[1052]** There are some differences between the experts on the question of whether PM2 was in itself suitable for programme management but Mark Britton accepts that it could have been adapted to fit. Mark Britton is however of the view, as set out in paras A217 and C168 of PA's first report and his evidence on Day 74 that EDS's Lifecycle methodologies would have been suitable. Robert Worden considers that, particularly with the project and programme management capabilities of Transform, EDS's methodologies were suitable both for project and programme management and also for lifecycle development. There is no significant difference between the experts and I am satisfied that EDS possessed methodologies which were

suitable for the CRM project.

***Intention to use methodologies***

**[1053]** In relation to SDLC methodology, Sky rely on the inference to be drawn from the fact that EDS did not use an SDLC methodology during the project. It also relies on matters which it contends show that EDS did not intend to use Transform or SLC3 and did not have a suitable SDLC methodology.

**[1054]** EDS's case is summarised in para 712(3) of their closing submissions where they say that they did indeed have suitable methodologies for this sort of project (and it intended to use one or more of them).

**[1055]** The allegation made by Sky is that EDS did not have the intention to use an SDLC methodology. The evidence from EDS's witnesses on this aspect was from Joe Galloway and Gerard Whelan. On its face it provides good and cogent reasons why EDS included the reference in the response to methodologies and that they intended to use methodologies.

**[1056]** The focus of Sky's challenge on the question of intention was twofold. First, they challenged EDS's intention to use Transform on the basis that the description of the Transform methodology in section 12 of the Technology Document was in fact a description of EDS's SLC3 methodology. This, Sky say, shows an intention not to use Transform, a methodology which was produced by SHL and which, after SHL's move to EDS was not supported by EDS. Equally, Sky say there was no apparent intention to use SLC3 at any time. Secondly, they challenged any continuing intention to use Transform



after John Chan became involved in the project. John Chan's name first became linked with the project on 11 May 2000. He was then approached to be Project Manager on 28 May 2000 and attended the presentation to Sky on 1 June 2000, albeit in a non-participating role. It is clear from the evidence of Gerard Whelan and John Chan that John Chan did not favour Transform. He focused more on the need for a project and programme management methodology and intended to use PM2 and not the parts of Transform which were applicable to those functions. He was not going to impose any SDLC methodology on the workstreams but was to leave it to them to select methodologies.

**[1057]** The representation which is alleged to be false is a representation that EDS intended to use 'project management and SDLC methodologies'. I consider the evidence demonstrates that at the time of the EDS response EDS intended to use project management and SDLC methodologies. Whether the SDLC methodology was Transform, SLC3 or some other methodology to be chosen by the workstreams, I am satisfied that EDS had an intention to use one or more SDLC methodologies. The proposal in the response, subject to further discussion with Sky, was to use Transform and PM2 methodologies as part of a rapid, iterative development application. John Chan intended to use PM2 and leave the choice of the methodology to the workstreams. He did not intend to impose Transform but clearly intended a SDLC methodology or methodologies to be used.

**[1058]** Sky's challenge does not, I consider, go to the truth of the alleged representation. The description in section 12 of the Technology Document of Transform is inaccurate because it has used the description of SLC3. All this shows, in my judgment, is that EDS intended to use some form of SDLC methodology rather than no methodology. Equally, the evidence that John Chan did not intend to impose any SDLC methodology but to leave it to the workstreams shows an intention to use an SDLC methodology or methodologies.

**[1059]** The cross-examination of Gerard Whelan and John Chan was aimed at establishing that EDS did not have a continuing intention to use Transform but that is not the pleaded allegation or a representation which could be supported on the facts. In closing Sky tried to change the emphasis of its case to a representation that there would be 'a single overarching methodology'. They pointed out that the reference to 'project management and SDLC methodologies' would encompass a case of a project management methodology and an SDLC methodology. However for Sky to proceed in closing on this basis would go against the way in which the case had been conducted. Further, Sky made comparatively late amendments to the pleaded representation and, if they had wanted to plead an allegation of 'single overarching methodology' they should have made that clear. That case would have had difficulties in terms of the case pleaded in para 38 of the particulars of claim as it is clear that Chordiant and AA methodologies would have to be taken into account. What the change of tack does show is that Sky's case on an intention to use 'project management and SDLC methodologies' could not, as I have found be sustained.

**[1060]** There was also an allegation by Sky that EDS's statement in section 1.2 of the EDS response that 'Based on our experience, we expect that 80% of the implementation can be based on best practice templates we have developed' was false because best practice templates for 80% of the implementation were never deployed and there was no proper basis for this statement. In Sky's closing submissions at paras 556 to 561 it is relied on as



being relevant to EDS's general attitude. This is not relevant to the alleged representation or to the question of falsity. In any event, the evidence from Gerard Whelan, Joe Galloway and Dan Barton indicates that this would be taken to mean that 80% of the software development would be based on Chordiant's out of the box functionality and materials from previous projects. Mark Britton accepts that 80% could be calculated on that basis but says that it would not be normal to refer to that in this way. I am not satisfied that this was a false statement or that it has any impact on the issues related to representations.

**[1061]** In the circumstances, I find that there was no misrepresentation as to methodology as pleaded in paras 38 and 39 of the particulars of claim and Sky's case on this allegation fails.

***Summary: misrepresentation prior to the letter of intent and the prime contract***

**[1062]** For the reasons set out I find that EDS made fraudulent representations as to time both prior to the letter of intent and prior to the prime contract. I reject Sky's other allegations of misrepresentations.

***Further representations before the letter of agreement***

**[1063]** Sky rely on four negligent representations which they say were made prior to the letter of agreement. The representations relate to:

(1) EDS's resources for the re-planned project;

(2) EDS's under-estimate of the work completed and progress made;

(3) The programme plan that EDS produced; and

(4) EDS's analysis of the cost to complete.

**[1064]** Sky say that in meetings between Sky and EDS in April, May and June 2001 EDS sought to persuade Sky that senior individuals were now working on and engaging in the project, that EDS understood why they had failed to date and that as a result they understood how to, and were equipped to, make the project a success going forward.

**[1065]** In the course of those meetings, Sky allege that to induce them to continue the CRM project with EDS, EDS made a number of misrepresentations negligently and in breach of a duty of care owed to BSkyB and SSSL. EDS admit that a duty of care was owed to SSSL and I have held that no duty of care was owed to BSkyB. EDS deny the content and meaning of the representations made and in any event, deny acting negligently.

**[1066]** Sky say that, in reliance on these misrepresentations, together and individually, Richard Freudenstein took the decision in the second week of June 2001 that EDS should remain as systems integrator and that accordingly he made that recommendation to Tony Ball, which Tony Ball accepted. In light of that decision, commercial negotiations took place between Sky and EDS as to the terms on which EDS would remain in place as systems integrator and this led to the letter of agreement, which was ultimately signed by Richard Freudenstein and Steve Leonard on 16 July 2001.

**[1067]** Sky allegations are set out in para 68 of the particulars of claim. They plead that EDS falsely represented as follows:

(1) As to *Resources:* that they possessed or had available to them the resources they needed to ensure that the project would be completed successfully in accordance with the revised programme plan and the revised budget;



(2) As to *Complexity and Completion* that the cause of the problems had been the bid team's under-estimation of the complexity of the project and that a significant amount of work had been completed which was of value to the project and would provide the basis for project completion;

(3) As to *Planning:* that they had a programme plan that was achievable and the product of proper analysis and re-planning; and

(4) As to *Cost:* that they had carried out a proper analysis of the cost of completing the project and that the estimated overrun against the budget baseline was £14.564 million.

**[1068]** Sky contend that, but for those misrepresentations, they would have removed EDS as systems integrator at this stage in 2001, instead of waiting until March 2002 and would have replaced EDS with an alternative systems integrator ('ASI') to continue and complete the CRM project.

**[1069]** I shall deal with the four representations in turn.

***Resources***

**[1070]** Sky allege that over a period of four months between April and July 2001, EDS negligently made false misrepresentation as to resources. Sky rely specifically on statements made on six occasions:

(1) at a presentation given by EDS at Sky's Osterley offices on 16 April 2001;

(2) in a letter written by Barry Yard to Mike Hughes dated 18 April 2001;

(3) at the presentation of the phase 2 plan at the Marriott Hotel on 18 May 2001;

(4) by assurances given by Steve Leonard to Richard Freudenstein on or about 4 June 2001;

(5) in an e-mail sent by Greg Hyttenrauch to Mike Hughes dated 7 June 2001; and

(6) at the Executive Steering Group meeting on 13 July 2001.

**[1071]** EDS say, in broad terms, that, to the extent it made any representations, as opposed to promises, it represented only that certain requirements had been identified, some positions had been filled and that EDS reasonably expected to be able to fill any remaining positions and to meet any remaining resource requirements and that all of this was true.

**[1072]** EDS say that there was a process of negotiation from April 2001 until the letter of agreement, in which various options were considered and the programme was replanned by Sky and EDS. EDS say that Sky seek to pick individual letters and presentation slides from that process to construct representations relating to proposals differing from those ultimately negotiated. Whilst EDS say that they conveyed to Sky a commitment to the project and determination to deliver, they say that this does not amount to the representation pleaded.

**[1073]** EDS state that they supplied SSSL on a monthly basis with spreadsheets identifying the resources being employed on the project and accordingly, SSSL was well aware at the date of the letter of agreement of the number of resources then being employed.

**[1074]** I now turn to consider the six individual statements which are alleged to amount to the representation.

***The meeting at Osterley***

**[1075]** Sky allege that on 16 April 2001 at the claimant's premises in Osterley, Steve Leonard, Barry Yard and Greg Hyttenrauch represented to Mike Hughes,



Scott Mackay and Andy Waddell that EDS would provide the right people to ensure that the programme was completed successfully. In fact from the e-mail which was sent after the meeting, it seems that Steve

Leonard and Barry Yard were not at the meeting or were not there for the meeting referred to in the e-mail and that Peter Jeffs and Tony Dean were.

**[1076]** EDS admit that they made the statement but say that it was a statement as to the future and at most a promise not a representation, and that even as a promise, it cannot have meant that the programme would be 'successfully completed' in accordance with the revised project plan or budget, since, at that stage, neither had been drawn up. EDS also say it could not refer to the existing project plan or budget, because, as stated in the e-mail of 16 April 2001, both parties recognised that these would have to be replanned.

**[1077]** Sky say that, despite EDS's previous failure to source appropriately skilled resources for the project, the assurances made by Greg Hyttenrauch and senior EDS executives were taken at face value. At para 175 of his first witness statement Scott Mackay says that he 'thought at the time that EDS certainly seemed to be bringing their big hitters from the senior levels of EDS management onto the project, and that they would be making available whatever resources were needed to get the project back on track'.

**[1078]** Whilst, as admitted by EDS, they made a statement that they would provide the right people to ensure that the programme was completed successfully, I accept EDS's submission that this was a statement of future intent or, at most a promise, and this could not, of itself, amount to a representation. From the e-mails sent after the meeting it is evident that Sky expressed concern about the capability of some EDS resources on the project and it was proposed that Mike Hughes, Tony Dean and Greg Hyttenrauch were going to meet to discuss this, later that week. I do not consider that this statement can found a case in misrepresentation.

***Barry Yard's letter***

**[1079]** The second representation relied on by Sky is contained in a letter sent by Barry Yard to Mike Hughes on 18 April 2001, two days after the Osterley meeting. In the letter, Barry Yard stated that 'Greg Hyttenrauch has been assigned to provide the necessary delivery oversight to bring the programme to a successful conclusion, together with an experienced team of people that will bring additional focus to the tasks at hand'. Sky say that the representation implied that EDS had the right people available and that those people had been assigned to the project.

**[1080]** EDS admit the content of the letter but deny that it gives rise to the implied representation contended for by Sky. They say that the letter represented only that Greg Hyttenrauch had been assigned to the project and that 'other experienced personnel had been or would be assigned to provide additional focus'.

**[1081]** EDS say that the implication contended for by Sky is presumably so as to allege that EDS represented that they had available the people who would be needed to complete the revised programme successfully and that such resources had already been assigned to the project. EDS say that this is not what the letter says and is inconsistent with the main point of the letter which was that the programme was to be replanned, the issues were being addressed and various options were to be considered. Moreover, EDS say that it would be inconsistent with other statements relied upon, such as those at the Marriott Hotel on 18 May 2001, which made clear that more resources were needed.

*[2010] IP & T 597 at 788*

**[1082]** Sky say that Barry Yard's words cannot bear the gloss that EDS seek to place on them: the phrase 'has been assigned' referred both to Greg Hyttenrauch and the 'experienced team' and the reference was to 'has' which does not mean 'has or will be'. They submit that the purpose of Barry Yard's letter was to

reassure the management of Sky that EDS was wholly committed to addressing the issues that existed and that Barry Yard gave that reassurance by representing that suitably qualified resources had been identified and earmarked.

**[1083]** Sky also say that Barry Yard's letter had its desired effect because, as stated in para 103 of his first witness statement, Mike Hughes on reading it believed that EDS were finally addressing the previous lack of high-quality resources and were putting better resources in place. Sky say that this effect would not have been achieved by a representation short of the one in fact made, namely that resources had been found and were on their way.

**[1084]** Sky contend that, even if the representation had only the limited meaning contended for it by EDS, such representation was false and was made negligently as EDS did not have the resources needed for the project going forward and had no reasonable basis to suppose that the 'experienced personnel' referred to by Barry Yard could be identified or made available to the project at any stage.

**[1085]** The wording of the letter does not and could not, in my judgment, bear the meaning contended for by Sky. It was clear that Greg Hyttenrauch had been assigned but the phrase 'to bring the programme to a successful completion, together with an experienced team of people' did not mean that the experienced team had been assigned. Rather I consider that it was Greg Hyttenrauch who had been assigned to bring the programme to a successful completion, 'together with' in the sense of 'using' an experienced team of people. The statement does not give rise to the implied representation relied on by Sky.

**[1086]** In addition, these are particulars of the representation pleaded in para 74 of the particulars of claim and at that stage EDS did not have a 'revised programme plan' and a 'revised budget'.

***The Marriott presentation***

**[1087]** On 18 May 2001, EDS presented a review of their proposed plan for phase 2 going forward at a Marriott Hotel in London. Cathy Leleux, Dave Page, Ed Lewis, Dan Sparkes, Ian Parker, Julian Clifford and Greg Hyttenrauch attended on behalf of EDS. Sky say that it was an important presentation, described in para 215 of Greg Hyttenrauch's statement as a 'make or break' opportunity to persuade Geoff Walters of Sky that EDS could deliver.

**[1088]** Sky plead that EDS represented 'that it had identified the resources required to complete the project successfully and that it had reasonable grounds for believing that such skilled and experienced resources were available to EDS Ltd for the project'.

**[1089]** Sky rely on several of the slides in the presentation which referred to details of the resources that would be needed to implement phase 2, which included a technical team of 90 personnel. The fourth slide was headed '5 Success Factors Phase 2'. The last of the five factors listed was 'Identified and fulfilling need for more quality resources'. By including this factor in the list, Sky say that EDS were representing that they had identified a need for more quality resources and that they were fulfilling that need. Sky say that this is the plain and unambiguous meaning of the words that EDS used.

*[2010] IP & T 597 at 789*

**[1090]** EDS say that the effect of the statements was that they had identified the need and were 'taking steps to secure such resources'. EDS say that the allegation that EDS represented that 'it had identified the

resources required to complete the project successfully' appears to allege a warranty that these were all that would be required but EDS say that it was an estimate which was a careful one.

**[1091]** As to the allegation that EDS represented that 'it had reasonable grounds for believing that such skilled and experienced resources were available to EDS Ltd for the project', EDS say they had found some and expected to find the rest, but there was no representation as to its expectation in the slides. In any event, the planning process was still continuing.

**[1092]** Sky say that the distinction between the meaning of the representation as alleged by Sky and as admitted by EDS is an important one as EDS stated that they were 'fulfilling' the need for resources. This meant not merely 'taking steps' to secure them but succeeding in doing so. Sky contend that the words cannot sensibly bear the limited meaning contended for it by EDS and that, given EDS's historical failure to resource the project, a representation with such limited meaning would not have given Sky the reassurance that it needed. Sky say that EDS's statement that they were 'fulfilling' the need had an implicit assertion that the need could be fulfilled on the basis that EDS had reasonable grounds for believing the necessary resources to be available. Sky say that this is obviously how EDS intended Sky to understand their representation and, as set out in their witness statements, it is how Scott Mackay and Andy Waddell understood it.

**[1093]** The presentation had the title 'Review of Phase 2 Plan'. The slide which set out the success factors referred to the results of 'intensive analysis and re-planning over last three weeks' and evidently set out what was planned for phase 2. I consider that EDS was saying that it had identified the need for more quality resources and that it was fulfilling that need. Whether that would be successful or not would depend on the process for fulfilling the need for such resources. In the circumstances in which the slide was presented I do not see how it could bear an implied representation that EDS had reasonable grounds for believing the necessary resources to be available. Nor do I see how either Scott Mackay or Andy Waddell could have understood not only that EDS had identified the resources required but also that they could fulfil those requirements based on the pleaded allegations.

***The 1 June meeting***

**[1094]** On 1 June 2001 Richard Freudenstein met with Steve Leonard and Sky say that he asked him to provide his personal assurance that the development and testing teams that EDS intended to deploy had the right skills, experience and quality.

**[1095]** Sky say that the request and its rationale were recorded by Steve Leonard in an e-mail of 1 June 2001 sent to Greg Hyttenrauch, Laurence Anderson and Barry Yard:

> 'I have to give Richard my personal assurance that the development team and the testing team have the right skills, experience and quality. Richard has received feedback from his team that although we now have the right leadership we do not still have the quality to execute. Please supply me with the answers to Richard's questions ASAP today as I will be speaking with him again on Monday morning.'

*[2010] IP & T 597 at 790*

**[1096]** Sky rely on this e-mail to show that Steve Leonard was asking for the answer to questions raised by Richard Freudenstein and they say that Greg Hyttenrauch gave the answer by e-mail dated 3 June 2001 in which he said:

> 'I have also attached information on potential resources for the development team. Two of these have started and the remainder of the list are being pursued provided we have a way forward on the Programme.
>
> In the case of testing, we have had two new resources join at the beginning of May. Both have between four-five years experience in Mercury test tools (ie WinRunner and Test Director) and one is also experienced in LoadRunner (Stress test tool). They have also been trainers in the Mercury test tools having taught numerous classes on them. We are continuing to pursue additional, more experienced testers, for the test plan development work that would start in July.'

**[1097]** Sky say that Steve Leonard gave Richard Freudenstein the reassurance sought and stated not only that the development and testing teams had the right skills, experience and quality but also that the resources would be available when required in sufficient numbers. Sky contend that such representation implied that proper enquiries as to the availability of the needed resources had been made. Sky say that Steve Leonard's assurances were crucial because, if he had not given the assurances sought, then as Richard Freudenstein says in para 111 of his first witness statement, he would not have entered into the letter of agreement with EDS.

**[1098]** EDS admit that Steve Leonard gave an assurance to Richard Freudenstein to the effect that resources 'already identified for deployment' were of appropriate skill, experience and quality and that EDS 'intended that those it subsequently identified for deployment would also be appropriate'. Otherwise, EDS deny Sky's contentions.

**[1099]** EDS say that there is no record of the assurance given in the documents referred to, but that as set out by Richard Freudenstein in para 111 of his first witness statement, he recalls Steve Leonard giving him an assurance 'that the development team and testing team would have the right skills, experience and quality for the job'. EDS say that this is a promise not a representation.

**[1100]** Sky say that Steve Leonard himself admits that he gave Richard Freudenstein assurances as set out in his e-mail to Greg Hyttenrauch, Laurence Anderson and Barry Yard cited above. EDS accept Steve Leonard himself goes a little further in paras 13 and 14 of his second witness statement where he recalls saying that the development and testing team EDS had deployed had the right skills, experience and quality for the job. He also says that it is likely he expressed his confidence that the same would be true of any future members of the team. He also said:

> 'I did not tell Richard Freudenstein that a complete development and testing team had already been identified. My comments related to those who had already been identified and to our intentions for the future. I do not believe that Sky can have thought that we had already identified the full team. I have been shown e-mails from Greg Hyttenrauch to Mike Hughes dated 7 and 8 June 2001 which made clear that development and testing resources were still in the process of being identified.'

**[1101]** EDS say that neither account supports the pleaded representation. EDS refer to what Richard Freudenstein said in cross-examination on Day 10



when it was put to him that Steve Leonard did not tell him that a complete development and testing team had

already been identified and that Steve Leonard's comments related to those who already had been identified and EDS's intentions for the future. Richard Freudenstein responded that he could not recall Steve Leonard telling him that he had identified all the people and that what was being put to him seemed right. He said 'He definitely assured me they would get the right people.'

**[1102]** EDS say that Steve Leonard put across clearly in cross-examination on Day 64 the assurance which he provided to Richard Freudenstein. He said that he did not recall—

> 'going back to Richard and saying in some generic statement 'don't worry, we have all of the right resources', given that we were in the midst of some ongoing re-plan. But I certainly said to Richard (a) we are very focused on filling gaps as they exist and (b) I am pleased that you like the leadership team, I know we need to continue to strengthen it.'

Later he said that he wanted to give Richard Freudenstein specific feedback that, 'We had confidence that those people we had already deployed were of the right substance and that, as we continued to add resources, we would clearly work to ensure that they had the right substance.'

**[1103]** It was suggested to him that his statement would include, within it, that EDS had worked out what resources were needed. He responded:

> 'That, for me, would not have been a step that I would have contemplated, in view of the fact that scope was still evolving through this whole re-planning exercise. What I could have said, and believe I am offering to the court that I would have said, is, 'Those people we have, although you may have heard from your teams some concerns, we have looked into it, we are standing by those people. We believe we still have to add people and we want to ensure they are of the right quality.' The concept of, 'We know exactly how many and when and what locations', would have been a step further than I would have offered to Richard.'

**[1104]** Sky say that the context in which Richard Freudenstein sought the assurances was that the project had failed spectacularly, and a root cause of this failure, as identified by Peter Jeffs, who had been the EDS Project Manager, and by the EDS Red Team Review and by PwC was EDS's inability to staff the project with a sufficient number of suitably skilled resources. Sky refer to the fact that Richard Freudenstein had spoken to David Courtley, an ex-EDS employee, in an attempt to establish the quality of EDS's senior staff and that David Courtley had told him that 'EDS had some very good people but it was important to get access to the right ones'.

**[1105]** In this context, Sky say that Richard Freudenstein needed assurance that the debacle that had come to light in around April 2001 would not be repeated and that he would not have gained such assurance from the representation that EDS admit. Sky say that the important question was whether suitable resources would be available and that was the assurance sought by Richard Freudenstein and given by Steve Leonard.

**[1106]** Sky refer to Steve Leonard's second witness statement where he states that the team that EDS 'had deployed had the right skills, experience and quality for the job' and 'was confident that resources added to the project later would have the same characteristics'. Sky say that EDS's gloss on the



representation given to Richard Freudenstein is not consistent with this evidence as being 'confident' is much more of an assurance than an intention.

**[1107]** EDS specifically deny making a representation to the effect that all resources required for the future progress of the project had been identified and reserved and rely on several documents as showing that Sky could not have believed otherwise. Sky say that they do not allege that any such representation was made but that Steve Leonard represented that EDS had taken steps to determine what resources were needed for successful completion of the project and had determined that such, suitably qualified, resources would be available when required.

**[1108]** Sky further allege that it was implicit in Steve Leonard's representation that proper enquiries as to the availability of the necessary resources had been made. Sky say that EDS accept a representation that proper enquiries had been made to support the statement that the team EDS intended to deploy had the right skills, experience and quality because they say that they did make proper enquiries. The distinction between the implication alleged by Sky and that which Sky say is admitted by EDS is, Sky say, dependent on the express representation made. Whatever assurances Steve Leonard gave to Richard Freudenstein, they carried the implied representation that he had made inquiries sufficient to enable him to give them.

**[1109]** There is no written record of what was said by Steve Leonard to Richard Freudenstein in reply to the enquiry which Richard Freudenstein had made and which Steve Leonard set out in his e-mail of 1 June 2001. Steve Leonard said that he had to give Richard Freudenstein an assurance that 'the development team and the testing team have the right skills, experience and quality'. He asked Greg Hyttenrauch for information which Greg produced in the documents attached to his e-mail of 3 June 2001. At that time the development and testing teams were not fully staffed. Therefore, Greg Hyttenrauch enclosed information on new and potential resources for the development team. Equally he provided information on new resources for the testing team. As Greg Hyttenrauch said in his evidence on Day 62, on the basis of this information, Steve Leonard could say 'this is what we have and what we can access'. He said that if Steve Leonard had said that EDS had the people then that would not have been accurate.

**[1110]** Sky say that Steve Leonard stated to Richard Freudenstein not only that the development and testing teams had the right skills, experience and quality but also that the resources would be available when required in sufficient numbers and that this implied that proper enquiries as to the availability of the needed resources had been made. I do not accept that Steve Leonard would have said anything further than he said in evidence. He was a straightforward and honest witness and he said in evidence his recollection is that he would have said words to the effect: 'Those people we have, although you may have heard from your teams some concerns, we have looked into it, we are standing by those people. We believe we still have to add people and we want to ensure they are of the right quality.' As he said in his second witness statement, he recalls saying that the development and testing team EDS had deployed had the right skills, experience and quality for the job. However, as he points out these comments related to those who had already been identified and to EDS's intentions for the future. He did not believe that Sky could have thought that EDS had already identified the full team. Richard Freudenstein

*[2010] IP & T 597 at 793*

gave similar evidence and said that he could not recall Steve Leonard telling him that he had identified all the people, just that he had assured him that EDS would get the right people.

**[1111]** In those circumstances, I accept EDS's submission and find that Steve Leonard gave an assurance to Richard Freudenstein to the effect that resources already identified for deployment were of appropriate skill, experience and quality and that EDS 'intended that those it subsequently identified for deployment would also be appropriate'. I do not consider that Steve Leonard gave Richard Freudenstein the assurance alleged by Sky, that is, that such resources were or would be available when required in sufficient numbers which implied that proper inquiries had been made as to the availability of the resources required.

***Greg Hyttenrauch's e-mail***

**[1112]** On 7 June 2001, Greg Hyttenrauch sent an e-mail to Mike Hughes which was subsequently forwarded to Richard Freudenstein and Andrew Carney. The relevant part of the e-mail relied on by Sky is:

> 'In terms of staffing and strengthening the development team, I have attached a document that outlines resources that have joined the Chordiant team in May and additional resources that have been identified that can support both phase 1 and 2 work … I cannot secure any of these additional resources without an agreement to proceed.'

**[1113]** Sky say EDS thereby represented that they had identified resources that could support phase 1 and phase 2 work and that such resources would be available when Sky agreed to proceed with the letter of agreement.

**[1114]** Attached to the e-mail was a document entitled 'Development Resources' which named two 'expert' Chordiant resources which were stated to have joined the project 'in the last month', five that 'have been identified that can support both Phase 1 and Phase 2 work' and four additional 'potential' Chordiant resources. Sky say that the clear representation made by EDS and understood by Sky was that, as Mike Hughes says in para 116 of his first witness statement, EDS were finally 'addressing the resourcing issue'.

**[1115]** EDS say that the statement in the e-mail does not support the representation pleaded but makes it clear that EDS had not yet secured the resources identified, let alone any further resources that might be needed. They refer to Mike Hughes' evidence on Day 14 where he agreed that the e-mail said that additional resources had not been secured and could not be secured without an agreement to proceed.

**[1116]** EDS refer to a meeting between Greg Hyttenrauch and Richard Freudenstein and others on 7 June 2001 and to an e-mail which Greg Hyttenrauch sent to Richard Freudenstein on 8 June 2001. EDS say that this e-mail shows that EDS clearly had not identified or reserved all the resources who would be needed, and that it so informed Sky. EDS also say that this was accepted by Richard Freudenstein on Day 10. In the e-mail Greg Hyttenrauch said:

> 'I understand from our discussions that BSkyB is still expressing concern over EDS' ability to deliver. I do not feel that further meetings, documents or discussions will do anything further to change that view in the short term. The way to build back confidence is to start to deliver the solution. I feel that the commercial position that we have presented enables us to start



> delivering the solution with little to no risk on the part of BSkyB. The way it is structured means that BSkyB is not paying for the EDS labour unless we actually do deliver. If EDS is unable to deliver, then BSkyB does not pay …
>
> I hope that the information that I have provided on the development and testing resources has been helpful in showing how we have been, and will continue to, strengthen the team. I am pursuing other resources within EDS, but to obtain some of these resources I need to take them from their current engagements. In order to do that, I need an agreement from BSkyB that the programme will continue. Also, it will take a period of time to transition these resources off the work they are currently performing and onto the BSkyB programme. This makes an

> agreement even more important. In terms of team structure, I have assigned responsibility for all the elements of the programme to my current team.
>
> As the programme moves through its life cycle, additional resources will be brought on to support periods of heavier workload or more complex management activities. Responsibilities will also shift amongst the team as the programme progresses to ensure that at all times, the right people are doing the right job. EDS has assumed considerable delivery risk in the way in which our future payments have been structured. This places the onus clearly on EDS to have the best and most capable people to deliver this programme of work. If we do not, we will not get paid.'

**[1117]** This e-mail enclosed the same development team list as Greg Hyttenrauch had sent to Steve Leonard on 3 June 2001 but elaborated on the development team resources. In doing so, he said he had set out resources which had joined the Chordiant team in May as well as additional resources that had been identified that could support both phase 1 and 2 work. He also said that he could not secure any of the additional resources without an agreement to proceed. In terms of the representation alleged by Sky, it seems that EDS thereby stated that they had identified some resources that could support phase 1 and phase 2 work and that they could only secure those resources when Sky agreed to proceed with the letter of agreement.

**[1118]** What Greg Hyttenrauch said did not go as far as Sky allege. EDS represented that they had identified resources that could support phase 1 and phase 2 work but I do not consider that they represented that such resources would be available when Sky agreed to proceed with the letter of agreement. They could only secure them after the signing of the letter of agreement but did not represent that they would then be available.

***Executive steering group meeting***

**[1119]** The minutes of the Executive Steering Group on 13 July 2001 record the following statement by Greg Hyttenrauch:

> 'With the introduction of two phases, two teams will be mobilised, managed by Cathy Leleux.
>
> Phase 1 led by Jason Campbell—Chordiant, consists of an “A” team with more senior, experienced staff than previously, focussed 100% on the delivery of phase 1, and
>
> Phase 2, new manager with a team equipped with the depth and experience required to fully develop and build the complete system.
>
> Both teams have sourced the best available individuals worldwide, internally and externally when required. Phase 1 is fully staffed while



> phase 2 is building as required. Following the resignation of Paul Adelman, the new Billing person will be joining from America w/c 16 July 2001.'

**[1120]** Sky allege that it was implicit in Greg Hyttenrauch's statement that the 'best available individuals' had been identified and that such individuals would be good enough to satisfy the resource requirements for the project.

**[1121]** EDS admit the express representation but deny the implication, saying that nothing more was implied than that the 'individuals who had been sourced were believed to be the best available at that time'. EDS say that if Sky allege that this was intended to mean that the individuals already sourced were enough to satisfy the resource requirements then that cannot have been intended as it is inconsistent with the statement that 'phase 2 is building as required'. EDS say that, if Sky allege that it refers to the quality or sufficiency of future resources, then it is a promise.

**[1122]** Sky say that the representation went further than EDS accept and that the phase 1 resources were described as an 'A team' and the phase 2 resources as 'equipped with the depth and experience required to fully develop and build the complete system' and were being portrayed as the best available. Sky say that Greg Hyttenrauch was stating that the resources he had found were capable of delivering the project and that if Sky entered into the letter of agreement, EDS could deliver.

**[1123]** In using the phrase 'Both teams have sourced the best available individuals worldwide' I do not consider that EDS was saying anything other than that EDS had used what they believed to be the best available resources worldwide for the phase 1 and phase 2 teams. It was not implicit in what EDS said that they had identified the 'best available individuals' and that such individuals would be sufficient to satisfy the resource requirements for the project. The statement by Greg Hyttenrauch went no further than saying that the teams had 'sourced' the best available individuals. It was not implicit that the 'best available individuals' would be good enough to satisfy the resources required for the project and had been identified.

***Summary on resources***

**[1124]** Having considered the statements on which Sky rely to establish the representation, I find that none of those statements bears the meaning or could reasonably have been taken to bear the meaning that Sky attach to them. The statements were made in the context of negotiations which took place from April 2001 until the letter of agreement. In those negotiations various options were considered and the programme was replanned by Sky and EDS.

**[1125]** I accept that, as EDS submit, in putting forward their case Sky have sought to pick individual letters and presentation slides from that process to construct representations relating to proposals differing from those ultimately negotiated. It is evident that EDS wanted to convey to Sky their commitment to the project and their determination to deliver. In that context, I consider that EDS is correct in saying that they represented that certain requirements had been identified; that some positions had been filled and that they reasonably expected to be able to fill any remaining positions and to meet any remaining resource requirements.

**[1126]** However, I do not consider that the statements relied on by Sky can be said individually or together to give rise to the pleaded representation that EDS possessed or had available the resources needed to ensure that the project would be completed successfully in accordance with the revised programme plan and the revised budget.



***Complexity and completion***

**[1127]** Sky plead at para 78 of the particulars of claim that EDS represented—

> 'that it was their opinion, for which they had reasonable ground, that the primary cause of the problem had been the bid team's under-estimation of the complexity of the project, and that a significant amount of work had been completed which was of value to the project and would provide the basis for project completion.'

**[1128]** Sky allege that by saying this EDS represented two things: first, that the primary cause of project problems was the original bid team's under-estimation of the complexity of the task and secondly that EDS represented that a significant amount of work had been completed which would be of value to the project going forward. Sky say that those representations were false.

**[1129]** Sky contend that the principal reason why the project could not be completed within the timeframe of the contractual milestones was EDS's lack of resources, experience and expertise and that, by asserting the bid team's under-estimate as the primary cause of failure, EDS masked the true position.

**[1130]** In addition Sky contend that, prior to the letter of agreement being signed, no real progress had been made beyond the Process Workstream; that the work that had been done in respect of Data Architecture, Data Warehouse, Data Migration and the Graphical User Interfaces was of no value and had to be jettisoned. Further Sky contend that, contrary to Greg Hyttenrauch's representation at the Executive Group Meeting on 13 July 2001, the knowledge bases were not complete and had not been populated.

**[1131]** EDS admit representing that under-estimation of the complexity of the project was 'one of the problems which the project had encountered' but deny representing that it was the 'only' cause. They say that the bid team's under-estimate of the size and complexity of the project was one of only two 'primary causes of the need for more time', the other being a lack of adequate requirements specification. Otherwise EDS deny Sky's allegations.

**[1132]** Sky rely on representations made by EDS on four occasions:

(1) at the meeting on 8 April 2001;

(2) in the 'BSkyB Solution Options' document dated 24 April 2001;

(3) at the phase 2 planning session held on 10 May 2001; and

(4) at the Executive Group meeting on 13 July 2001.

**[1133]** I now turn to consider those statements.

***Meeting on 8 April 2001***

**[1134]** Sky say that, in the light of the matters discovered when Scott Mackay and Andy Waddell visited EDS's Canary Wharf offices on 3 April 2001 and the contents of the draft PwC report received by Richard Freudenstein, also on 3 April 2001, Sky began to appreciate in early April 2001 that the project was in crisis.

**[1135]** As a result, Mike Hughes arranged an urgent meeting with Tony Dean and Peter Jeffs for 8 April 2001 at Canary Wharf in an attempt to establish the project's true status. The meeting was attended by Mike Hughes, Scott Mackay, Tony Dean and Peter Jeffs. Sky rely on the note of the meeting which Mike Hughes subsequently sent to Richard Freudenstein.

*[2010] IP & T 597 at 797*

**[1136]** The purpose of the meeting, as stated in that note, was 'to ascertain the true status of the Technology Stream and understand the implications on our timescales and budget'. Sky say that a principal topic of discussion during the meeting was the reason for project delays and that Tony Dean and Peter Jeffs made a number of statements at the meeting to the effect that the primary cause of the problems facing the project in terms of delay was that EDS's bid team had under-estimated the complexity of Sky's requirements. In particular, Sky rely on the following statements made by Peter Jeffs and Tony Dean, summarised in Mike Hughes' note as 'key messages':

> (1) that 'The size and complexity of the overall 'enterprise-wide solution (system)' had been severely under-estimated by the bid team' particularly around the interfaces and operational finance requirements;
>
> (2) that 'some retrospective systems design activity needs to take place';
>
> (3) that more time than anticipated would be required for testing and that:
>
> 'The combination of re-work, additional configuration/build in Chordiant for Operational Finance and/or building an Operational Finance system, integration development and a different architectural design on eCRM, together with testing, was driving a re-plan, which added 11 months to the timescale.'

**[1137]** Sky rely on the evidence of Mike Hughes at para 96 of his first witness statement and of Scott Mackay at para 169 of his first witness statement where they say that they left the meeting with a clear understanding that the bid team had under-estimated project complexity and that this was the principal cause of the problems with which the project had to contend. They say that Mike Hughes' note is entirely consistent with this. Sky say that in the note, the only one reason given for delay is the under-estimate of project complexity and that none of the true reasons for project failure such as EDS's chronic resource shortages, lack of methodology or unworkable plans are mentioned.

**[1138]** EDS say that Sky has 'selectively quoted' from Mike Hughes's note of the meeting. Whilst EDS accept that Peter Jeffs expressed the views recorded in the note and relied on by Sky, they say that this view was expressed by him alone.

**[1139]** EDS also refer to the note that 'The biggest issue by far, was around the complexity of the overall combination of the individual elements and multiple interfaces required to deliver the functionality Sky required' and that—

> 'EDS Senior Management, SL and Barry Yard, (Managing Director) UK, EDS eSolutions, were

> not accepting any of the above and remained of the opinion that a more appropriate way forward could be found. Currently they seem alone in this view, although neither SM or I had the opportunity to meet Swot Team Members.'

The Swot team was a reference to Greg Hyttenrauch and his Red team which, as stated in the note, had been formed to audit work to date and to 'validate the Programme Teams' assumptions on recovery and revised way forward, including looking at alternate options which deliver a solution to BSkyB within our timescales'.

*[2010] IP & T 597 at 798*

**[1140]** Whilst Peter Jeffs expressed the view recorded in the note, there were other difficulties mentioned and it is clear that his view was not shared by Steve Leonard and Barry Yard. In these circumstances I find it difficult to see how EDS could be making any representation when Peter Jeffs's views were not accepted by EDS's senior management.

***BSkyB solution options document***

**[1141]** Sky rely on a letter sent on 23 April 2001 from Barry Yard to Mike Hughes enclosing a 'BSkyB Solution Options' paper. The paper had been produced by Greg Hyttenrauch and Mike Fitzgerald and, as explained in the covering letter, its purpose was to propose two alternative options 'to address the schedule issues that are currently facing the eCRM programme'. Sky say that the aim of the document was to persuade Sky that the EDS team that had then been introduced could turn the project around; that EDS had undertaken a proper analysis of the state of the project and that they could now deliver to a new plan.

**[1142]** Sky refer to the following text in the Options Paper under the heading 'Background and Introduction':

> 'The major constraint facing the programme is not enough time to achieve all the goals of the programme by the key date. This has led to the need to list and address all key constraints, associated limitations and hence create a new set of programme assumptions moving forward.'

**[1143]** Sky say that the message being given was clear: that the problems facing the project had not been caused by an incompetent, under-resourced delivery team but that the original bid team had under-estimated project size and complexity, with the result that no delivery team, however competent, could have succeeded in the timeframe available. Sky say that EDS were stating that, armed with a realistic plan and scope, EDS's management and technical team would be able to deliver.

**[1144]** EDS refer to the Management Summary section of the Options Paper which states: 'The combination of programme issues, high complexity and significant other technical, organisational, operational, business process and change management issues has led to a slippage on previously agreed key dates'. EDS also refer to the key constraints and limitations which are listed below the passage relied on by Sky and include the following management and technical issues:

> 'Management
>
> —Overall Programme Management incomplete and implemented late.

—Lack of information sharing and consistent approach has led to confusion, mixed direction and unnecessary management friction.

—Key partners in the programme are not “in synch” or being actively managed as a team

—Reporting and roles and responsibilities are unclear.

—Lack of integration of total team has hampered the programme and smart thinking.

Technical

—The billing system and linkage with operational finance has proved more problematic than first envisaged leading to delays.

—SDLC assumptions have inappropriate.

—Requirements are not locked down.

*[2010] IP & T 597 at 799*

—The environment will require extensive levels of testing-the most appropriate testing strategy and associated timelines are not yet agreed.'

**[1145]** I accept EDS's submission and, in my judgment, there is nothing in the letter of 23 April 2001 or the Options Paper which can support the pleaded allegation that there was a representation in those documents that 'the primary cause of the problem had been the bid team's under-estimation of the complexity of the project'.

***Phase 2 planning session: 10 May 2001***

**[1146]** Sky rely on a presentation on project progress given at a phase 2 Planning Session held at EDS's offices in Stockley Park on 10 May 2001, which included a set of Powerpoint slides providing a 'status update'. Those slides showed percentage completion of work in respect of Data Architecture, Data Warehouse, Data Migration and Graphical User Interfaces. Sky say that the slides represented that a significant amount of work in those areas had been completed or was substantially complete.

**[1147]** EDS admit the representation. They say that slides 5 to 7 of the presentation related to the completeness of functional specifications/use cases and that slides 8 to 11 were necessarily dependent on the completeness of the functional specification. EDS say that the actual figures were disputed by Sky. They refer to the evidence at para 198 of Andy Waddell's first witness statement which shows that Scott Mackay stated that *more* use cases had been completed than was suggested in the slides and Ian Haddon pointed out that the data architecture figures did not include billing and operational finance.

**[1148]** EDS refer to the fact that the meeting was stopped early and eventually rescheduled for 18 May 2001. They also refer to Greg Hyttenrauch's evidence on Day 62 when he explained what happened at the

meeting. He said that at the meeting on 10 May 2001 there was a disagreement between the EDS team and Sky over the extent of completion and that issue needed to be resolved before things could move forward. He said that—

> 'there was a discussion around the extent of the completion of the operational, the IPA requirements to do with billing and I recall that discussion. That went around and around in the meeting room. And then coming out of that, one of the actions was we needed to get clarity on the state of some of these items so that the next time we got together we could be focusing on the plan, not on whether Sky or EDS believed the state of development was in one position or the other.'

**[1149]** He was referred to the slides showing percentage of completion and asked whether EDS was proceeding on the basis that what was set out in it was an accurate representation of useable work. He said:

> 'I can't go item by item, line by line and tell you which ones were wrong. What I can tell you is there was concern about this status between ourselves and Sky, that was rectified with a common understanding of the state of that status that was used for 18 May planning session.'

**[1150]** I accept Greg Hyttenrauch's evidence. Whilst evidently EDS did represent that the state of the work was as set out in the slides at the presentation, it is clear from his evidence that it had no effect on Sky who had their own knowledge and views as to the state of completion and disagreed



with the information contained in the slides. By the end of the meeting the stated degree of completion was no longer considered to be valid and Sky were not relying on it.

***Executive group meeting: 13 July 2001***

**[1151]** Sky refer to the Executive Group Meeting held on 13 July 2001, three days before the signing of the letter of agreement and which they say effectively marked the relaunch of the project. Sky allege that at that meeting, Greg Hyttenrauch made a number of representations as to the progress of phase 1. In particular, Sky say that he represented that all three Knowledge bases had been built and populated. Sky also allege other representations but do not appear to have pursued those even in their pleadings.

**[1152]** Sky say that the representation upon which they rely is recorded in the meeting minutes which state as follows:

> 'Phase One (GH):
>
> Progressing well, requirements and scope completed, Architecture implementation infrastructure data paper will be completed 23 July 2001. Work on code and screen scraping has started and proofs of concept that Chordiant does work with Legacy have also been completed. All three Knowledge bases (Technical, Billing and Sales) have been built and populated. Training for CSR's on the new system will be completed before the go-live date of 19 October 2001.'

**[1153]** Sky say that, contrary to Greg Hyttenrauch's representation, the knowledge bases were not complete and had not been populated.

**[1154]** EDS admit having represented that the knowledge bases had been built and populated which was accurate. EDS say that Sky's allegation misunderstands the knowledge databases as it was for Sky to supply the content and EDS's role was to design and develop the databases themselves. EDS say that as explained by Greg Hyttenrauch at para 230 of his witness statement, as at 13 July 2001 the knowledge databases were substantially complete in that they had been populated with tables, structure and links either to documents, where SSSL had produced those or to 'placeholders' where SSSL had not done so. EDS refer to a joint technical workshop meeting on 11 July 2001 and say that Sky was well aware that work still had to be done on the knowledge databases. EDS say that almost all the remaining work was part of phase 1 under the letter of agreement, which was delivered in October 2001.

**[1155]** EDS also say that this representation is not dealt with in Sky's witness statements, and was not raised in the cross-examination of Greg Hyttenrauch.

**[1156]** The only aspect which appears to be relied upon by Sky in paras 79.4 and 80.4 of the particulars of claim relates to the knowledge databases. On this Greg Hyttenrauch says that, based on information from Laurence Smith, EDS had done what they were required to do in terms of building the databases and populating them with placeholders whilst awaiting documents from Sky. This evidence was not challenged and I accept it. As a result I consider that the statement that all three knowledge databases (Technical, Billing and Sales) had been built and populated was correct so far as the scope of work for EDS was concerned. Sky cannot therefore base any claim on any misrepresentation arising from the executive group meeting on 13 July 2001.

**[1157]** It follows that, on the statements relied on by Sky, I do not consider that they have established a claim in respect of the alleged misrepresentation that the primary cause of the problem in 2001 had been the bid team's



under-estimation of the complexity of the project or that a significant amount of work had been completed which was of value to the project and would provide the basis for project completion.

**[1158]** In any event, I consider that one of the causes of the problem was the underestimation of the complexity and that this led, as Greg Hyttenrauch said, to EDS employing insufficient skilled resources because of the underestimation of the size and complexity. Further, I am not persuaded that the work completed and later found to be of less or little value would necessarily have been a view which should have been formed in the period up to the letter of agreement. For instance, at para 80.3 of the particulars of claim Sky allege that the work done on the Data Architecture, the Data Warehouse, Data Migration and the GUI was of no value, was ultimately jettisoned and had to be redone. This obviously relates to what happened after the letter of agreement.

**[1159]** But, in any case, there is evidence, for example, from Karl Davies at paras 190 to 196 of his witness statement, Dan Barton at para 128 of his first witness statement and from Robert Worden in para 1620 of his first report which provides cogent evidence that work was re-used and may have needed to be re-done but was not jettisoned. There were reasons why work ultimately proved to be of limited value to the project, because the project changed rather than because that work was inherently of little value. For instance, the functional specifications were changed from Baseline 1 to Baseline 3/4 and the project moved to an incremental basis which would mean that some of the existing data migration work would be redundant.

***Planning***

**[1160]** Sky allege in para 82 of the particulars of claim that at the planning presentation on 18 May 2001 and thereafter, EDS represented that they 'had a programme plan that was achievable and the product of proper analysis and re-planning'. Sky say that those representations were false because the plan that EDS presented on 18 May 2001 and which, ultimately and in a revised form, became App 2 to the letter of agreement was flawed, was not achievable and had been produced negligently, not being the product of a proper analysis or planning exercise.

**[1161]** Sky say that the programme was over-parallelised, under-resourced and not based on a proper assessment of the work required to complete the project and that it prescribed an inappropriate and unworkable development approach. In particular, Sky contend in para 84 of the particulars of claim that EDS failed to allow adequate time for the System Definition phase; that contrary to Greg Hyttenrauch's representation on 13 July 2001 the programme was heavily paralleled; that EDS had not undertaken a proper assessment of the work required to implement the solution and that the thread-based development approach enshrined in the plans was inappropriate for the project.

**[1162]** Sky rely on representations made on three occasions:

(1) At the planning presentation given at the Marriott Hotel on 18 May 2001;

(2) At a meeting on 21 May 2001 at Sky's offices in Osterley; and

(3) At the Executive Steering Group Meeting on 13 July 2001.

**[1163]** In addition, Sky rely on the plan itself, in the form presented on 18 May 2001 and as annexed to the letter of agreement, as a misrepresentation.

*[2010] IP & T 597 at 802*

**[1164]** In paras 188 and 189 of the defence EDS admit that they made each of the individual representations relied on by Sky but neither admit nor deny the over-arching representation alleged but deny the falsity of any representations.

**[1165]** It is necessary, first, to consider the statements relied on by Sky to establish the representations.

***Marriott Hotel presentation: 18 May 2001***

**[1166]** Sky rely on a presentation at the Marriott Hotel on 18 May 2001 at which EDS stated that it had completed an 'intensive analysis and re-planning over the last three weeks' and that one of the results of the analysis and re-planning for phase 2 was identification of a number of 'Success Factors'. One success factor was an 'incremental development approach' and the 'Increments comprised of functional threads organised according to business needs'. Sky say that EDS thereby represented that the thread-based incremental approach that had been identified as a success factor had been properly analysed and planned.

**[1167]** EDS admit this representation and say that extensive planning had been carried out in which Sky had been involved, as referred to in Sky's note of 14 May 2001 in which they stated that 'work over the last few weeks, with significant input from BSkyB staff in conjunction with EDS, Chordiant and AA, resulted in delivery on Friday of a more detailed phase 1 delivery plan which on first review appears credible'. EDS accept that the presentation also referred to incremental development comprised of 'functional threads' but say that this adds nothing to the pleaded over-arching representation.

**[1168]** It is evident that EDS did represent that there had been 'intensive analysis and re-planning over the last three weeks'.

***Meeting at Sky: 21 May 2001***

**[1169]** Sky rely on a meeting on 21 May 2001 at Osterley, during which Greg Hyttenrauch and Steve Leonard told Richard Freudenstein that EDS had a detailed plan coupled with specific cost numbers to bring the project to a successful conclusion.

**[1170]** EDS admit this but point out that the reference to the plan was a reference to the plan presented to Sky on 18 May 2001 and takes the matter no further. This is consistent with what Richard Freudenstein says in his witness statement at para 105.

***Executive steering group: 13 July 2001***

**[1171]** Sky rely on an Executive Steering Group meeting that took place on 13 July 2001 at which they say that Greg Hyttenrauch represented that:

> 'The Programme Structure, which relied on heavily paralleled activities, has changed to a slightly paralleled structure with much more structure and management. Replanning effort has heavily involved both Sky and Andersens to ensure all are happy with approach and issues for the plan going forward, this has also led to much improved working relationships and a more integrated team.'

**[1172]** EDS admit this.



***High level plan: May 2001***

**[1173]** Sky rely on a high level plan produced by EDS in May 2001 and which became App 2 to the letter of agreement. It showed go-live of phase 2 of the Project on 31 July 2002. Sky say that EDS thereby represented that such a date, and the milestones that the plan contained, were achievable and the product of a proper planning exercise.

**[1174]** EDS admit that they produced a high level plan mentioned in 18 May 2001 presentation but say that the presentation did not itself introduce the go-live date of 31 July 2002, which was the result of subsequent revisions and appeared in the version sent by Greg Hyttenrauch to Mike Hughes on 12 July 2001. EDS say that the plan attached to the letter of agreement, like the letter of agreement itself, provided for 'Project approach, requirements, analysis and architecture (system design)' to be completed by 31 August 2001, with

phase 2 go-live on 31 July 2002.

**[1175]** EDS do not accept that this gave rise to the representation alleged.

**[1176]** EDS say that the re-programming carried out from mid-March 2001 led to the High Level Plan for Option 1 presented to Sky on 26 April 2001. That option gave completion dates for phase 1 (Chordiant front end on existing functionality: 30 October 2001), phase 2 (most of remaining functionality, billing, workflow and web channel: 29 April 2002) and phase 3 (remaining channels: 28 June 2002) at £8.9m additional cost, mostly labour.

**[1177]** EDS refer to the Option 1 plan which in the Management Summary section stated as follows:

> 'Given the timeframe available to conduct this planning, EDS recognizes that there are a number of assumptions and risks that need to be taken. These risks and assumptions need to be reviewed in concert with schedule and as part of any discussion between B Sky B and EDS on the approach to be taken for programme. These risks and assumptions are identified in section 5 of the document.'

**[1178]** Section 5 then set out 'System Integration Definition Assumptions' which EDS say were mainly concerned with the completeness and timeliness of the definition of requirements and associated risks, and listed 'Incremental Design and Construction Assumptions'. EDS say that the first three of these reflected the uncertainty over requirements and the required interfaces, while others set out the assumptions made, and the metrics applied, in the calculation of the development effort required. The first of these assumptions read:

> 'Plan to re-plan once system definition is complete to granularise estimates further.
>
> It is recognised that as analysis and system definition phases complete, more detailed information will be available to plan the content of each increment, including identification of threads, revised effort estimates and elapsed time.'

**[1179]** System Definition for phase 2 referred to as 'Requirement Refinement and Support' was planned for completion at the end of August 2001.

**[1180]** EDS refer to Greg Hyttenrauch's evidence at para 190 of his witness statement where he says that it was made clear to Sky that until EDS had completed the System Definition phase and the requirements had been completed, which was provided for in the August 2001 milestone, EDS were



still running a large risk because they did not know how big the project actually was. He says that, in order to deal with this risk, EDS included a cost sharing provision in the letter of agreement.

**[1181]** EDS also refer to the fact that the planning process was not being carried out by EDS alone but, as Richard Freudenstein wrote to Tony Ball on 30 April 2001, many planning meetings were going on facilitated by PwC and they would eventually sign off on any plan (as would Sky). Richard Freudenstein accepted in his evidence on Day 10 that he wanted everybody to sign off on the plan.

**[1182]** EDS therefore say that:

> (1) The plans were and were said to be the subject of extensive planning, but the nature of that planning and the metrics were disclosed to Sky and Sky contributed to the process.
>
> (2) The plans were expressed to be subject to assumptions and risks, notably as regards the adequacy, stability and timely delivery of the requirements, which would not be known until after the letter of agreement.
>
> (3) The plans were compressed, with the associated risks of such compression, to satisfy Sky's desire to reach go-live as soon as possible, with a long stop date of 31 July 2002.

**[1183]** EDS say that the particulars of the representation do not support or refer to the dates that were ultimately incorporated in the plan and that there was no representation other than that EDS had carried out extensive re-planning and that, in their opinion, the dates specified in the letter of agreement were achievable, subject to the assumptions and risks stated.

**[1184]** I consider that the statements made by EDS did amount to a representation that they had developed an achievable plan, which had been the product of proper analysis and re-planning. Every plan is subject to risks and assumptions but that does not prevent the plan being the product of proper analysis and re-planning and being achievable, subject to those risks and assumptions.

**[1185]** EDS say that Sky imposed a requirement to have delivery of the system on 31 July 2002 and rely on the evidence of Greg Hyttenrauch. In his witness statement at para 166 he says that 'Sky latched on to July 2002 as an end date' and that Scott Mackay and Mike Hughes 'fixed on July 2002 as a backstop that could not be moved'. He states that this fettered the re-planning process to an extent and that, 'left to our own devices we might have planned to take slightly longer by a couple of months, but nevertheless the plan was a sensible one'.

**[1186]** This is not accepted by Sky. Scott Mackay says that it was Sky's desire to have the new system delivered as early as possible and it is therefore probable that he would have impressed upon Greg Hyttenrauch the need to have the system in as soon as possible. He does not recall ever insisting on July 2002 as an immovable go-live date and it was not his position to do so. Mike Hughes says that he has no recollection of insisting on the backstop date and does not believe that he did. He says that from an early stage in the 2001 re-planning exercise EDS were suggesting operational handover of the new CRM system would occur on 30 June 2002 and that he was simply looking to EDS to provide an honest assessment of what they needed in order to successfully implement the CRM programme and that the onus was on EDS to provide Sky with an accurate revised timetable. He says that, whilst Sky were



keen for delivery to take place as soon as possible, the main priority was to have phase 1 in place before the pre-Christmas period in 2001, with final delivery in good time to allow it to be up and running for the pre-Christmas period in 2002.

**[1187]** I do not accept that Sky imposed a requirement to have delivery of the system on 31 July 2002, as Greg Hyttenrauch seeks to suggest in his evidence. It is clear that Sky wanted the earliest possible delivery date but I consider that the timeframe had to and did come from EDS. It may be that the pressure from Sky

for early completion led EDS to adhere to the July 2002 date but I consider that EDS are wrong to suggest that the date was somehow forced onto them by Sky. Indeed, if that were the perception of EDS, it hardly indicates a firm basis for the programme produced at the time.

**[1188]** EDS say that the programme plan was the subject of extensive analysis and planning, and EDS believed it was achievable, albeit tight. In relation to the analysis carried out and the achievability of the programme, EDS refer to Robert Worden's view, at paras 1659 to 1665 and 1687 to 1695 of his first report, that the process was 'fairly professional' and that the estimates of effort were realistic, but that the end date of 31 July 2002 to which the plan was fitted required a degree of compression and parallel development of the increments that was not viable, in that there was a high probability that issues raised in one parallel increment would have implications for another, so that they could not proceed independently and delays would occur. Robert Worden's conclusion is that EDS's approach to planning the amount of work and elapsed time required was not adequate. On this basis, EDS accept that any representation that 31 July 2002 date was reasonably achievable, in the sense that the analysis gave adequate grounds for thinking the date was achievable was false, to the extent noted by Robert Worden and EDS accepts that it follows that the representation would have been made negligently.

**[1189]** Robert Worden's evidence is clear and demonstrates that EDS did not, even in 2001, carry out a proper analysis and re-planning exercise to produce a programme which, even absent the risks and based on the assumptions, would have been achievable. The representation was false and, as EDS accepts, was negligently made.

**[1190]** In those circumstances, EDS challenge Sky's assertion that it relied on the representation. EDS say that Sky did not rely on the representations in the sense of being induced by them to agree the terms of the letter of agreement or that they were material. Rather, EDS say that Sky relied on the terms of the letter of agreement: the cost-sharing provisions as regards cost and the termination provisions as regards time.

**[1191]** EDS say that after the discussions and planning sessions between Sky and EDS the personnel at Sky most closely connected with the project, such as Geoff Walters, Andy Waddell and Nicola Simpson were not convinced EDS could deliver. They rely on Sky's internal e-mails at the time. Despite their views, EDS say that Richard Freudenstein went ahead saying that he was relying on the assurances given by Greg Hyttenrauch, Steve Leonard and the commercial team. EDS rely on Richard Freudenstein's evidence on Day 10 that he relied on 'the assurances and the commercial terms both, because the commercial terms gave me confidence in the assurances they were making and also because they were good commercial terms'.

**[1192]** EDS say that the only relevant representations are those which arise out of the assurances given to Richard Freudenstein, some of which were assurances for the future. EDS refer to para 105 of his witness statement where



he said that Steve Leonard had assured him that EDS 'had formulated a recovery plan which meant that they were confident of delivering both phase 1 and phase 2 within the agreed time frames'.

**[1193]** EDS refer to the evidence of the basis of Richard Freudenstein's recommendation to Tony Ball for Sky to continue with EDS as systems integrator on the terms set out in the letter of agreement. EDS rely on Richard Freudenstein's statement at para 122 of his witness statement which reflects what he said in making his recommendation to Tony Ball to proceed with EDS in an e-mail dated 12 June 2001. The e-mail stated:

> 'My recommendation to continue with EDS for phase 1 and phase 2 (subject to performance

> criteria) is purely based on a commercial position ie it will be the cheapest and there is currently no clear alternative. It is not based on complete confidence in their ability to deliver, only on a gut instinct that with £14 million at risk and their european ecrm strategy at risk, they will be motivated to deliver (they don't get paid if they don't deliver)
>
> No one is disputing Geoff's technical assessment ie based on what we have seen to date, he is correct to doubt EDS ability to deliver. All I am saying is that based on that technical assessment, I still think EDS is the best option because we have set up the commercial deal to minimise our risk of this eventuality and I can't give you a clear alternative (and neither can Geoff).'

**[1194]** However, as EDS state, Richard Freudenstein also says at para 123 of his witness statement that—

> 'even despite the lack of a clear commercial alternative, there is no way in which I would have recommended that Sky continue with EDS if I had personally felt that they were unable to implement the project … The assurances which I had received from Steve Leonard, to which I refer above, meant that, in my mind, EDS would be able to achieve the phased implementation of the solution. The fact that we managed to negotiate an attractive commercial deal whereby EDS were willing to link their profits to future performance of the system only served to increase my confidence in them.'

**[1195]** EDS say that it is clear that, when Richard Freudenstein signed the letter of agreement he was influenced by the attractive commercial terms and, at most, the assurances as to the future that he had received from Steve Leonard. EDS say that he signed despite reservations concerning EDS's ability to deliver and in fact neither he nor those he consulted placed any reliance on the alleged representations.

**[1196]** Sky submit that, in the context in which the representations were made, Sky was positively looking for statements of what was involved in continuing the project with EDS for the purposes of making that very decision. Sky say that Richard Freudenstein's evidence on Day 11 bears this out and Sky did rely on the representations that EDS made.

**[1197]** Sky say that whilst the commercial deal and the financial safeguards were part of the picture, they follow on from the need for assurance that EDS have the resources to deliver, that EDS have a viable plan to deliver and as to the costs to complete.

**[1198]** Sky refer to Richard Freudenstein's evidence on Day 11 that 'the structure in the deal eliminated risk but also the structure in the deal gave me



confidence that they wouldn't do that deal unless they knew they could deliver'. Sky say that whilst there were people in Sky who had doubts on EDS's ability to deliver and whilst EDS was seen as the best option because of the commercial deal to minimise the risk of this eventuality, Richard Freudenstein also said that 'EDS were the best option because, while the empirical evidence was that we could not be confident they could deliver, the assurances I had been given, and the commercial deal, meant that they were our best option'. He also stated that:

> 'if I had thought they would not deliver because they did not have the ability to deliver it, I wouldn't have made the recommendation. I was working from the basis because of what

> Leonard and Hyttenrauch had been saying, that they could deliver, even though I absolutely acknowledge that there was doubt amongst the team about that; having started from the position that I thought that they could deliver because they had so much at stake, and because of what they were telling me, I was making a commercial judgment that this was the best option.'

**[1199]** Sky therefore say that whilst the commercial terms were obviously part of the decision, so too were the assurances, that is the representations.

**[1200]** Richard Freudenstein was clearly in a difficult position in deciding whether to recommend that Sky should continue with EDS on the basis of the terms in the letter of agreement. There were obviously a number of factors which he had to take into account. Whilst the commercial terms reduced the risks of proceeding with EDS and were important, from that point of view, it is clear that Sky was interested in being assured as to the time to reach go-live. The process of re-planning in 2001 was evidently carried out to give Sky assurance that EDS had carried out proper planning and had an achievable plan to complete within the timescale. The assurances given to Sky and, in particular to Richard Freudenstein, by EDS were necessary to counter the clear view of people within Sky that EDS could not deliver. In my view, Sky had alternatives but obviously if EDS could perform that would be the better option.

**[1201]** Whilst the commercial terms offered by EDS were a very important factor in Sky's decision to continue with EDS, I consider that, in the light of the obvious scepticism as to EDS's ability to deliver by people within Sky, the assurances given to Richard Freudenstein were relied on by him and were material to him making the recommendation to Tony Ball to continue with EDS on the terms of the letter of agreement.

**[1202]** For those reasons, I consider that EDS's negligent misrepresentation that they had developed an achievable plan, which had been the product of proper analysis and re-planning was a material misrepresentation which EDS intended Sky to rely upon and which Sky did rely upon in entering into the letter of agreement.

**[1203]** Sky accepts that the representation was made by EDSL only. For similar reasons to those set out in relation to the representations made prior to the selection of EDS and the letter of intent, I consider that, in principle, any representation was made to both SSSL and BSkyB. However, given my findings on the existence of a duty of care owed by EDSL to BSkyB, EDSL has no liability to BSkyB for negligent misstatement.

**[1204]** On the basis that EDSL made the misrepresentation to SSSL, I consider that EDSL is also liable to SSSL under the Misrepresentation Act 1967. This is a case where SSSL entered into the letter of agreement after a



misrepresentation had been made to them by EDSL, the other party to that agreement. On the basis of my finding that EDSL were negligent in making the representation, I do not consider that EDSL has established that they had reasonable grounds to believe up to the time the agreement was made the facts represented were true. EDSL would have no liability under the Misrepresentation Act 1967 to BSkyB because they did not enter into an agreement with BSkyB.

*Cost*

**[1205]** Sky rely on what was said at a presentation made by EDS on 7 June 2001. Sky allege in para 87.1 of the particulars of claim that, at that presentation, EDS represented to Andrew Carney and other Sky executives that EDS had assessed the cost of completing the project in terms of the Technology Workstream and that the estimated overrun against the budget baseline was £14.564 million. EDS admit in para 191 of the defence that this representation was made.

**[1206]** Sky also allege in para 86 of the particulates of claim that the representation was to the effect that EDS had carried out a proper analysis of the cost to complete in order to arrive at their overrun figure of £14.564 million. This is not admitted by EDS.

**[1207]** Sky contend that the representation was false because EDS did not carry out a proper analysis, nor indeed could they do so reliably until such time as the System Definition phase had been completed. In addition Sky say that the representation was based on two invalid assumptions: first, that the work that EDS had completed to date was of value and, secondly, that EDS would have the skilled and experienced resources needed for the project.

**[1208]** Sky say that the representations were also made negligently in that EDS failed to disclose that their estimates would be intrinsically unreliable owing to the incomplete state of the System Definition phase; that EDS failed adequately to assess the degree of progress that had been made to date and that EDS failed to take into account their lack of resources or the lack of realism in their plan.

**[1209]** EDS deny the falsity of the representations and assert at para 193 of the defence that they carried out a proper analysis; that it was valid to plan, as they did, on the basis of the work to date being of value. EDS also deny negligence. They say at para 194 of the defence that sensible estimating was possible notwithstanding the incomplete System Definition phase; that they did carry out a proper assessment of the project; that they did have, or expected to have, suitable resources and that the programme plan was not unrealistically short.

**[1210]** Sky refer to the evidence of Steve Leonard who was asked about the estimate of cost to finish the project which EDS presented to Sky on 7 June 2001 and showed an increased cost of £14.5m. He said in evidence on Day 64 that it was his expectation that the costing was something which EDS intended Sky to understand had been evaluated carefully and after proper research.

**[1211]** Sky also refer to Greg Hyttenrauch's evidence on Day 62 where he accepted that in the presentations that led to the letter of agreement the message that was being given to Sky was that the estimated overrun, against the budget baseline, was £14.564m and that this estimate had been arrived at after carrying out a proper analysis of the cost of completing the project. He also accepted that EDS wanted and expected Sky to rely on EDS's statements

*[2010] IP & T 597 at 809*

to that effect. In addition he also agreed that whether that was a reliable analysis would be dependent upon the adequacy of EDS's planning and the value of the work that had been done and was going to be reused.

**[1212]** Sky say that in the light of that evidence EDS cannot argue that there was no representation or that EDS did not intend Sky to rely on the representation. Sky say that the representation was false as no proper analysis of cost to complete had been carried out.

**[1213]** EDS refer to the presentation made on 21 May 2001 where EDS had put forward a variance or overrun of about £10m and to Greg Hyttenrauch's evidence in para 226 of his witness statement that estimation was a continuous process and costs moved throughout. They say that at the meeting on 7 June 2001 EDS put forward an estimate of a £14.564m overrun which was and was known to be subject to the same risks as the planning. EDS also rely on the same presentation which refers to the possibility of further overruns and proposed to deal with them by sharing them 25/75 according to the risk sharing provisions of the prime contract.

**[1214]** EDS say that, in the event, the letter of agreement did not include any budgetary figure, but instead, after allowing for various credits, provided for costs to be shared in the same ratio as under the prime contract (25%/75%) for the first £7.2m of overrun; for EDS to absorb 100% of the next £3.725m and, thereafter to pay a heightened 30% share of any overrun.

**[1215]** EDS submit that the representation on 7 June 2001 was simply that £14.564m was EDS's estimate, subject to the assumptions and risks and that no further representation was made at that stage. In any event, EDS say that even if they made some representation as to costs, it was true and they rely on Robert Worden's view at paras 1696 to 1697 of his first report that EDS's approach to estimating costs was adequate.

**[1216]** Further, EDS say that any such representation was not made to induce SSSL to enter into the letter of agreement as the letter of agreement did not refer to the figure of £14.564m, but acknowledged the possibility of overrun, and dealt with it differently.

**[1217]** It is evident that EDS put forward the figure of £14.564m as the overrun figure so as to inform Sky of the estimated overrun cost of the project. In doing so they represented, as they admit, that they had assessed the cost of completing the project in terms of the Technology Workstream and that the estimated overrun against the budget baseline was £14.564 million.

**[1218]** In putting forward that figure I consider that EDS also represented that they had carried out a proper analysis of the cost to complete in order to arrive at that overrun figure of £14.564 million. It was an estimate and was subject to risks and assumptions as any estimate is but, as Steve Leonard and Greg Hyttenrauch both accepted and had to accept, it was put forward on the basis that EDS wanted Sky to understand it had been evaluated carefully and after proper analysis. Indeed, it is difficult to think of any alternative basis on which it could have been put forward. That was also the way in which Richard Freudenstein understood the estimate.

**[1219]** Was it the subject of a proper analysis? Robert Worden has considered EDS's approach to estimating effort and says at para 1656 of his first report that it was commensurate with the information available to EDS at the time. On that basis, he says that considering only the manpower costs but not hardware and software costs, based on his view of the effort estimates he considers that EDS's estimates of costs were adequate. PA say that the estimating process was inadequate because they were derived from resource



requirements which were not arrived at through a proper process. They do not appear to have considered the evidence which Robert Worden cites and which, in my judgment, does show that there was a proper process. There had to be assumptions including assumptions about the value of work already carried out.

The fact that the estimate of time was wrong would not, in my judgment, of itself, mean that the estimate of overall resources was not itself based on a proper process but would have been based on an estimate of time which would have been assumed to be correct.

**[1220]** I am therefore not persuaded, on the evidence, that EDS failed to carry out a proper analysis of the estimated overrun cost as of June 2001. It follows that there is no sustainable case on misrepresentation from this point of view.

***Summary***

**[1221]** Accordingly, I find that EDS negligently misrepresented that they had developed an achievable plan, which had been the product of proper analysis and re-planning and that this gives rise to liability for negligent misrepresentation prior to the letter of intent. Otherwise I am not satisfied that EDS were otherwise liable. […]

[***Editor's note:*** *Report continued at*: [2010] IP & T 811 (IP & T Cases Aug/Sep 2010)].