

Kingsley Napley



**Women in Technology  
Breakfast Briefing – 15 June 2011**

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**Negotiating IT Contracts**  
**Legal Issues**

Simon Halberstam  
Partner (Technology Law)

## Contractual Stages

- Pre-Contract
  - > Misrepresentations
- Contract
  - > Liability
  - > Intellectual Property
  - > Escrow

## Misrepresentations

- Fraudulent
- Negligent
- Innocent
- Misrepresentation Act 1967:
  - > Fraud
  - > Negligence

## Fraudulent Misrepresentation

- Statement of fact
- Without belief in truth
  - > Recklessly
  - > Knowingly
  - > without caring whether true or false
- Intention that it should be acted on
- Is acted upon
- *Male fides* not proof prerequisite

## Negligent Misrepresentation

- False statement w/o reasonable basis to believe true
- Common law or Misrepresentation Act 1967
  - » honest belief in the truth of the statement made
  - » MA - reverse onus on defendant to disprove negligence
  - » had a reasonable ground to believe and did believe true

## Innocent Misrepresentation

- False statement
  - > honest belief that true

## Misrepresentation Remedies

- Rescission of contract
  - > Status quo ante
  - > Return goods and money
- Affirm the contract and sue for damages



## Sky v EDS

- project to design, build, implement and integrate a CRM system for Sky
- EDS Limited found liable for fraudulent misrepresentation as to time
- court found that EDS intended Sky to rely on these statements
- finding of deceit/fraud > contractual caps on liability ineffective
- ineffective entire agreement clause
- £47.6 million contract
- £30 million limitation of liability clause
- £318m settlement

## Liability Exclusions

- Reasonableness statutory controls
  - > Unfair Contract Terms Act 1977 (UCTA)
  - > Unfair Terms in Consumer Contracts Regulations 1994
  - > Section 3 Misrepresentation Act 1967
- *South West Water v International Computers Ltd*
  - > £2,200,000 damages awarded – contractual limitation £250,000.
- *St. Albans and City District Council v International Computers Ltd*
  - > £800,000 damages awarded – contractual limitation £100,000
- Sky V EDS
- Low cap on liability effective?
- Negotiation double-edged
- Semantics? – loss of data c.f. damage to data
- Loss of Profit – direct or indirect?

## Exclusion of Liability

- Standard form (contracts of adhesion)
- Need for notice
  - > Thornton v Shoe Lane Parking
    - » “the customer is bound by the - condition if he knows that the ticket is issued subject to it” - Denning
    - » [if]the exemption is so wide and so destructive of rights ..... in order to give sufficient notice , it would need to be printed in red ink with a red hand pointing to it ... or something equally startling”

## Making Website Terms/Disclaimers Effective

- legal weight/certainty v customer friendliness of website
- ascending chance of enforceability
  - > reference statement without hyperlink “this contract is subject to company’s T’s and C’s”
  - > reference statement with hyperlink (still hidden)
  - > terms at bottom of page (visually unattractive)
  - > dialogue box - must scroll through terms before clicking

## Making Email Terms/Disclaimers Effective

- **must incorporate in email** (start or end?)
- **“this email is subject to .....**”
  - > inadequate
- **placing t’s and c’s in hyperlinks or attachments**
  - > worse
  - > hyperlinks
    - » need compatible email system
    - » assume www access
  - > attach -firewall removal

## IPR

- Assignment
  - > open source
- Licence
  - > Sole/exclusive?
  - > source?
  - > third party use
  - > intra-group use

## Indemnity

- IPR infringement
  - > no admissions/settlement
  - > control defence
  - > assistance
  - > cap?
  - > covered by insurance?

## Escrow

- half-way house
  - > protect investment
  - > avoid abuse
- neutral agent
- triggers
  - > insolvency
  - > support failure
- verification?



## Cookies – the new law

- Privacy and Electronic Communications (EC Directive) (Amendment) Regulations  
(<http://www.legislation.gov.uk/ukxi/2011/1208/contents/made>)
- Obtaining users' positive consent is the key
- Exception to the rule:
  - > When cookies used are “strictly necessary” for service requested by user
  - > E.g. remembering contents of a checkout basket
  - > Not applicable for remembering users' preferences or collecting statistical info

## ICO Guidance - Enforcement

- Websites need not immediately implement changes but show consideration/plans for compliance
- No enforcement action until May 2012
- Up to £500,000 penalty for serious breaches
- Idle organisations will receive warnings - may lead to enforcement action after May 2012 if still non-compliant

## ICO Guidance – What to do now

- Cookie audit – check what type of cookies are used by your website and how they are downloaded onto users' machines
- Decide on which method(s) of consent best suits your website, given the type of cookies used
- Record your cookie audit and consent/implementation plan lest the ICO ever come knocking

## ICO Guidance - Implementation

- Pop-ups
- Privacy Policies
- Settings and features-led consent
- Web browser settings

## Questions

### **Simon Halberstam**

Partner (Technology Law)

[shalberstam@kingsleynapley.co.uk](mailto:shalberstam@kingsleynapley.co.uk)

+44 (0) 20 7814 1258



### **Andrew Solomon**

Corporate & Commercial Solicitor

[asolomon@kingsleynapley.co.uk](mailto:asolomon@kingsleynapley.co.uk)

+44 (0) 20 7369 3794

